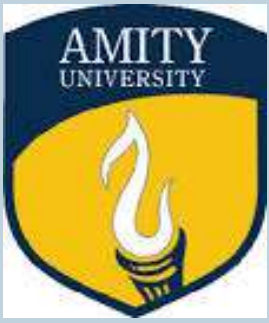
ISSN 2249-2232

Previously UGC Approved Journal No. 41080



AMITY LAW REVIEW

A JOURNAL OF AMITY LAW SCHOOL

Volume 20

December, 2024

AMITY LAW REVIEW

Volume 20

December, 2024

AMITY LAW SCHOOL

Amity Law Review
(A Peer Reviewed/ Refereed Journal)

Volume 20 2024

Published and distributed by
Amity Law School,

Amity Law Review is published annually.

ISSN: 2249-2232

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Electronically published at:

Amity Law Review(ALR)
Amity Law School,
I-1 Block, Amity University,
Sector – 125, Noida 201313

Amity Law Review
A Peer Reviewed/ Refereed Journal

Vol. 20, 2024

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Acknowledgement

We sincerely express our gratitude to the following reviewers for their time and insights, which have made the research paper publishable by suggesting necessary changes

Dr. Gargi Bhadoria – Faculty of Law, ALSN.
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Our sincere thanks to the following students for their support:

Atul Kumar, BB. A LL. B (H) programme
Gunjan Agarwal, BB. A LL. B (H) programme
Kavya Tyagi, BB. A LL. B (H) programme
Sudarshan Singh Chouhan, BB. A LL. B (H) programme

BALANCING THE SCALES: THE INTERSECTION OF TECHNOLOGY AND HUMAN RIGHTS IN NIGERIA

Patrick Chukwunonso Aloamaka[*]

Abstract

The rapid evolution of technology has yielded profound societal transformations, particularly evident in Nigeria, where the proliferation of digital innovations has been swift. Nevertheless, the utilization of technology in Nigeria has presented a gamut of obstacles to the safeguarding and advocacy of human rights. Employing a doctrinal research approach, this paper scrutinizes the intersection of technology and human rights within the Nigerian context, concentrating on facets such as privacy, data protection, freedom of expression, information accessibility, and national security. The study underscores the intricacies entailed in reconciling national security imperatives with the shield of human rights, underscoring the paramount significance of an approach that prioritizes human rights in the development and application of technology. Additionally, the paper examines the role of policy and legal frameworks in nurturing and upholding human rights in the digital era. Ultimately, the paper concludes by underscoring the imperative for sustained inquiry and concerted efforts to address the challenges arising from the convergence of technology and human rights in Nigeria, fostering a more just and harmonious coexistence.

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Keywords*: technology, human rights, social media, privacy, freedom of expression.*

I. Introduction

Technology has become an essential component of society in recent years, changing how people interact, work, and live. Nigeria, like many other countries, has witnessed a rapid adoption of digital technologies, which has brought about significant changes in various aspects of life. However, the use of technology in Nigeria has also posed several challenges to the protection and promotion of human rights.

According to the International Covenant on Civil and Political Rights (ICCPR), every individual has the right to freedom of expression and access to information, which are crucial components of a democratic society.[1] Similarly, the right to privacy is enshrined in the Universal Declaration of Human Rights, and is recognized as an essential aspect of human dignity.[2] The intersection of technology and human rights in Nigeria presents a unique challenge that requires attention from policymakers, human rights activists, and technology experts.

The intersection of technology and human rights in Nigeria is a complex issue that requires careful examination. This article aims to explore the impact of technology on human rights in Nigeria, with a particular focus on privacy, data protection, freedom of expression, access to information, and national security. The article also examines the challenges faced in balancing national security interests with human rights protection and

[1] International Covenant on Civil and Political Rights, art 19, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[2] See Universal Declaration of Human Rights, art 12, GA Res 217A(III), UN Doc A/810 (10 December 1948).

emphasizes the need for a human rights-centred approach to technology development and deployment.

As stated by the United Nations Human Rights Council, "human rights must be at the centre of the digital transformation, and not an afterthought."[3] This underscores the importance of examining the intersection of technology and human rights in Nigeria to ensure that technological advancements do not undermine fundamental human rights. The paper makes a significant addition to the continuing discussion about how technology might support and defend human rights in Nigeria, and underscores the need for a comprehensive approach that prioritizes human rights in the development and deployment of technology.

To achieve this aim, this article draws on relevant literature and reports, as well as primary and secondary sources of laws in Nigeria. The article also examines policy and legal frameworks for protecting human rights in the digital age and their effectiveness in Nigeria.

Through this article, we aim to provide an analysis of the challenges and opportunities in protecting human rights in the Nigerian digital age, and to offer recommendations for future research and action in this area.

II. Legal Frameworks for Protecting Human Rights in the Digital Age

The protection of human rights in the digital age is a critical concern, and policy and legal frameworks are necessary to ensure that the rights of individuals are safeguarded. In Nigeria, there are various legal frameworks that address human rights in the digital age, including:

[3] United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/41/35 (2019).

1. The Nigerian Constitution[4]: The Nigerian Constitution guarantees certain fundamental rights, including the right to freedom of expression and the right to privacy.[5] These rights apply to both the physical and digital worlds, and the government is obligated to protect them.
2. The Cybercrime Act: The Cybercrime Act was passed in 2015 and criminalizes various forms of cybercrime, including identity theft, hacking, and online fraud.[6] The act also contains provisions that protect the privacy of individuals and prohibit the interception of communications without a warrant.[7]
3. The Nigeria Data Protection Act: The Nigeria Data Protection Act 2023 (NDPA) was passed in 2023 represents a significant step in the regulation of personal data processing in Nigeria. The Act aims to safeguard the fundamental rights and freedoms of data subjects, ensure fair and lawful processing of personal data, and establish a robust regulatory framework through the Nigeria Data Protection Commission.[8]
4. The Freedom of Information Act: The Freedom of Information Act was passed in 2011 and guarantees the right of individuals to access information held by public authorities.[9] This includes information held in digital form.
5. The National Cybersecurity Policy and Strategy 2021 (NCPS)[10]: The National Cybersecurity Policy and Strategy was launched initially in 2014 and reviewed in 2021 and provides a framework for protecting Nigeria's cyberspace.[11] The policy recognizes the importance of protecting human rights in cyberspace and emphasizes the need for a

[4] CFRN (1999 as amended).
[5] CFRN (1999 as amended), s. 39 & 37 consecutively.
[6] Cybercrime Act (2015), s. 7
[7] Cybercrime Act (2015), s. 24
[8] Nigeria Data Protection Act 2023 (NDPA).
[9] FOI (2011), s. 2(1).
[10] National Cybersecurity Policy and Strategy (NCPS) 2021, Federal Republic of Nigeria.

balanced approach that takes into account both security and human rights considerations.

While these frameworks are important, there are challenges in their implementation. For example, the Cybercrime Act has been criticized for its broad provisions and the potential for abuse by law enforcement agencies.[12]

III. The Impact of Technology on Human Rights in Nigeria

Technological advancements in Nigeria have facilitated the development of online platforms and social media, which have provided opportunities for the exercise of freedom of expression, assembly, and association. The use of social media in Nigeria has led to the emergence of citizen journalism, which provides alternative sources of information and allows citizens to hold their government accountable.[13] However, the proliferation of bogus news and hate speech has also increased as a result of social media use, which have been used to incite violence and undermine social cohesion in Nigeria.[14]

Furthermore, technology has enabled the Nigerian government to monitor and surveil citizens, raising concerns about the right to privacy. The Nigerian government has been known to use advanced technology such as facial recognition and artificial intelligence to monitor and control the activities of citizens.[15] The government has also been accused

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[11] F. E. Ikuero, *Preliminary Review of Cybersecurity Coordination in Nigeria*, 41 NIGERIAN JOURNAL OF TECHNOLOGY 523 (2022).

[12] Ibid (n. 32).

[13] Usman Jimada, *Social Media in the Public Sphere of Accountability in Nigeria*, 17 GLOBAL MEDIA JOURNAL (2019).

[14] Chiagozie Nwonwu, Fauziyya Tukur & Yemisi Oyedepo, *Nigeria elections 2023: How influencers are secretly paid by political parties*, BBC NEWS, Jan. 18, 2023, https://www.bbc.com/news/world-africa-63719505 (last visited Apr 24, 2023).

of using digital surveillance tools to target political dissidents, human rights activists, and journalists.[16]

Moreover, technology has affected the right to work and economic rights in Nigeria. While technological advancements have created job opportunities in the technology sector, they have also led to the displacement of workers in other sectors. As e-commerce has grown, physical stores have become less common, leaving many Nigerians unemployed.[17] Additionally, the use of automated systems in the workplace has led to the displacement of workers, especially in the manufacturing and service sectors.

While technology has had a positive impact on human rights in Nigeria, it has also created new challenges that threaten the enjoyment of fundamental human rights. The Nigerian government needs to ensure that technological advancements do not undermine human rights, particularly the right to privacy and freedom of expression. There is a need for a human rights-centred approach to technology development and deployment in Nigeria, which prioritizes the protection and promotion of human rights.

IV. Technological advancements and their effects on human rights

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[15] Dennis Erezi, *Nigeria is spying on its citizens' data and communications: Report*, THE GUARDIAN NIGERIA NEWS , Dec. 8, 2021, https://guardian.ng/news/new-report-claims-nigeria-is-spying-on-its-citizens-data-and-communications/ (last visited Apr 24, 2023).

[16] Hannah Ajakaiye, *Data trails: How Nigeria's state surveillance crackdown on journalists, active citizens*, INTERNATIONAL CENTRE FOR INVESTIGATIVE REPORTING (2022), https://www.icirnigeria.org/data-trails-how-nigerias-state-surveillance-crackdown-on-journalists-active-citizens/ (last visited Apr 24, 2023).

[17] Modupe Oni, *Reinventing brick and mortar retail experience in Nigeria*, BUSINESS DAY, Jul. 28, 2022, https://businessday.ng/?s=Reinventing%20brick%20and%20mortar%20retail%20experience%20in%20Nigeria (last visited Apr 24, 2023).

Globally, technological developments have had a significant impact on human rights and transformed the way we live, work, and communicate. In the Nigerian context, these advancements have had both positive and negative effects on the enjoyment of human rights.

On the positive side, technology has enabled citizens to exercise their right to freedom of expression, association, and assembly. Social media platforms like Twitter, Facebook, and Instagram have provided spaces for individuals to express themselves, share information and ideas, and hold their government accountable. In Nigeria, social media played a critical role in the #EndSARS protests in October 2020, which brought attention to police brutality and impunity in the country.[18] Social media also played a significant role in the 2019 and 2023 general elections, enabling citizens to mobilize, engage in public discourse, and report on electoral irregularities.[19]

In addition, technology has made it easier for citizens to access information and participate in political processes. The Nigerian government has launched several initiatives aimed at improving transparency and accountability, such as the open government portal and the Freedom of Information Act. These initiatives have been facilitated by the use of technology, enabling citizens to access government data and hold their leaders accountable.

However, the negative effects of technological advancements on human rights in Nigeria cannot be ignored. The Nigerian government has been accused of using digital surveillance tools to monitor and control the

[18] Kelvin Inobemhe & Tsegyu Santas, *#EndSARS Protest: A Discourse on Impact of Digital Media on 21st Century Activism in Nigeria*, 4 GALACTICA MEDIA: JOURNAL OF MEDIA STUDIES 100 (2022).

[19] Francis Onyemachi, *How social media changed the face of politics in Nigeria*, BUSINESSDAY NEWSPAPER , Apr. 9, 2023, https://businessday.ng/technology/article/how-social-media-changed-the-face-of-politics-in-nigeria/ (last visited Apr 24, 2023).

activities of citizens, particularly political dissidents and human rights activists.[20] The use of sophisticated surveillance technology has raised concerns about the right to privacy and has made it difficult for citizens to exercise their rights without fear of reprisal.[21]

Moreover, the spread of hate speech and fake news on social media has led to the violation of the right to freedom of expression, as well as the right to life and security. The spread of misinformation and disinformation has been used to incite violence and undermine social cohesion in Nigeria, particularly during elections and other politically charged periods. This has had negative consequences for human rights, particularly the right to life, security, and freedom of expression.

V. The right to privacy and data protection in Nigeria

In Nigeria, the right to privacy and data protection is protected by the Nigerian Constitution[22] and the NDPA 2023.[23] Under the Nigerian Constitution, the right to privacy is guaranteed under section 37, which states that "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."[24] This provision extends to the protection of personal data and information.

The NDPA was passed in 2023 with the goal of safeguarding data subjects' fundamental rights and liberties by making sure that personal information is handled in a fair, legal, and transparent manner. It provides

[20] Ibid (n. 8)
[21] Osivue Itseumah, *The Politics of Data Security in Nigeria*, THE REPUBLIC, Jan. 17, 2022, https://republic.com.ng/december-21-january-22/politics-data-security-nigeria/ (last visited Apr 24, 2023).

[22] Constitution of the Federal Republic of Nigeria (CFRN), 1999.
[23] Nigeria Data Protection Act, 2023, s. 1.
[24] CFRN (1999), s. 37.

a legal framework for personal information protection and establishes the Nigeria Data Protection Commission to regulate data processing activities. The Act applies to data processed within Nigeria and by entities outside Nigeria that handle the personal data of Nigerian residents.[25]

Core principles include lawful and fair processing, data collection for specified legitimate purposes, data accuracy, data retention only as necessary, and secure processing to protect against unauthorized access or loss.[26] Data subjects have rights to access, correct, erase, restrict processing, and transfer their personal data, and to withdraw consent at any time.[27]

Data controllers and processors must implement appropriate security measures. They must notify the Commission and affected individuals of data breaches without undue delay.[28]

These provisions ensure robust protection of privacy and data rights under Nigerian law.

VI. Challenges and opportunities in protecting privacy in the digital age

1.Challenges

1. Data Breaches and Cybersecurity Threats: With the increasing amount of data being collected and stored digitally, there is a heightened risk of data breaches and cyber-attacks.[29] These can result in the unauthorized access, theft, or loss of sensitive personal information.

[25] Nigeria Data Protection Act 2023, s 1.
[26] Nigeria Data Protection Act 2023, s 25.
[27] Nigeria Data Protection Act 2023, ss 31-38.
[28] Nigeria Data Protection Act 2023, ss 48-49.
[29] Yuchong Li & Qinghui Liu, *A comprehensive review study of cyberattacks and cyber security; Emerging trends and recent developments*, 7 ENERGY REPORTS 8176 (2021).

2. Complex Regulatory Environment: Different countries and regions have varying privacy laws and regulations. Navigating this complex regulatory landscape can be difficult for organizations operating globally, leading to compliance challenges.
3. Technological Advancements: Quick developments in technology, such artificial intelligence (AI) and the Internet of Things (IoT), create new ways to collect, process, and analyse data.[30] These technologies can sometimes outpace existing privacy protections, making it challenging to ensure adequate safeguards.
4. Big Data and Data Analytics: The use of big data and advanced analytics can lead to privacy concerns, as large datasets often include sensitive personal information. Balancing the benefits of data analytics with privacy protection is a critical challenge.
5. Consumer Awareness and Consent: Many consumers are not fully aware of how their data is being collected and used, leading to inadequate or uninformed consent.[31] Ensuring that individuals understand their privacy rights and how their data is handled remains a significant challenge.
6. Cross-Border Data Transfers: Transferring data across borders involves navigating different legal requirements and ensuring that data protection standards are maintained. This can be complex and resource-intensive for organizations.

2.Opportunities

1. Enhanced Data Security Measures: Advancements in cybersecurity technologies and practices provide opportunities to strengthen data

[30] Inam Ullah et al., *Integration of data science with the intelligent IoT (IIoT): current challenges and future perspectives*, DIGITAL COMMUNICATIONS AND NETWORKS (2024).

[31] Mar'atush Sholihah, Hasti Pramesti Kusnara & Diana Fitri Anggraini, *Privacy Dilemmas : Navigating Marketing Strategies in a Post-Cookie Era*, 7 JOURNAL OF ECONOMIC BUSSINES AND ACCOUNTING (COSTING) 8765 (2024).

protection. Organizations can implement robust security measures to safeguard personal information.

2. Regulatory Frameworks: The development and implementation of comprehensive data protection regulations, such as the GDPR and NDPA, provide a structured approach to privacy protection and establish clear guidelines for organizations.
3. Technological Innovation: Innovations in privacy-enhancing technologies (PETs), such as encryption, anonymization, and blockchain, offer new ways to protect personal data while still enabling its use for legitimate purposes.
4. Increased Consumer Awareness: As awareness of privacy issues grows, consumers are becoming more vigilant about their data. This can drive demand for better privacy practices and push organizations to adopt higher standards.
5. Corporate Responsibility and Trust: Organizations that prioritize data protection can build trust with their customers, leading to competitive advantages. Demonstrating a commitment to privacy can enhance a company's reputation and customer loyalty.
6. International Collaboration: Global cooperation on data protection issues can lead to more consistent and effective privacy standards. Collaborative efforts can help address cross-border data transfer challenges and improve overall data security.

VII. Freedom of Expression and the Role of Social Media

The Constitution of Nigeria, specifically Section 39, recognizes and protects the fundamental right to freedom of expression. It guarantees individuals the right to express themselves without interference or censorship. However, this right is not absolute; it is subject to certain

limitations and conditions. While the Constitution guarantees the right to freedom of expression, it also allows for restrictions on this right in certain circumstances. These restrictions are designed to strike a balance between safeguarding freedom of expression and protecting other important societal interests.

In today's digital age, social media platforms have become a key tool for exercising this right. Social media has given people a voice to express their opinions, share information and ideas, and demand accountability from those in authority. However, social media use has also presented difficulties that threaten the exercise of freedom of expression, particularly in Nigeria.

Social media has become a powerful tool for political mobilization in Nigeria. During the 2019 and 2023 general elections, social media played a significant role in shaping public opinion and mobilizing voters. However, the Nigerian government has used various laws and regulations to suppress freedom of expression on social media. For example, in 2015, the Cybercrime Act was signed into law, which criminalized various online activities, including the publication of false information, cyber-stalking, and online impersonation. These laws have been used to arrest and prosecute individuals for their online activities.

The Nigerian government's actions have been criticized for being a violation of freedom of expression. Nigeria is a signatory to the ICCPR, which upholds freedom of expression as a basic human right.[32] However, the government's actions in recent years have raised concerns about the extent to which this right is being protected.[33]

[32] ICCPR (1966), art 19.

[33] Amnesty International Nigeria, *Nigeria is considering incredibly harsh punishments for social media users who criticize the government*, AMNESTY INTERNATIONAL (2019), https://www.amnesty.org/en/latest/press-release/2019/12/nigeria-bills-on-hate-speech-and-social-media-are-dangerous-attacks-on-freedom-of-expression/ (last visited Apr 24, 2023).

In addition to government interference, social media platforms themselves have also come under scrutiny for their role in regulating speech online. While social media platforms have been praised for giving voice to marginalized groups and facilitating the spread of information, they have also been criticized for allowing the spread of hate speech, misinformation, and fake news.[34] The role of social media platforms in regulating speech is particularly important in Nigeria, where there is a history of ethnic and religious tensions. The spread of hate speech on social media has been identified as a major challenge to the exercise of freedom of expression in Nigeria.[35]

Despite these challenges, social media also presents opportunities for the exercise of freedom of expression. Social media has enabled individuals to hold those in power accountable, facilitate public discourse, and increase transparency. For example, the #EndSARS movement in Nigeria in 2020,[36] which called for an end to police brutality, was largely organized and mobilized through social media platforms.

Social media has become a powerful tool for the exercise of freedom of expression in Nigeria. However, the Nigerian government's actions and the challenges posed by social media platforms themselves have threatened the exercise of this right. It is important for the Nigerian government to balance the need to regulate online activities with the protection of freedom of expression. Social media platforms also have a

[34] Niam Yaraghi, *How should social media platforms combat misinformation and hate speech?*, BROOKINGS (2019), https://www.brookings.edu/blog/techtank/2019/04/09/how-should-social-media-platforms-combat-misinformation-and-hate-speech/ (last visited Apr 24, 2023).

[35] Uzoka, Ngozi Chisom, *HATE SPEECH AND FREEDOM OF EXPRESSION: LEGAL BOUNDARIES IN NIGERIA*, 4 LIBRARY RESEARCH JOURNAL 111 (2021).

[36] The #EndSARS movement, emerging in Nigeria in 2020, aimed to dissolve the Special Anti-Robbery Squad (SARS) due to allegations of human rights abuses, brutality, and corruption, achieving global recognition and engagement.

responsibility to regulate speech online while protecting freedom of expression.

VIII. The importance of freedom of expression in Nigeria

In Nigeria, the importance of freedom of expression cannot be overemphasized, especially in the context of the country's history and current political climate.

One of the primary benefits of freedom of expression is the promotion of open and honest public discourse. Freedom of expression enables individuals to share their opinions, ideas, and experiences without fear of reprisal.[37] This is particularly important in Nigeria, where there is a history of political oppression and censorship.[38] By providing a platform for individuals to express themselves, freedom of expression helps to create a more open and transparent society, where ideas and opinions can be freely exchanged.

Furthermore, freedom of expression is essential for holding those in power accountable. In Nigeria, there have been numerous instances where the government has been accused of corruption and human rights violations. Freedom of expression allows individuals to voice their concerns and criticisms of the government, which is essential for ensuring that those in power are held accountable for their actions. This accountability is particularly important in the context of Nigeria's current political climate, where there is a need for greater transparency and accountability.

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[37] See Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 (10 December 1948) art 19; ICCPR (1966), art 19.

[38] HUMAN RIGHTS WATCH, *World Report 2021: Rights Trends in Nigeria*, HUMAN RIGHTS WATCH (2020), https://www.hrw.org/world-report/2021/country-chapters/nigeria (last visited Apr 24, 2023).

Freedom of expression is also critical for promoting diversity and tolerance in Nigeria. The country is home to over 250 ethnic groups,[39] each with its own unique culture and traditions. Freedom of expression enables individuals from diverse backgrounds to express their opinions and ideas, which helps to promote tolerance and understanding among different groups. This diversity is essential for creating a more inclusive and cohesive society.

Despite the importance of freedom of expression, there have been numerous challenges to its exercise in Nigeria. For example, the government has been accused of using various laws and regulations to suppress freedom of expression, particularly on social media. The government has also been accused of using force to silence critics and opposition voices.

IX. The impact of social media on freedom of expression

Social media has had a significant impact on freedom of expression in Nigeria, providing a forum where people can share opinions and ideas on a global scale. However, social media has also been a subject of controversy, with concerns raised about the spread of hate speech and misinformation. This section will provide a detailed discussion with relevant citations on the impact of social media on freedom of expression in Nigeria.

In Nigeria, social media platforms like Facebook and Twitter have become essential components of public conversation. These platforms have been used to mobilize social and political movements, expose

[39] Ministry of Foreign Affairs, Nigeria, *NIGERIA CULTURE AND HERITAGE*, MINISTRY OF FOREIGN AFFAIRS, NIGERIA, https://foreignaffairs.gov.ng/nigeria/nigeria-culture/#:~:text=The%20culture%20of%20Nigeria%20is (last visited Apr 24, 2023).

corruption and human rights abuses, and engage in open and honest discussions on various issues.

However, the exercise of freedom of expression on social media in Nigeria has been challenged by government regulations and censorship. For instance, Twitter's activities in Nigeria were halted by the government in 2021 due to the platform's purported involvement in instigating violence and disseminating false information.[40]

Despite these challenges, social media has played a significant role in promoting freedom of expression in Nigeria. Social media platforms have provided a platform for marginalized voices, such as women and the LGBTQ+ community, to express themselves and engage in public discourse. Social media has also been used to hold those in power accountable, with citizens using these platforms to expose corruption and human rights abuses.

Additionally, the spread of hate speech and misinformation on social media has raised concerns about its impact on freedom of expression in Nigeria. The use of social media to spread false information and hate speech has been blamed for inciting violence and exacerbating tensions between different ethnic and religious groups in the country.[41]

In response to these concerns, there have been calls for the regulation of social media in Nigeria. However, many have argued that such regulation could lead to government censorship and limit freedom of expression. The issue of balancing freedom of expression and the need to regulate

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[40] Nimi Princewill & Stephanie Busari, *Nigeria bans Twitter after company deletes President Buhari's tweet*, CNN, 2021, https://edition.cnn.com/2021/06/04/africa/nigeria-suspends-twitter-operations-intl/index.html (last visited Apr 24, 2023).

[41] Koblowe Obono & Karimah Aminu Diyo, *Social media disinformation and voting decisions during 2019 presidential elections in Nigeria*, 8 EJOTMAS: EKPOMA JOURNAL OF THEATRE AND MEDIA ARTS 129 (2022).

social media to prevent the spread of hate speech and misinformation remains a contentious issue in Nigeria.

X. Access to Information and Technology in Nigeria

Access to information and technology is a critical aspect of human rights in Nigeria, as it allows citizens to participate in public life, access important services, and stay informed about issues that affect them. However, Nigeria faces significant challenges in ensuring that all citizens have access to information and technology.

One significant issue is the "digital divide," which is the unequal distribution of internet access and technology across various classes. As of 2022, only 38% of the Nigerian population had access to the internet.[42] This divide is particularly stark between urban and rural areas, with rural areas having much lower levels of access to technology and the internet. Additionally, there is a significant gender gap in access to technology, with men having much higher rates of internet use than women.[43]

Another challenge is the lack of access to public information. Although Nigeria has a Freedom of Information Act 2011 (FOI)[44] that guarantees the right to access information held by public institutions, implementation of the law has been slow and uneven.[45] Many public

[42] Statista, *Nigeria internet penetration 2025*, STATISTA (2022), https://www.statista.com/statistics/484918/internet-user-reach-nigeria/ (last visited Apr 25, 2023).

[43] Felix Chukwuma Aguboshim, Ifeyinwa Nkemdilim Obiokafor & Chidiogo C Nwokedi, *Closing ICT usability gaps for Nigerian women and girls: Strategies for reducing gender inequality*, 15 WORLD JOURNAL OF ADVANCED RESEARCH AND REVIEWS (2022).

[44] Nigeria, Freedom of Information Act (2011)

[45] Freedom House, *Nigeria: Freedom in the World 2021 Country Report*, FREEDOM HOUSE (2021), https://freedomhouse.org/country/nigeria/freedom-world/2021 (last visited Apr 25, 2023).

institutions are still reluctant to release information, and citizens often face bureaucratic hurdles in accessing information.

There have been efforts to address these challenges in Nigeria. The government has launched various initiatives to increase internet access, such as the National Broadband Plan, which aims to increase broadband penetration to at least 90% by 2025.[46] There are also non-governmental organizations and civil society groups that work to promote access to information and technology.

However, there is still much work to be done to ensure that all Nigerians have access to information and technology. This includes addressing the digital divide, improving implementation of the Freedom of Information Act, and increasing public awareness about the importance of access to information and technology in promoting human rights.

XI. Barriers to access to information in Nigeria

A basic human right that is necessary for the fulfilment of other rights is the ability to obtain information. However, in Nigeria, there are several barriers to access to information that hinder the exercise of this right. One of the barriers to access to information in Nigeria is the lack of a comprehensive legal framework for access to information.

Although there is a Freedom of Information Act in Nigeria, it is often not implemented effectively, and citizens face challenges in accessing information. Among these are the limited public cognizance and comprehension of the Act's stipulations, bureaucratic impediments and protraction in processing information requests, the dearth of robust enforcement mechanisms, the wide-ranging and often unduly expansive exemptions potentially curtailing access to pivotal information,

[46] Nigerian Communications Commission, *New Nigerian National Broadband Plan 2020 - 2025*, NCC.GOV.NG (2020), https://ncc.gov.ng/media-centre/public-notices/817-new-nigerian-national-broadband-plan-2020-2025 (last visited Apr 25, 2023).

inadequate safeguards for safeguarding whistle-blowers, institutional resistance to the culture of openness, inadequate resource allocation for efficacious implementation, the absence of standardized protocols, the digital divide's impedance to equitable information access, and the Act's principal emphasis on public entities, resulting in a regulatory void concerning information disclosure practices of private entities. This array of limitations accentuates the imperative for comprehensive reforms aimed at fortifying the Act's efficacy in realizing its designated objectives.

Another barrier to access to information in Nigeria is the high cost of technology and the lack of access to the internet. According to the Nigerian Communications Commission, more than half of the Nigeria population does not have access to the internet.[47] This limits access to online sources of information and hinders citizens' ability to participate in digital communication.

In addition, there is limited availability of information in local languages, which is a barrier to access to information for a significant proportion of the population that is not proficient in English, the official language of Nigeria. This limits the ability of citizens to access information on matters that affect them and their communities.

Moreover, there is a lack of transparency in government and public institutions, which hinders access to information. Public institutions in Nigeria are often not proactive in providing information to the public, and citizens have to make formal requests for information under the Freedom of Information Act. Even when requests are made, public

[47] Nigerian Communications Commission, *Broadband Penetration Hits 44.5% as NCC Reviews Short Code Services*, NCC.GOV.NG (2022), https://ncc.gov.ng/media-centre/news-headlines/1248-broadband-penetration-hits-44-5-as-ncc-reviews-short-code-services (last visited Apr 25, 2023).

institutions are often reluctant to provide the requested information, and citizens face significant delays and obstacles.[48]

Furthermore, the culture of secrecy and lack of accountability in government and public institutions in Nigeria makes it difficult for citizens to access information.[49] Corruption and lack of transparency in the public sector hinder the availability of accurate and reliable information, and citizens often have to rely on alternative sources of information that may not be credible or reliable.[50]

These barriers must be addressed to ensure that citizens can exercise their right to access information and participate effectively in governance and decision-making processes.

XII. Opportunities and challenges in using technology to promote access to information

There are various opportunities and challenges in using technology to promote access to information in Nigeria. One of the opportunities is the wide availability and accessibility of mobile phones, which can serve as a tool for information dissemination and access. According to a report by the Nigerian Communications Commission (NCC), as of January 2023, Nigeria had over 226 million active mobile subscribers.[51] This presents an opportunity to use mobile technology to disseminate information to a large number of people.

Another opportunity is the availability of the internet, which has significantly improved access to information in Nigeria. The number of

[48] Ibid.
[49] Ibid, 105.
[50] Ibid, 104.
[51] NIGERIAN COMMUNICATIONS COMMISSION , *Subscriber Data*, NCC.GOV.NG (2023), https://ncc.gov.ng/statistics-reports/subscriber-data (last visited Apr 25, 2023).

active internet users in Nigeria are 109 million in 2022.[52] The internet provides a platform for the dissemination of information to a larger audience, particularly through social media platforms such as Twitter, Facebook, and Instagram.

However, there are also challenges in using technology to promote access to information in Nigeria. One of the challenges is the high cost of internet data. Despite the increasing number of internet users in Nigeria, the cost of data remains high, making it difficult for many people to access information online.

Another challenge is the low level of digital literacy among Nigerians. According to a report, less than 50% of Nigerians have basic computer literacy and digital skills.[53] This low level of digital literacy makes it difficult for many people to access information online, particularly in rural areas where there is limited access to digital devices.

Furthermore, there are also infrastructural challenges such as poor internet connectivity and power supply. In many parts of Nigeria, particularly in rural areas, there is limited access to the internet due to poor connectivity and power supply.[54] This hampers efforts to use technology to promote access to information in these areas.

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[52] Statista, *Nigeria: number of internet users 2017-2021*, STATISTA (2022), https://www.statista.com/statistics/1176087/number-of-internet-users-nigeria/ (last visited Apr 25, 2023).

[53] Godsgift Onyedinefu, *Over 50% of Nigeria's population lack digital skills- World Bank*, BUSINESSDAY NG, May 19, 2022, https://businessday.ng/technology/article/over-50-of-nigerias-population-lack-digital-skills-world-bank/#:~:text=More%20than%2050%20percent%20of (last visited Apr 25, 2023).

[54] Adeyemi Adepetun, *"Poor electricity access puts rural Internet penetration below 15%,"* THE GUARDIAN NIGERIA NEWS - NIGERIA AND WORLD NEWS, Nov. 18, 2020, https://guardian.ng/technology/poor-electricity-access-puts-rural-internet-penetration-below-15/ (last visited Apr 25, 2023).

While there are opportunities in using technology to promote access to information in Nigeria, there are also challenges such as high cost of internet data, low level of digital literacy, and infrastructural challenges. To overcome these challenges, there is a need for the government and other stakeholders to invest in improving internet connectivity and power supply, reducing the cost of internet data, and promoting digital literacy among Nigerians.

XIII. National Security and Human Rights: Balancing Interests

National security and human rights are two important issues that are often viewed as competing interests. On the one hand, governments have an obligation to preserve national security and safeguard their population. However, individuals have a right to privacy, freedom of expression, and due process under the law. Balancing these interests is a complex and ongoing challenge, particularly in the era of technology and globalization.

There are several sources that outline the challenges of balancing national security and human rights. The United Nations has issued several resolutions and declarations on the topic, including the Universal Declaration of Human Rights, which emphasizes the importance of protecting human rights even during times of national emergency. The International Covenant on Civil and Political Rights further elaborates on the protection of civil and political rights during times of emergency, including the right to privacy and freedom of expression.

In Nigeria, the challenges of balancing national security and human rights are particularly complex. The country has faced a range of security threats, including terrorism, organized crime, and separatist movements.

[55] As discussed earlier, the government has responded with a range of measures, including increased surveillance, arrests and detentions, and restrictions on freedom of expression.[56] These measures have raised concerns among human rights advocates, who argue that they violate international law and threaten the rights of individuals.[57]

One of the key challenges in balancing national security and human rights is ensuring that security measures are proportionate and necessary. This means that governments should only use measures that are necessary to address a specific security threat, and should ensure that these measures do not unduly infringe on individual rights. Additionally, governments should ensure that they are transparent about their security measures, and that they provide adequate oversight and accountability mechanisms to ensure that these measures are not abused.[58]

Technology has both facilitated and complicated the balancing of national security and human rights in Nigeria. On the one hand, technology has provided governments with new tools for surveillance, data collection, and analysis. This can be particularly useful in addressing security threats, such as terrorist plots or organized crime networks. However, these same technologies can also be used to violate individual

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[55] Mark Duerksen, *Nigeria's Diverse Security Threats*, AFRICA CENTER FOR STRATEGIC STUDIES (2021), https://africacenter.org/spotlight/nigeria-diverse-security-threats/ (last visited Apr 25, 2023).

[56] AMNESTY INTERNATIONAL, *Everything you need to know about human rights in Nigeria 2020*, AMNESTY INTERNATIONAL (2021), https://www.amnesty.org/en/location/africa/west-and-central-africa/nigeria/report-nigeria/ (last visited Apr 25, 2023).

[57] Ibid.

[58] The Geneva Centre for Security Sector Governance , *The Role of Government - Security Sector Integrity*, SECURITY SECTOR INTEGRITY (2016), https://securitysectorintegrity.com/institutions-and-organisations/the-role-of-government/ (last visited Apr 25, 2023).

rights, such as through the monitoring of private communications or the collection of personal data without consent.

At the same time, technology has also provided new avenues for promoting human rights and protecting against abuses[59]. Social media platforms, for example, have been used to mobilize protests, expose human rights abuses, and hold governments accountable.[60] The internet has also facilitated access to information and provided new opportunities for advocacy and engagement.

Overall, it is important for the government to take a measured and proportionate approach to security measures, while also ensuring that individual rights are protected. Technology can play a role in this balancing act, but it is crucial to recognize the possible dangers and make certain that these technologies are used in a responsible and accountable manner.

XIV. The challenges of balancing national security with human rights in the use of technology

The use of technology in national security operations can lead to significant challenges in balancing national security with human rights. One of the most significant challenges is the potential for government surveillance to infringe upon individuals' privacy rights.[61] This can occur through the use of various surveillance technologies, including CCTV cameras, facial recognition software, and phone tapping. The use of these technologies can result in the gathering of enormous volumes of

[59] Human Rights Watch, *Technology and Rights*, WWW.HRW.ORG, https://www.hrw.org/topic/technology-and-rights (last visited Apr 25, 2023).

[60] Ibid (n. 5).

[61] Daragh Murray & Pete Fussey, *Bulk Surveillance in the Digital Age: Rethinking the Human Rights Law Approach to Bulk Monitoring of Communications Data*, 52 ISRAEL LAW REVIEW 31 (2019).

personal information that can be utilized to monitor people's whereabouts, monitor their communications, and build up detailed profiles of their personal lives.

Another challenge is the potential for government censorship of online content, which can lead to the suppression of free speech and the violation of individuals' rights to access information.[62] However, this can lead to the suppression of free speech and the violation of individuals' rights to access information.

Furthermore, the use of technology in national security operations can also lead to the targeting of vulnerable communities, such as ethnic and religious minorities.[63] This can occur through the use of data mining techniques that are used to identify individuals who are perceived to be a threat to national security based on their demographic characteristics.

The challenges of balancing national security with human rights in the use of technology are significant and require careful consideration. Governments must ensure that their national security operations are conducted in a manner that respects individuals' human rights, including their rights to privacy, free speech, and access to information. Primary and secondary sources provide a basis for understanding the challenges that arise and the steps that can be taken to address them.

XV. The role of the Nigerian government in balancing interests

The Nigerian government plays a critical role in balancing national security and human rights in the use of technology. The government has the responsibility to ensure the protection of its citizens while also

[62] For instance, in the case of Nigeria in 2021 when the government implemented a total ban on Twiter because the Platform deleted President Buhari's post.

[63] ADAM FISH, TECHNOLIBERALISM AND THE END OF PARTICIPATORY CULTURE IN THE UNITED STATES (2017).

respecting their fundamental rights.[64] In this regard, the government has implemented several policies and regulations aimed at safeguarding national security without infringing on human rights.

The National Security Agencies Act of 1986,[65] for instance, describes the authorities and duties of several security organizations in Nigeria, such as the "Nigerian Security and Civil Defense Corps (NSCDC), the Department of State Services (DSS) and the Nigerian Police Force (NPF)." The Act empowers these agencies to gather intelligence and take necessary measures to protect the country's territorial integrity and sovereignty.[66]

Another example is the Cybercrime (Prohibition, Prevention, Etc.) Act of 2015, which seeks to prevent and punish cybercrime in Nigeria.[67] The Act criminalizes cyber offenses such as hacking, identity theft, and phishing.[68] However, the Act also guarantees the protection of human rights, including the right to privacy and freedom of expression.[69] It prohibits the interception of communications, except in cases where authorized by law or a court order.[70]

Despite these efforts, there have been concerns about the government's implementation of these policies and regulations. There have been reports of human rights violations by security agencies, particularly in the areas of surveillance and censorship. In addition, some have argued that these

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[64] UNITED NATIONS, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, OHCHR (1998), https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-and-responsibility-individuals-groups-and (last visited Apr 25, 2023).

[65] National Security Agencies (NSA) Act 1986 Cap. 74, LFN 2004
[66] NSA Act (1986), s. 6.
[67] Cybercrime (Prohibition, Prevention, Etc.) Act of 2015, Laws of the Federation of Nigeria.
[68] Cybercrime Act (2015), s. 7 & 13.
[69] Cybercrime Act (2015), s. 24.
[70] Ibid.

policies may be used as a pretext for government repression and infringement on freedom of speech and other human rights.

XVI. The need for a human rights-centred approach to technology development and deployment

Technology has the potential to advance human rights in various ways, such as improving access to information and facilitating free expression. However, it can also pose significant risks to human rights, such as privacy violations and restrictions on freedom of expression. To ensure that technology is developed and deployed in a way that respects human rights, a human rights-centred approach is necessary.[71]

A human rights-centred approach aims to uphold and promote human rights principles in various contexts. These include healthcare, education, criminal justice systems, environmental protection, worker's rights, gender equality, freedom of expression, and privacy and data protection. Illustrative instances of this approach comprise the formulation of the Universal Guidelines for Artificial Intelligence,[72] and the application of human rights impact assessments (HRIAs) to assess the potential human rights ramifications of nascent technologies prior to their implementation.[73] This approach prioritizes the protection and promotion

[71] UNIVERSAL RIGHTS GROUP & SNU AI POLICY INITIATIVE , TOWARDS A HUMAN RIGHTS-BASED APPROACH TO NEW AND EMERGING TECHNOLOGIES (2022).

[72] Mark Ryan & Bernd Carsten Stahl, *Artificial intelligence ethics guidelines for developers and users: clarifying their content and normative implications*, 19 JOURNAL OF INFORMATION, COMMUNICATION AND ETHICS IN SOCIETY 61 (2021).

[73] UNIED NATIONS , *OHCHR | Guiding Principles for human rights impact assessments for economic reform policies*, OHCHR (2020), https://www.ohchr.org/en/calls-for-input/guiding-principles-human-rights-impact-assessments-economic-reform-policies (last visited Apr 29, 2023).

of human rights throughout the entire technology development and deployment process.

A human rights-centred approach[74] can help to prevent the negative impact of technology on human rights. It involves designing and implementing technology in a way that takes into account the potential human rights implications, as well as incorporating human rights principles into the development and deployment process.

XVII. Challenges to a human rights-centred approach

One challenge to a human rights-centred approach is the lack of awareness and understanding of human rights principles among technology developers and policymakers.[75] This can lead to the development and deployment of technologies that pose significant risks to human rights.[76] Another challenge is the tension between the commercial interests of technology companies and the protection of human rights.[77] In some cases, companies may prioritize profit over human rights considerations.[78]

XVIII. Recommendations for future research and action

[74] United Nations Sustainable Development Group, *UNSDG | Human Rights-Based Approach*, UNSDG.UN.ORG (2022), https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach (last visited Apr 29, 2023).

[75] UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS : IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 34 (2011).

[76] V Dignum and U Furbach (eds), Responsible Artificial Intelligence: How to Develop and Use AI in a Responsible Way (Springer 2019).

[77] AMNESTY INTERNATIONAL, *Surveillance giants: How the business model of Google and Facebook threatens human rights*, WWW.AMNESTY.ORG (2019), https://www.amnesty.org/en/documents/pol30/1404/2019/en/ (last visited Apr 29, 2023).

[78] Ibid.

The following recommendations aim to provide a balanced approach, addressing gaps in the legal framework, improving enforcement, promoting digital literacy, and enhancing transparency.

1. Strengthening Legal Frameworks: Amend existing laws such as the Cybercrime Act and the Nigeria Data Protection Act to address current gaps and ambiguities. This includes setting clearer guidelines on lawful interception and surveillance, and ensuring stringent data protection measures.
2. Improving Implementation and Enforcement: Establish independent oversight bodies to monitor and enforce compliance with data protection and privacy laws. These bodies should have the authority to investigate breaches and impose penalties.
3. Promoting Digital Literacy: Launch nationwide digital literacy campaigns to educate citizens on their digital rights and how to protect their personal information online.
4. Encouraging Transparency and Accountability: Mandate transparency reports from both government agencies and private companies on their data collection, surveillance practices, and measures taken to protect user privacy.
5. Balancing National Security and Human Rights: Develop clear and transparent policies that outline the circumstances under which surveillance and data collection are justified in the interest of national security. These policies should include robust safeguards to prevent abuse.
6. Leveraging Technology for Human Rights: Promote the use of technology to enhance human rights, such as using Blockchain for transparent and secure voting systems, or AI for monitoring and reporting human rights abuses. Encourage innovation in privacy-enhancing

technologies (PETs) that can help protect individuals' personal data while still enabling technological advancement.

XIX. Conclusion

In conclusion, the intersection of technology and human rights in Nigeria presents both challenges and opportunities. While technology has facilitated access to information and freedom of expression, it has also posed threats to privacy and data protection, and has created challenges in balancing national security and human rights. It is imperative that the Nigerian government takes a human rights-centred approach to technology development and deployment to ensure that the benefits of technology are maximized while minimizing its negative impact on human rights.

TELEMEDICINE AND DIGITAL TECHNOLOGIES VIS-A-VIS ACCESS TO HEALTHCARE

Dr. Jyoti Bhakare[*] *and Vipasha Chirmulay*[**]

Abstract

The intersection of healthcare and technology has resulted in the development of a spectrum of digital innovations to improve medical processes of diagnosis and treatment. Healthcare systems are adopting digital health solutions to improve access and transform care delivery. These innovations affect the ways through which patients and healthcare providers interact with each other. Telemedicine refers to the delivery of clinical services to patients through remote means, using electronic or information and communication technology. It is a relatively simple means for deploying digital healthcare across India. India being a heterogeneous country, faces infrastructural challenges to meet the healthcare needs of different sections of its population. Remote healthcare services use technical infrastructure, which requires cooperation on part of the institutions involved and the individual users. While the relevance of telemedicine will continue to grow, it is important to preserve human health by ensuring a safe environment for patients to enforce their right to health. Taking into consideration the present impact of telemedicine practices on clinical practice, the authors thought it necessary to analyse their ethical and legal implications in this paper.

Keywords: *telemedicine, e-pharmacy, access, health, human rights*

I. Introduction

Telemedicine involves the use of technologies which can offer methods to deliver medical care. These technologies provide interaction or communication between the healthcare practitioner and patient at distant sites. Telemedicine has been defined by the Centers for Medicare & Medicaid Services (United

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States) as "the exchange of medical information from one site to another through electronic communication to improve a patient's health".[1] In 1998, the World Health Organization had defined telemedicine as "the delivery of health care services, where distance is a critical factor, by all health care professionals using information and communications technologies for the exchange of valid information in diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities, and that its purpose is to improve health outcomes".[2]

A 2023 study found that 25% of semi-rural and rural populations in India have access to modern healthcare such as clinics, healthcare facilities or pharmacies. It recommended that, since 90% of the population has to travel to another location to seek healthcare, telemedicine as a mode of healthcare can contribute to affordable and accessible healthcare.[3] This points to the disparity in healthcare access across urban and rural areas, which has resulted in poor health outcomes. At present, many of the services rendered by a healthcare provider such as consultation, counseling, can be done through electronic information and communication technology. The telemedicine model uses hardware components such as a smartphone or a computer, scanning and sensor equipment to enable the collection of patient information by healthcare providers, who can relay back their readings and interpretation to the patient. This can provide the necessary medical care from qualified practitioners where

[1]'Medicare Telehealth Trends Methodology', available at: https://data.cms.gov/resources/medicare-telehealth-trends-methodology (last visited on 29/4/24) A Health Telematics Policy', available at:

[2]A Health Telematics Policy', available at:: https://iris.who.int/bitstream/handle/10665/63857/WHO_DGO_98.1.pdf?sequence=1 (last visited on 29/4/24)

[3] 'Only 25% of semi-rural, rural population has health facilities within reach', Business Standard, Aug 11, 2023. available at: https://www.business-standard.com/health/only-25-of-semi-rural-rural-population-has-health-facilities-within-reach-123081100674_1.html (last visited on 3/5/4)

it is not available otherwise. It also reduces the time and costs for patient transport.

After the Covid-19 pandemic, traditional face-to-face means of healthcare have been transformed because of the deployment of electronic and tele-communication. Telemedicine was being frequently used for live consultations and fee e-payments.[4] Reports estimated the value of the telemedicine market in India at 1.10 billion dollars in 2022, and that it may expand at a compound annual growth rate of around 21.2% till 2030.[5] Since the government seeks to extend the internet network to all villages by 2025, India may have almost one billion smartphone users by the year 2025.[6]

This transformation offers advantages for patients who are homebound or reside in underserved areas. However, the nature of virtual care provided and the process of digitisation may disadvantage certain parts of the population. In rural areas, lack of digital literacy or internet access faced by elderly or homeless persons, or by persons without adequate language knowledge, may hamper the benefits of telemedicine. In 2020, the Government of India launched its digital health initiative, the Ayushman Bharat Digital Mission, as a part of its policy to attain universal healthcare in India. Its infrastructure would enable healthcare practitioners to access the health data of their patients, by using their health IDs. The paper has sought to shed light on the developments in telemedicine, and their ethico-legal impacts on clinical consultation, evaluation and reporting.

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[4] V. Nagaraja, *et al*, 'Perspectives and use of telemedicine by doctors in India: A cross-sectional study' Health Policy and Technology (2024), available at: https://www.sciencedirect.com/science/article/pii/S221188372400008X (last visited on 30/4/24)

[5] India Telemedicine Market Analysis, available at: https://www.insights10.com/report/india-telemedicine-market-analysis/ (last visited on 30/4/24)

[6] V. Nagaraja, *et al*, 'Perspectives and use of telemedicine by doctors in India: A cross-sectional study' Health Policy and Technology (2024), available at: https://www.sciencedirect.com/science/article/pii/S221188372400008X (last visited on 30/4/24)

II. Applications of telemedicine

1. Information and consultation

Telemedicine platforms such as mobile applications or websites, connect the patients with registered healthcare professionals by using messaging or calling features. In this form of consultation, the healthcare professional may provide a prescription or ask for diagnostic tests. A second type of platform connects a treating healthcare professional with a specialist healthcare professional regarding a patient under the former's care. This exchange of information is carried out to obtain the inputs of the specialist on the diagnosis. Such specialists may be located in India or may be licensed to practice in another country.[7]

Internet portals or websites which provide health related information indirectly enable communication between users who seek it and the health professionals who provide it. Such professionals may be accountable for the accuracy of any general health content they provide, but not for what the reader does based on such information. For instance, Mayo Clinic, WebMD, Healthline are commonly used health information websites. If the portal enables individualized responses from a professional within a time frame, then there may be greater accountability.[8] Although websites may display legal disclaimers, the ethical duty of professionals in such scenarios has to be considered.

2. Diagnosis

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[7]Telemedicine in India: The Future of Medical Practice, available at: https://www.nishithdesai.com/Content/document/pdf/ResearchPapers/Telemedicine-in-India.pdf (last visited on 6/5/24)

[8] Danielle Chaet et al, 'Ethical practice in Telehealth and Telemedicine' 32 J Gen Intern Med. (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 2/5/24)

In the store-and-forward technology model (also called asynchronous communication), a professional gets access to the patient's medical history (provided through a questionnaire) or health records (such as lab reports, medical scans) at any time and can review them to provide his opinion.[9] Electronic transmission of pathological images has enabled pathologists to remotely diagnose specimens in real-time.[10] In synchronous telemedicine, the professional clinically interacts with the patient in real time, and is accountable for the medical consultation provided. Various teleconsultation applications such as Practo Health, Mfine are widely used in India.

3. Monitoring and treatment

Alongside remote consultation, healthcare providers can get access to patient's health data by using digital tools. Wearable devices such as smartwatches, fitness trackers have given patients greater control over managing their health and lifestyle. In Singapore, Health springs Group recently launched an app for consultation and personalized treatment to make aesthetic healthcare accessible for users. The app provides teleconsultation for skin conditions, plans for diet and weight management, e-shop for supplements etc.[11]

Artificial Intelligence ('AI') can provide real-time analysis of patient vitals and predict patient outcomes, which can help to manage healthcare resources. During the Covid-19 pandemic, the tele-ICU system developed in the West, where health information of a patient being treated for Covid in one intensive care unit was transmitted to another health Centre via electronic

[9] Danielle Chaet et al, 'Ethical practice in Telehealth and Telemedicine' 32 J Gen Intern Med. (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 2/5/24)

[10] Binil Jacob, 'Digital microscopy: Bridging the gap in remote healthcare', available at: https://etinsights.et-edge.com/digital-microscopy-bridging-the-gap-in-remote-healthcare (last visited on 4/6/24)

[11] 'Healthsprings Group Launches New Telemedicine App With Aesthetic Medicine Feature', Vietnam News, Ap. 26, 2024. available at: https://vietnamnews.vn/media-outreach/1654645/healthsprings-group-launches-new-telemedicine-app-with-aesthetic-medicine-feature.html (last visited on 3 May 2024)

communication, thus enabling specialists to monitor patients in multiple ICUs remotely.[12]

4. E-pharmacy

E-pharmacies sell medical products such as prescription drugs, non-prescription drugs, dietary supplements and medical tools on their internet portals. In India, e-pharmacy portals PharmEasy, NetMeds, 1mg, Healthkart are commonly used. Asynchronous websites can enable doctors to send e-prescriptions to patients based on their replies in chat or questionnaires, without physical examination.[13]

In pharmacy practice, AI is being adopted to automate medication dispensing, management of inventory, providing personalized medication plans, etc., which can enhance efficiency. Prescriptions contain sensitive patient information, which has to be protected and labelled accurately so that AI algorithms can be trained to recognise and analyses such information reliably. The industry vendor of the algorithm must disclose any patient data monitoring and must also define the ownership, access, sharing of data.[14]

III. Impact on the medical field

1. Access to healthcare

In India, rural communities face lack of access to quality healthcare. This adversely affects life expectancy, maternal and infant mortality rates. Economic and physical limitations restrict access to qualified personnel and medical knowledge. While there are small hospitals or clinics in such areas, technology

[12] Anjali Raja, 'The role of AI in telemedicine developments in India', available at: https://indiaai.gov.in/article/the-role-of-ai-in-telemedicine-developments-in-india (last visited on 15 May 2024)

[13] Pallavi Khanna, 'Online Pharmacies in India: Legal and Ethical Considerations', 1 VIT Law Review (2021), available at: https://chennai.vit.ac.in/files/online%20pharmacies%20in%20india%20-%20legal%20and%20ethical%20considerations.pdf (last visited on 2/5/24)

[14] Hisham E. Hasan, Deema Jaber et al, 'Ethical considerations and concerns in the implementation of AI in pharmacy practice: a cross-sectional study', 25 BMC Medical Ethics (2024), available at: https://bmcmedethics.biomedcentral.com/articles/10.1186/s12910-024-01062-8 (last visited on 5/5/24)

is being used to train and update local healthcare providers in such areas. In 2020, the Indian Ministry of Health and Family Welfare launched a national tele-consultation service 'e-Sanjeevani National Telemedicine OPD', where a patient can register as a patient, upload health records and select an OPD, which will connect him to a doctor over video call, who can issue him an e-prescription.[15]

2. Insurance coverage

With the increase in the number of people using telehealth apps and healthcare providers who offer telehealth services, the medical insurance industry is adapting to the changes. In 2020, India's Insurance Regulatory and Development Authority issued guidelines concerning telemedicine, whereby general health insurance companies would be required to cover telemedicine charges in the terms and conditions of the medical insurance policies which they offer.[16] As a part of the National Health Stack initiative, the Ministry of Health and Family Welfare will now launch a centralised National Health Claim Exchange portal, where almost fifty insurance companies will be able to process insurance claims submitted by public and private hospitals.[17]

IV. Ethical and Legal Concerns

1. Autonomy and informed consent

There are issues of consent, individual choice, independence, empowerment, control, and self-determination. While telehealth can provide patients the freedom to remain at home, it can also isolate them and reduce independence. Methods of data collection, storage, and manipulation in telehealth may affect

[15] National Telemedicine Service, available at: https://esanjeevani.mohfw.gov.in/#/ (last visited on 2/5/24)

[16] "Allow telemedicine claims: IRDAI", The Hindu, Jun. 11, 2020. available at: https://www.thehindu.com/business/Industry/allow-telemedicine-claims-irdai/article31807301.ece (last visited on 4/4/24)

[17] "India: Govt to launch national digital health claims platform", Asia Insurance Review, May 28, 2024 available at: https://www.asiainsurancereview.com/News/View-NewsLetter-Article/id/88317/Type/eDaily/India-Govt-to-launch-national-digital-health-claims-platform (last visited on 30/5/24)

patient autonomy. Autonomy would be assessed by co-design, understanding of the system and control under different usage scenarios, whether it enhances independence, and if independence is desirable. Technology may affect patient care by obscuring important information from practitioners, such as potential harms or suicide risks.[18]

Telecommunication service providers which enable consultation through monitoring devices or mobile applications have access to patient consultation data which affects confidentiality. In such an electronic exchange, telecommunication service providers have access to the content in the interaction, while health information websites may leak such information to third parties without the knowledge of the patient.[19]

Service providers have financial interest in online transactions when they get commissions for displaying sponsored advertisements, membership, processing fees etc. Search engines may also allow unverified pharmacists to advertise, which may not enable them to be traced.[20]

2. Patient trust and physician accountability

As a moral activity, medicine requires patients to place trust in their healthcare professional, that he will place their welfare above all his other interests and provide competent care. In telemedicine, the professional should disclose any of his financial or personal interests regarding a health service company, application or website which may influence his role, and should minimize such

[18] Amanda Jane Keenan, George Tsourtos, Jennifer Tieman, "The Value of Applying Ethical Principles in Telehealth Practices: Systematic Review" 23 J Med Internet Res (2021), available at: https://www.jmir.org/2021/3/e25698/PDF (last visited on 29/5/24)

[19] Chaet, D., Clearfield, R., Sabin, J.E. et al. 'Ethical practice in Telehealth and Telemedicine' J. Gen Intern Med 32 (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 29/5/24)

[20] Pallavi Khanna, 'Online Pharmacies in India: Legal and Ethical Considerations', 1 VIT Law Review (2021), available at: https://chennai.vit.ac.in/files/online%20pharmacies%20in%20india%20-%20legal%20and%20ethical%20considerations.pdf (last visited on 29/5/24)

conflict or bias. A healthcare professional has a responsibility to affiliate with those websites who provide privacy policies to users.[21]

Telehealth should be viewed as a supplementary method to improve care and treatment. Trust and mutual respect may be difficult especially if the patient and provider have never met in person. Patients may feel reluctant to speak freely in the presence of unfamiliar equipment, due to any privacy or communication concerns.[22] If technology such as AI-based recommendations does not meet the required clinical standards, then such mode of care should not be preferred.[23] Patients may have concerns about accepting AI-based recommendations because of their non-reliability.[24] A 2024 study by Ulster University School of Computing found that user ratings of digital health apps are not reliable indicators of their quality, which could affect public trust in such technologies. There is a need for a rigorous evaluation of the metrics which can help users to make safe and reliable choices of apps.[25]

Healthcare providers may encourage patients who have no insurance reimbursement to choose telehealth visits so as to accommodate patients who have insurance coverage for in-person visits. This affects patient safety and accessibility.[26]

3. Equity of Access and Quality of care

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[21] Chaet, D., Clearfield, R., Sabin, J.E. et al. 'Ethical practice in Telehealth and Telemedicine' J. Gen Intern Med 32 (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 29/5/24)

[22] Amanda Jane Keenan, George Tsourtos, Jennifer Tieman, "The Value of Applying Ethical Principles in Telehealth Practices: Systematic Review" 23 J Med Internet Res (2021), available at: https://www.jmir.org/2021/3/e25698/PDF (last visited on 29/5/24)

[23] Chaet, D., Clearfield, R., Sabin, J.E. et al. 'Ethical practice in Telehealth and Telemedicine' J. Gen Intern Med 32 (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 29/5/24)

[24] Hisham E. Hasan, Deema Jaber et al, 'Ethical considerations and concerns in the implementation of AI in pharmacy practice: a cross-sectional study', 25 BMC Medical Ethics (2024), available at: https://bmcmedethics.biomedcentral.com/articles/10.1186/s12910-024-01062-8 (last visited on 30/5/24)

[25] Study highlights need for more rigorous evaluation of digital health apps, available at: https://www.digitalhealth.net/2024/06/study-highlights-need-for-more-rigorous-evaluation-of-digital-health-apps/ (last visited on 3/4/24)

Different demographics may have different factors which influence the use of telemedicine. This model of care may not be convenient for patients who do not have the resources for technology, or professional consultation payment. The costs involved, and non-conformance to legal standards impact the adoption of telemedicine.[27]

Medical conditions which require a physical contact examination by a healthcare professional cannot be suitably addressed through telemedicine. If the mode used does not meet the medical clinical standards of consultation, then it may not be the preferred approach. In telephonic or video consultations, bodily cues which a physician uses to analyse a patient, such as his body language and facial expressions, may not be transmitted to the physician, which may compromise the quality of care which the patient will receive. A healthcare professional must use his professional judgment and be able to recognize any limitations in telemedicine technologies while providing care to his patient.[28]

Access to care for marginalized communities is affected by the affordability of technology, which affects seriously ill patients. Digital services require users to have literacy in English language, technology and healthcare in order to understand their content, which acts as a barrier to weaker sections of society. This 'digital poverty' excludes them from accessing resources which are easily accessed by users from privileged backgrounds. For instance, people with mental health needs or special needs may not have the capacity to comprehend the usage of digital health resources.[29]

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[26] Amanda Jane Keenan, George Tsourtos, Jennifer Tieman, "The Value of Applying Ethical Principles in Telehealth Practices: Systematic Review" 23 *J Med Internet Res* (2021), available at: https://www.jmir.org/2021/3/e25698/PDF (last visited on 20/5/24)

[27] V. Nagaraja, et al, 'Perspectives and use of telemedicine by doctors in India: A cross-sectional study' Health Policy and Technology (2024), *available at*: https://www.sciencedirect.com/science/article/pii/S221188372400008X (last visited on 30/4/24)

[28] Chaet, D., Clearfield, R., Sabin, J.E. et al. 'Ethical practice in Telehealth and Telemedicine' J. Gen Intern Med 32 (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 20/5/24)

In cases where complex decision making is essential to diagnose or detect subtle signs of a disorder or illness, physical examination by a healthcare practitioner or checking non-verbal nuances of the patient are important. In such cases, if the convenience of remote care is given priority over the quality of care, then the level of care provided to the patient may not be ideal.[30] To prevent misinterpretation or misdiagnosis, the image quality in teleradiology or telepathology should be created and communicated as per international standards. For medical emergencies or acute illnesses, the patient should be evaluated by a licensed healthcare professional in person. His results can then be electronically transmitted to a remote consultant.[31] Patients should be provided with adequate technology for telehealth visits and training for its proper use.[32] Assumptions made by the developers regarding the design of the app may exclude many of its intended users, from the gender, ethnicity and racial perspectives. For example, a menstruation tracking app which is trained on data taken from only Asian women may provide inaccurate results to individuals of other ethnicities, races or to transgender persons.[33]

V. Regulatory framework

1. Medical practitioners and pharmacies

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[29] Louise Stone, 'GPs need more evidence that digital mental health services work before prescribing them', available at: https://insightplus.mja.com.au/2024/21/gps-need-more-evidence-that-digital-mental-health-services-work-before-prescribing-them/ (last visited on 4/6/24)

[30] Sarah C. Hull, Joyce M. Oen-Hsiao, Erica S. Spatz, "Practical and Ethical Considerations in Telehealth: Pitfalls and Opportunities" 95 Yale J Biol Med 367 (2022), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9511944/ (last visited on 15 May 2024)

[31] Revathi G Maroju, Sonali G Choudhari *et al*, "Role of Telemedicine and Digital Technology in Public Health in India: A Narrative Review", 15 Cureus (2023), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10085457/ (last visited on 15/5/24)

[32] Sarah C. Hull, Joyce M. Oen-Hsiao, Erica S. Spatz, "Practical and Ethical Considerations in Telehealth: Pitfalls and Opportunities" 95 Yale J Biol Med 367 (2022), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9511944/ (last visited on 15 May 2024)

[33] Susan Shepard, 'Identifying the Privacy & Ethical Pitfalls in Connected Medical Devices', available at: https://www.mddionline.com/digital-health/identifying-the-privacy-ethical-pitfalls-in-connected-medical-devices (last visited on 27/4/24)

The National Medical Commission Act 2019 regulates the allopathic medical profession in India. The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 provide for medical standards which registered medical practitioners are required to follow. The Telemedicine Practice Guidelines 2020 have been made a part of these Regulations. They permit registered medical practitioners to use telemedicine tools such as audio, video, text-based platforms to consult patients, after taking their consent. They compel the practitioner to consult the patient in-person if a physical examination is necessary for evaluation. Practitioners have to issue an electronic prescription which should detail the particulars of the patient and the practitioner, along with the list of medicines and instructions.

The Guidelines correspond with the Drugs & Cosmetics Act 1940, which specify those drugs and medicines that can be sold with and without prescriptions, by licensed pharmacists and by general retailers. However, practitioners cannot prescribe medicines listed in Schedule X of the Drug and Cosmetic Act, or any narcotic and psychotropic substances. Misconduct by practitioners such as insistence on telemedicine, misuse of patient data or images, prescribing prohibited medicines through telemedicine shall be subject to penalty as per the 2002 Regulations or appropriate laws. In the 2021 case involving the death of late actor Sushant Singh Rajput, the prescription of the prohibited drug Clonazepam to him by his doctor through text message was deemed to be violative of the Guidelines.[34]

The Registered Medical Practitioner (Professional Conduct) Regulations, which were notified in 2023, have now been withdrawn. They seek to restrict professionals from circulating patient testimonials, images, videos and solicitations through social media. They also include the new Guidelines for Practice of Telemedicine.

[34] Priyanka Singh And Anr vs The State Of Maharashtra And Ors (AIR 2021 BOM 938)

The Telecom Commercial Communication Customer Preference Regulations 2018 prohibit telemedicine platforms from sending unsolicited promotional or commercial communications such as SMS to users of the platform. Transactional messages which involve communication regarding any purchase of service or goods have to be sent to the receiver with his consent and in the format provided by his access provider.

If a healthcare practitioner provides services to a patient beyond the scope of his state's limits, it could potentially be considered as practice without a licence in the other State.[35] In case of cross-border remote consultations, the question of jurisdiction may arise. For example, if a patient residing in India remotely consults a physician practising in the United States, it is not definite whether the laws of the United States or the Indian law will apply. Under public international law, the effects doctrine considers that the state where the victim is located can claim jurisdiction.[36]

Online pharmacies are subject to the requirement for permit for the sale of medical products. There is a risk of e-pharmacies selling non over-the-counter prescription medicines or unapproved drugs. Also, they can sell and make available medicines to consumers in different countries, which makes it difficult to determine legal jurisdiction for regulation. The sale of drugs is governed by laws which do not specifically recognise the e-pharmacy model.[37] The practice of tele-dentistry, tele-nursing, tele-radiology, Ayurveda,

[35] Chaet, D., Clearfield, R., Sabin, J.E. et al. 'Ethical practice in Telehealth and Telemedicine' J. Gen Intern Med 32 (2017), available at: https://link.springer.com/article/10.1007/s11606-017-4082-2#citeas (last visited on 20/5/24)

[36] D. Svantensson, "Cross-Border Telemedicine: New Area, Same Legal Challenges", 32 Masaryk University Journal of Law and Technology 227 (2009), available at: https://core.ac.uk/download/pdf/230602186.pdf (last visited on 25/5/24)

[37] Pallavi Khanna, 'Online Pharmacies in India: Legal and Ethical Considerations', 1 VIT Law Review (2021), available at: https://chennai.vit.ac.in/files/online%20pharmacies%20in%20india%20-%20legal%20and%20ethical%20considerations.pdf (last visited on 20/5/24)

homeopathy and other systems of medicine through telemedicine remains unregulated.

2. Intermediary entities

In the course of online interaction between a patient and the healthcare provider, personal information related to the health of the patient is shared and transmitted. Such personal information is considered as sensitive personal data under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011. These Rules obligate entities involved in the interaction, like clinical establishments, pharmacy companies and other intermediaries such as technology developer companies, to ensure that there are security measures for safe storage of such data. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 require entities to follow due diligence procedures such as publishing and following privacy policies and taking action against violators upon receiving knowledge of non-compliance. The Electronic Health Record Standards 2016 provide the principles for protection, privacy, disclosure and preservation of Protected Health Information and Electronic Protected Health Information.

The Telemedicine Practice Guidelines 2020 also address technology platforms such as mobile applications or websites that enable patients to consult practitioners. They have categorically excluded AI based platforms which can advise or prescribe medicine to users. The Guidelines obligate platforms to ensure that the practitioners listed are registered with national or state medical councils.

VI. Conclusion

Advances in the use of telemedicine have outpaced the legal and ethical considerations involved. The risks and benefits of electronically mediated care can be dealt with through coordination between medical, information

technology and appropriate education organisations. Digital literacy gaps and limited internet access in certain populations require state action. Additionally, ensuring data privacy and security in the virtual healthcare environment is important.

While the case law development on the nature of malpractice in telemedicine is still immature, it should be adopted as a complementary approach to traditional in-person care. Ethical considerations must be addressed to ensure equitable and responsible implementation. The future of telemedicine would develop in a system that is not only accessible but also upholds the highest ethical standards.

ADANI HINDENBURG SAGA: APROPOS INDIAN LEGISLATIONS

Dr. Sanchita Tewari[*]

Abstract

The Adani Group, a conglomerate with diversified interests spanning across sectors such as ports, power, agribusiness, and infrastructure, has garnered both admiration and scrutiny on the global stage. The study delves into the Hindenburg Research report, a critical analysis of Adani's business practices and financial disclosures. Moreover, it raises concerns regarding alleged discrepancies in Adani's corporate governance, financial transparency, and environmental compliances. Furthermore, Hindenburg Research unveils a purported corporate malfeasance, asserting that Adani's business dealings are fraught with opacity and potential conflicts of interest. The report highlights instances of regulatory scrutiny and legal disputes. While the Adani Group vehemently refutes the allegations presented in the Hindenburg Research report, the present study has ignited a discourse on corporate governance standards, financial integrity, and environmental responsibility within the context of Adani's expansive empire. As stakeholders evaluate the veracity of the claims made in the report, the findings therein prompt a critical examination of Adani's role in shaping the future of industry and sustainability.

Keywords: *Corporate governance, Hindenburg claims, OCCRP Report, Buy back.*

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I. Background

Change is inevitable, and the magnitude and speed of change differs from case to case. Liberalization, Privatization and Globalization have changed the rules of the game. The only way to survive in the changed business environment is to change the way business is conducted. Thus, the question before us is whether these three factors have compelled the companies to restructure the operations of the company, at the cost of violating the existing laws and regulations? With the liberalization in the Foreign Direct Investment policies in the past few years, Mergers and Acquisitions and alliance talks have heated up in India and are growing at a tremendous pace. They are looked upon as instruments of successful corporate restructuring and fulfilment of corporate goals. However, it is to be noted at this juncture that although restructuring is carried out for creating customer value, it affects every stakeholder and every aspect of the business. Here comes the increasing importance of due diligence in today's complex business environment. Legal due diligence consists of a scrutiny of all, or specific parts, of the legal affairs of the company with a view of uncovering any legal risks.

The Oxford Dictionary defines restructuring as "giving a new structure, to rebuild/ to rearrange." Restructuring is a corporate management term that stands for the act of partially dismantling or otherwise reorganizing a company to make it more efficient and therefore more profitable. Restructuring is the modern mantra of survival. Corporate governance needs to be practiced even while rearranging or reorganizing these companies. It is about promoting corporate fairness, transparency and accountability. In other words, we can say good corporate governance is good business. Consequently, corporate governance must prevent enterprises from indulging in fraudulent and unethical practices.

The paper seeks to address issues in corporate governance relating to business strategies of big corporate giants like Adani. Corporate world has always been facing ethical dilemmas and accusations pertaining to lack of transparency and fairness in dealings. The collapse of big giants has become a global phenomenon, and are more widespread than is being visualized and understood. Stakeholders have often been let down by unethical acts of people at the helm of affairs in the company. In the light of such stunning failures and collapses there has been a debate for the need of a framework that could curb the unethical and illegal tendencies in the corporate world.

II. Legislative Framework Governing Buy Back

Historically, Indian corporate law did not include provisions allowing for the buyback of shares by companies. However, there have been persistent demands to incorporate such provisions. Ultimately, in 1999 the Companies (Amendment) Act was passed to permit share buybacks, subject to certain defined conditions.

Previously, buybacks had not been allowed due to concerns they could prejudice creditors who had invested in companies with the expectation that funds would be used to further business growth. There was also a view that buybacks could create artificial scarcity in the supply of shares, potentially inflating demand and raising stock prices without underlying improvements in business performance or value. Lawmakers took the position that capital should not be redirected from growth initiatives to benefit existing shareholders through stock repurchases.

1.Buyback of Shares: Purpose and Regulations

Companies often repurchase their own shares for strategic reasons. Some key purposes of share repurchase might include increasing promoter shareholding (repurchasing shares boosts the ownership stake of

company insiders), manage the surplus cash which the company has, attract investors by showing to them the higher value of shares. Moreover, it can also be used as an Anti-takeover strategy as consolidating shareholding makes it harder for other companies to acquire a significant ownership stake, so as to affect the decision-making power.

Section 67 of the Companies Act in clear terms restricts companies from repurchasing shares unless it would reduce share capital or provide financial assistance for buy back, except ordinary course lending or through a special resolution-approved scheme or loans to the employees, exclusive of the key managerial personnel. However, loans to employees cannot exceed six months' salary[1].

Contraventions are punishable by fines from Rs. 1,00,000 to Rs. 25,00,000 and imprisonment up to three years for defaulting officers. Fines from Rs. 1,00,000 to Rs. 25,00,000 also apply to companies.[2]

Section 68 specifies conditions for allowed repurchases. Repurchases must be authorized by articles and approved by a board resolution for up to 10% of paid-up equity capital and reserves or a special resolution for 10-25%.[3] Notice of the meeting including material facts, rationale, share classes involved, investment amount, and completion timeline must be circulated after the resolution is passed.[4]

SEBI regulations also require notice to state the maximum repurchase price and promoter tender details and six-month prior holdings if the promoters are offering for buy back of shares. Additional conditions include: only one repurchase annually; debt-equity ratio cannot exceed

[1] The Companies Act, 2013, (Act 18 of 2013), s. 67.
[2] Id., s. 67(5).
[3] Id., s. 68.
[4] Id., s. 68(3).

twice capital and reserves post-repurchase[5]; only fully paid shares can be repurchased[6]; a six-month lock-in period after new share issues[7]; SEBI regulation compliance for listed companies; and a non-insolvency declaration signed by two directors including the managing director[8].

Also, a company in default of redeeming debentures, preference shares, repayment of deposits or loans/interest to any financial institution cannot conduct a buyback for three years after remedying the default.

Rule 17 of Companies Rules 2014, lists out the procedural conditions. It states-

1. File with registrar of companies the approved letter of offer along with the prescribed fees.
2. The letter of offer shall be dispatched to all the shareholders post filing it with registrar of companies within 21 days.
3. The offer shall remain open for 15-30 days from the dispatch of letter
4. The company shall complete the verification of offers in 15 days from the date of closure of offer
5. A communication of rejection has to be made otherwise it shall be deemed to be accepted
6. Immediately after acceptance, a separate bank account has to be made, where the entire amount of buy back has to be deposited.
7. Once the buy back is finished, the shares shall be extinguished physically within 7 days and a proof must be produced to Registrar[9].

There are three permissible sources for performing a buyback firstly, open market purchases through a stock exchange at prevailing prices or

[5] Id., s. 68(2)(d).
[6] Id., s. 68(2)(c).
[7] Id., s. 68(2)(f).
[8] Id., s. 68(6).
[9] Id., s. 68(7) & (9).

via a book building process where the company sets a minimum price and accepts the highest bid. Secondly, tender offer to existing shareholders where the company sets a price and number of shares to repurchase, allocating purchases proportionately if shares are offered above the desired amount. And, lastly, employee stock option program[10]. However, a question might arise that from where will such buy backs be funded. There are three permissible funds for that, free reserves, Securities premium account, proceeds from the issue of any shares or other securities, excluding shares of the same class issued earlier.

For buybacks financed from free reserves or securities premium account, it calls for an additional procedural requisite, i.e. an equivalent amount must be transferred to a capital redemption reserve reflecting such transfer in the balance sheet[11].

After all the aforementioned statutory requirements and completing the buyback, the company must file relevant documents with the Registrar and SEBI within 30 days[12]. Section 70 of the Companies Act prohibits buybacks or financial assistance between related companies, including through any subsidiary or investment company/group of investment companies[13].

Furthermore, if any company is defaulting in redemption of debentures, preference shares or repayment of deposits or loans or interest in loans to any financial institutions cannot perform a buy back until three years have passed after remedying the default[14].

2.Minimum Public Shareholding Rules

[10]Id., s. 68(5).
[11]Id., s. 69.
[12]Id., s. 68(10).
[13]Id., Sec 70.
[14] Id., Sec 70(1).

Regulation 38[15] of Listing Regulations require a listed entity to abide by the minimum public shareholding rule, as has been specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulations) Rules 1957. As per the aforementioned provisions, minimum offer or allotment to public shall be at least 25% of each class of shares. Every listed company other than the public sector companies have to maintain it.

And if it is below 25% then, it has to be increased up to 25% within 3 years from the date of commencement of the Securities Contracts Regulation Amendment Rules 2014. Wherein the public shareholding falls below 25% on any date, then within 12 months from such date, it shall rise till 25%.

III. A Glimpse at The Great Tapestry- Adani Empire

"*I am an Incurable optimist*"[16]- Gautam Adani

Through perseverance and determination, Gautam Adani has built an immense business empire that has made him the third wealthiest individual in the world. In the 1980s, after starting his career trading diamonds through Adani Exports, he laid the foundation for what would become a colossal conglomerate.

By 2002, while Reliance Industries was exponentially growing its market share to 73% higher than Adani's at the time, Mr. Adani had already begun amassing considerable wealth and building diversified businesses. Today, Adani Group's valuation has reached 19.31 trillion rupees, surpassing Reliance by 1.84 trillion rupees in market capitalization, despite Reliance remaining larger at this time. The rapid growth of Adani Group is quite

[15] Listing Obligations and Disclosure Requirements, 2015, reg. 38.
[16] "The Rain Maker", Business Today, Nov. 2022 available at: https://www.businesstoday.in/interactive/longread/inside-the-colossal-empire-of-gautam-adani-207-25-11-2022. (last visited on June 28, 2024).

remarkable, with its current size exceeding that of entire national economies like Ukraine and Sri Lanka.

From the beginning, Mr. Adani was supported by his brother as they strategically sought to capture entire industry supply chains through backward integration and expansion into adjacent sectors. Starting with coal trading, they acquired mining licenses and subsequently grew into logistics, power generation, and other infrastructure-related businesses.

Now that it has expanded so much that there is a whole flagship of Adani enterprises, like Adani Power, Adani Ports, Adani Green, Adani Total Gas and Adani Wilmar, Adani Connex, Adani Airports, Adani Abott Point etc. Not only is the size of this company growing, but it is growing sustainably, i.e. Adani Green energy ltd which is currently India's one of the largest renewable energy developers. A few years back it was running on 0.3GW, but now it is 6.6 GW, planning on to touch 13.7 GW with PPA. Adani Total Gas Ltd is developing as a city gas distribution network, piped, for industrial, commercial and residential purpose.

One of Adani's most significant moves was acquiring Ambuja Cements and ACC, making the group India's second largest cement manufacturer. This strategic vertical integration aims to control supply chain costs given cement's importance in logistics. Substantial new investments are also planned in the metals sector. Adani Wilmar has emerged as India's largest fast-moving consumer goods company, overtaking long-time leader Hindustan Unilever.

Mr. Adani has ambitious plans to establish ANIL focusing on industrial decarbonization through solar, wind, and green hydrogen manufacturing. Another major project is a joint venture with EdgeConneX to build renewable-powered smart cities called Adani Connex. Adani Airport Holdings is also rapidly expanding the group's airport portfolio.

The immense scale and continued expansion of Adani Group leaves many wondering if Mr. Adani is overstretching capabilities. However, the group's juggernaut momentum appears unstoppable and it will likely continue transforming India's business landscape and energizing domestic entrepreneurship.

IV. The Hindenberg Claims

There have been several allegations against Adani Group outlining corporate fraud and massive stock manipulation. While Adani argues that the motives of Hindenburg and their research are flawed, several allegations have been put forth:

Allegation 1 - A Mud of Several Past Run-Ins

Several associates of Gautam Adani have had run ins with law in past and a few among them have been brushed off before it came to board. Things were so suspicious that Former RBI senior official remarked that- "Any Group with such a meteoric ride based on borrowings, acquisitions and an elevated stock price deserves scrutiny".

For example, Vinod Ambani allegedly used offshore shell entities with no real operations, employees, or independent addresses to conduct questionable related-party transactions. It was concluded these were sham companies created solely for speculative fund movements. Stocks were allegedly manipulated to artificially increase prices.

There have also been several import/export scams alleged over the years involving diamonds, iron ore, and power equipment. Overall, Adani Group faces multiple fraud allegations, money laundering accusations, and an estimated $17 billion in alleged tax evasion[17].

[17] "Adani Group: How the World's 3rd Richest Man is Pulling the Largest Con in Corporate History", Hindenburg Research, January 24, 2023. available at: https://hindenburgresearch.com/adani/ (last visited on June 24, 2024).

One such case involved a 2005-06 diamond smuggling scam, according to the Directorate of Revenue Intelligence. Adani's younger brother was reportedly involved in the scheme and has been arrested twice previously on unrelated matters.

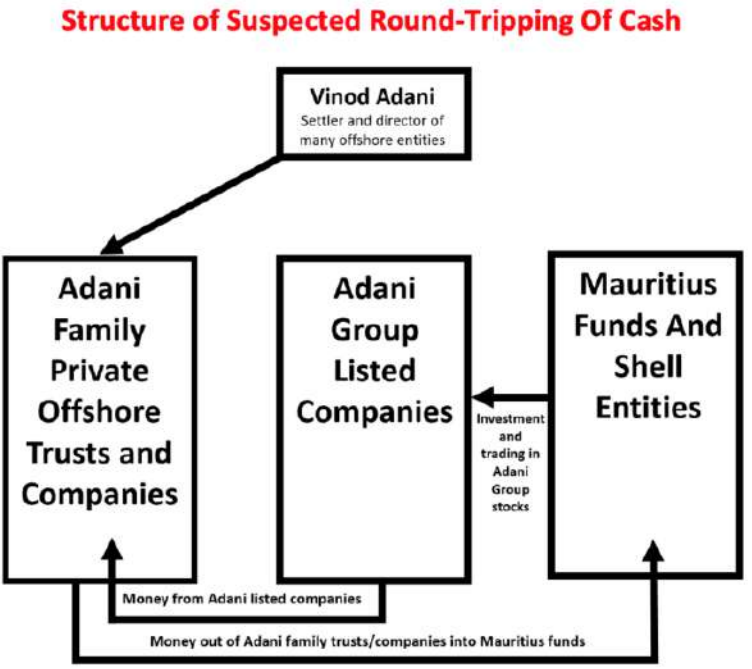
Allegation 2 - Family Affiliations and Perceived Opaqueness

The Adani Group has a family-oriented leadership structure, which some observers believe can enable opaque financial decision-making processes. The group's senior leadership includes at least eight family members, posing challenges for outsiders to fully understand the extensive business operations. Related party transactions, as mentioned in the previous report, appear connected to the family relationships within the company. One of the Adani brothers continues managing aspects of the company from Dubai, despite past allegations and investigations. Several other entities have also been identified as associated with Adani, such as those incorporated in Cyprus, the UAE, and Singapore[18].

Allegation 3- -Offshore Funding and Minimum Public Ownership Standards

The Securities and Exchange Board of India (SEBI) requires publicly traded companies to maintain a minimum 25% of shareholding not controlled by promoters or insiders. This rule aims to reduce potential for insider trading and market manipulation by diversifying ownership. Some analysts have noted that several Indian corporations reportedly use entities based in Mauritius and other offshore jurisdictions to satisfy these public ownership quotas.

[18] *Ibid.*



[19]

This diagram outlines potential cash flows between Adani group entities and offshore structures. If accurate, it suggests Adani controls share prices through the 25% public float via transnational shell companies.

Another perspective is that four Adani companies have high insider ownership near delisting thresholds:

- Adani Transmission: 74.19% [20]
- Adani Power: 74.97%[21]
- Adani Total Gas: 74.80% [22]
- Adani Wilmar: 87.94%[23]

[19] *Ibid.*
[20] *Ibid.*
[21] "Adani Group: How the World's 3rd Richest Man is Pulling the Largest Con in Corporate History", Hindenburg Research, January 24, 2023. available at: https://hindenburgresearch.com/adani/ (last visited on June 24, 2024).
[22] *Ibid.*
[23] *Ibid.*

While reports indicate values below 100% represent non-insider holdings, there are suspicions opaque funding occurs through shell entities lacking diversified ownership profiles.

Allegation 4- Shell Companies & Investment Saga

There are 5 investment fund which has suspicious functioning in their pattern of holdings. It was believed that they were all created out of an entity, called Monterosa Investment Holdings, in Mauritius under same address and overlapping nominee directors. They held over INR 360 billion in Adani listed companies. It has been alleged by one of the stick brokers that SEBI has intentionally put a blind eye towards it by ignoring it for making money. This investment company has its family ties with Adani and is now accused with fleeing away with $1 billion[24].

Similarly, there is Elara Capital, which operates in Mauritius and invests in Adani, 99% of its shares are owned by Adani. It has connections with Ketan Parekh Scam, i.e. one of the largest Indian stock market manipulations. While, One Fund holds almost $3 billion in Adani[25].

Several banking entities operating in Mauritius as offshore entities have made it difficult to establish the open secret that they flout with the laws. Such routed transactions are said Chinese Walls which try to hide the identity of the beneficial owners.

According to Bloomberg, around 95% of New Leaina Investments are held by Adani and it comprises of 1.01% stake in Adani energy.[26] Opal, the largest independent investor in Adani is a Mauritius based shell entity,

[24] *Ibid.*

[25]"Adani Group: How the World's 3rd Richest Man is Pulling the Largest Con in Corporate History", Hindenburg Research, January 24, 2023. available at: https://hindenburgresearch.com/adani/ (last visited o June 26, 2024).

[26] *Ibid.*

owns around 4.69% of the company. However, it does not have any website, no marketing material, nor any employees on LinkedIn.

The stock delivery volume is highly manipulated.

Allegation 5- Tiny Bookrunner for Mammoth- sized corporate house

Trading volumes were questioned for manipulation, yet Adani chose a small brokerage, Monarch Net worth Capital where it owns 10%, as a bookrunner, instead of engaging a larger entity, despite Monarch's history of manipulation and suspension[27].

Allegation 6- Rigging With Other Fraudsters

Mauritius is reportedly seen as a fertile ground for opaque transactions. Adani was involved in a 2001 scandal with Ketan Parekh, where its promoters aided market manipulation. Seven of Adani companies were banned from dealing in securities. Investigators suggest that 14 of Adani companies were engaged in organized share transfer and carried out circular trade leading to fake demand. Thereafter, in July 2004-05 there were around 30 schemes by Adani which manipulated the share prices, by creating an artificial demand leading to rise in value of shares by 128%. Certain social media posts suggest that Ketan Parekhk's daughter has worked with Elara Capital, which is almost owned by Adani group. This indicates that some of Ketan Parekh's business might still be running under Adani.

Allegation 7- Related Party Transactions

It has been alleged that in addition to using shell entities, there were several undisclosed related party transactions through which the Adani Group purportedly laundered money into onshore companies' balance sheets. As stated by a former chairperson of the Securities and Exchange Board of India (SEBI), "Use of complicated group structures and

[27] *Ibid.*

complex related-party transactions increase the concern on siphoning of funds, money laundering, round tripping etc., while such structures and transactions happen at a cross-country level, the lack of free information flow hinders monitoring and enforcement as well"[28]

The seven listed Adani companies have over 550 subsidiaries in total, some of which are alleged to be opaque entities that enable fertile ground for related party transactions. According to a disclosure with the Bombay Stock Exchange (BSE), there were approximately 6,025 related party transactions in 2022 alone[29]. A key figure allegedly involved in related party transactions is Vinod Adani, who until 2011 held important positions within the group but subsequently did not hold a formal role yet remained actively involved in negotiating foreign financing, as stated by Gautam Adani.

To conceal that the shell companies were actually shell entities, several company websites were established on the same day using the same templates and similar business descriptions. Moreover, the contact sections of these websites included numbers for registered agents rather than actual business contacts. This rudimentary effort to demonstrate online commercial presence made it very easy to identify the entities as allegedly being shells.

A United Arab Emirates (UAE)-based entity, DMCC, allegedly lent over one billion US dollars to Adani. However, as of March 2022 DMCC did not demonstrate obvious signs of operations. There were also several other similar entities alleged to have lent money to Adani without disclosing related party details, such as entities based in Cyprus,

[28] *Ibid.*
[29] *Ibid.*

Mauritius and Singapore. These companies were allegedly used to shuffle material losses and improve reported income in financial statements.

There seems to be a long list of the companies involved in the related party transaction with the Adani empire- Gardenia trade, Rehvar Infrastructure and Carmichaelm Milestone Tradelink's.

Not only that Adani's shell companies provide financial aid to it, the Adani company itself facilitates financial assistance to them, like in AdiCorp- the four of Adani group companies have lent in over billions of amounts. However, the financial statements of these companies do not disclose any such lending.

Allegation 8- Internal Red Flags

Since the very inception of the Adani group, the family members have been heavily involved in the business, however their top executives in accounts have been changed very frequently in a short span. There have been 5 CFOs in less than a decade. A closer look at each Adani group might leave us dumbstruck. (the data is reflected in the table)[30]

ENTITY	CFOs
ADANI ENTERPRISES	5 in 8 years
ADANI GREEN ENERGY	3 in 5 years
ADANI PORTS	3 in 5 years
ADANI POWER	3 in 5 years
ADANI TOTAL GAS	2 in 4 years
ADANI TRANSMISSION	2 in 2 years

[30] "Adani Group: How the World's 3rd Richest Man is Pulling the Largest Con in Corporate History", Hindenburg Research, January 24, 2023. available at: https://hindenburgresearch.com/adani/ (last visited on June 27, 2024).

Another key red flag is its independent auditor, which is a small firm consisting of only 4 partners and 11 total employees. This is suspicious because usually companies hire credible auditors to gain the trust of investors. But Adani group shinned this approach and opted for a tiny auditor to oversee its two public companies. Also, their website reflects that they were novice into auditing, with little or no prior experience. Post that, the online presence of the tiny audit firm has gone missing.

While, the audit of other Adani companies has been done by Big 4 firms like Deloitte Haskins, SRBC, Dharmesh Parikh, Ernst & Young. Audit of Adani Power reflects that its assets reflect only 23% of the total asset base and it continuously struggled to fulfill its obligations.

Allegation 9- The Scandal Series

The term 'scandal series tells half the story that there is not just one or two scandals but a lot many. To start with, Diamond scandal of 2004-05 where Adani enterprise was found smuggling cut and polished diamonds and boosting its export turnover. This was done to claim export benefits under the government scheme of Target Plus. It defrauded the government exchequer for extracting profits. For this, there was use of offshore entities in tax heavens like Singapore, UAE etc. Next on line is the Iron Ore Scandal, which spikes up to INR 600 billion[31]. Adani was involved in exporting undeclared volumes of illegally obtained iron ores through its Belekeri port, and for this scam, it had to bribe almost all level of government. As a result of this, the lease of Belekeri port was terminated.

Power equipment scandal of 2014 was to siphon off funds to the offshore entities. It overpriced the import of several equipment-like boilers, generators etc., by this he could siphon off money abroad and get tax

[31] *Ibid.*

benefits as per CERC guidelines. There were certain policies which facilitated return of certain value of investment money on initial capital. Despite sold evidences, the proceedings were dropped and further investigations got stonewalled. There are a few more of such scandals.

In response to the report, Gautam Adani stated "*I have a very open mind towards criticism. For me, the message has always been more important than the messenger. I always introspect and try to understand the other's point of view. I am conscious that I am neither perfect nor am I always right. Every criticism gives me an opportunity to improve myself.*"[32]

This response indicates an embrace of the report's findings. In late 2020, Adani even wrote a letter requesting an investigation. However, past actions suggest Adani initiated various defamation lawsuits against journalists who investigated the company.

In 2021, a defamation suit was filed against The Economic Times after the newspaper reported that some Mauritius-based shell companies associated with Adani had frozen bank accounts.

Following the 2023 publication, the Supreme Court convened an expert panel meeting. The meeting found that the Securities and Exchange Board of India (SEBI) had been examining the issues since 2020 on suspicion that purported public shareholders were not genuinely public. However, SEBI soon encountered difficulties conclusively determining the identities behind the apparent public shareholders.

[32] "Adani group's response largely confirmed findings, ignored key issues raised, says Hindenburg" The Economic Times, Jan 31 2023 available at: https://economictimes.indiatimes.com/news/company/corporate-trends/hindenburg-says-adani-groups-response-largely-confirmed-findings/articleshow/97430768.cms (last visited on accessed July 3, 2024).

V. The Fresh Stung to The Controversy- Occrp Report

The Organized Crime and Corruption Reporting Project (OCCRP), an international consortium of investigative journalists, recently published a report alleging potential stock manipulation by Adani Group. In the August 31st report, OCCRP claims that in at least two instances, public investors tied to the majority shareholders of Adani Group were identified. OCCRP further asserts it has corroborating documentary evidence from multiple tax havens, bank records, and internal Adani Group emails. This documentation has allegedly been supported by public records from various countries showing millions of dollars in related investments.

The report specifically names two individuals - Nasser Ali Shaban Ali and Chang Chung-Ling - who have served as directors and shareholders for companies associated with the Adani Group empire. Four companies are alleged to have ties to these individuals: Lingo Investment, Gulf Aziz Trading, Mid East Ocean Trade, and Gulf Asia Trade and Investment.

Whether any violations occurred will depend on if the two named individuals can be classified as promoters with insider shareholdings under applicable regulations. When a company repurchases its own stock, it can create an artificial scarcity effect perceived to increase share value. The group has experienced substantial growth from $8 billion in market capitalization in September 2013 to $260 billion in 2022. However, this rise has been surrounded by ongoing controversy and faced a significant setback in late January when Hindenburg Research published a critical report[33].

[33] Anand Mangnale, Ravi Nair and NBR Arcadio, 'OCCRP REPORT' OCCRP, (Aug, 2023), available at: https://www.occrp.org/en/investigations/documents-provide-fresh-insight-into-allegations-of-stock-manipulation-that-rocked-indias-powerful-adani-group, (last visited on May 2, 2024).

Key issues raised include potential violations of public shareholding limits, i.e. 25% and allegations of siphoning funds. According to the OCCRP report, around $100 million was allegedly diverted through Mauritius entities tied to Adani Group. Investigations into corroborating evidence are ongoing[34].

VI. Conclusion

In the swirling tempest of allegations and counterclaims, the Hindenburg Research report stands as a pivotal moment in the ongoing saga of the Adani Group. With its bold assertions, the report has thrust the conglomerate into spotlight of public scrutiny, igniting a fervent debate.

The concerned reports, i.e. Hindenburg report and OCCRP report claim that there have been certain legislative violations on buy back and minimum shareholding rules.

Companies Act, 2013 prohibits a company from giving financial assistance to conduct buy back of shares. Furthermore, it specifies that companies who are subsidiary or holding company of each other or invest in each other, such companies cannot buy shares in among themselves. However, as per the Hindenburg report, there are numerous companies across the nation's boundaries, which were given birth by Adani group to channelize the funds. The relation between these companies were either, Adani invested in them or, they invested in Adani.

This investment is in the form of share ownership at times and they have been into financial relations, which raises a brow. However, what is more striking is that most of these companies behave like dummy entities, with no real website, no real workspace or even no employees. This stirs up

[34] *Ibid.*

suspicion that are they real entities or shell companies set up by Adani to divert the fund.

Some of such companies are-

- Cyprus based New Leaina owned US $ 420 Million in Adani energy
- Opal Investment owns 4.69% of the company
- One Fund holds nearly US $ 3 billion worth of share in Adani
- Elara Capital
- Monterosa Investment Holdings with shares worth INR 360 billion in Adani

Moreover, there are some independent investment funds, like APMS Investment Fund, Albula Investment Fund, Cresta Fund Limited, LTS Investment Fund Limited, Lotus Global Investment Fund had same address and multiple overlapping nominee directors. This is incredibly suspicious. There are certain things which are not violative per se, however they indicate towards the ongoing violation, like hiring a previously convicted firm for bookrunning. Not just that it is previously convicted, but it is small firm with inexperienced employees.

Another striking issue is that there has been involvement of Adani with several fraudster, namely Ketan Parekh. There have been allegations that several brokers and sub brokers carried out synchronized fictitious trading in the shares of Adani. Moreover, there has been over 550 subsidiary companies with over 6000 related party transaction, which are un disclosed. Shell companies from offshore have funded massive amounts in Adani and traces of Vinod Adani's extensive relation with such shell entities have been established. These incidents clearly proves that there is a clear violation of the buyback provisions of the Companies act 2013.

Another key allegation was the minimum shareholding rule violation, wherein the minimum 25% rule is violated in certain entities of Adani and the list of a few has been provided under the heading "The Hindenburg Claims".

At the heart of the matter lies the question of compliance - compliance with buyback provisions designed to ensure fair market practices and compliance with minimum public shareholding rules aimed at fostering investor confidence. The report alleges that the Adani Group may have strayed from these regulatory guardrails, casting doubt upon the integrity and also the robustness of its corporate governance framework.

However, the allegations laid bare by the Hindenburg report cannot be brushed aside lightly. They strike at the very core of the Adani Group's credibility, challenging prosperity that has come to define the conglomerate's ascent. The trust, of the shareholder, once lost, is difficult to reclaim, and the repercussions can reverberate far beyond the boardroom.

Yet, amidst the cacophony of accusations, one thing remains abundantly clear - the need for clarity, transparency, and accountability in corporate governance. Regardless of the veracity of the allegations, the mere existence of such claims underscores the imperative for robust regulatory oversight and stringent adherence to ethical standards. In an era of heightened expectations, companies - especially those of the magnitude like the Adani Group - cannot afford to falter in their commitment to integrity and transparency.

As regulatory authorities delve deeper into the allegations, the eyes of the world remain fixated on the unfolding drama. In this crucible of scrutiny, the truth will inevitably emerge, shining a light into the darkest recesses of corporate governance and financial stewardship.

However, even as the storm of accusations rages, there is room for hope -hope that a stronger and more sustainable corporate governance framework will emerge from the crucible of adversity. For the Adani Group, this could be an opportunity to reaffirm its commitment to transparency and accountability, restore trust among investors and stakeholders, and emerge from the shadow of doubt stronger and more determined than ever.

Last but not the least, the Hindenburg report serves as a sobering reminder of the delicate balance that exists between ambition and integrity, between profit and principle. It is a call to arms for companies to uphold the highest standards of ethical conduct, to embrace transparency as a guiding principle, and to recognize that in the crucible of accountability, true greatness is forged.

GOVERNANCE OF ARTIFICIAL INTELLIGENCE: ADDRESSING THE ROLE OF INFORMATION AGENCY IN SHAPING POLITICAL, ECONOMIC AND SOCIAL OUTCOMES

Dr Kamna Sagar[*]

ABSTRACT

Though disputes over its governance have surfaced, concerns regarding artificial intelligence's (AI) potential political, economic, and social ramifications have grown in recent years. This article describes how the governance of new tech analysis should be grounded in the idea that artificial intelligence (AI) involves the production of artificial agents, and that the problem that governance aims to solve is best understood as a matter of information agency. It explains how taking into account the basic characteristics of artificial agents allows pertinent rules to be methodically examined across various applications. The article finishes by outlining the framework's potential applications for additional governance research as well as for bridging the knowledge gaps between social science and technological viewpoints on artificial intelligence.

Keywords*: Governance, AI tools, Intellectual property, Technology*

I. Introduction

Although artificial intelligence (AI) is not a new technology, discussions on its governance and other political, economic, and societal implications have

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become more prevalent in recent years. Additionally, this falls under a larger study focus concerning the social effects of algorithmic decision-making, which is currently present in many societal activities, including high-frequency trading, and internet search engines. According to Radu (2021) and Ulnicane et al. (2020), social science experts have been paying more attention lately to the societal impact of AI and algorithms, but they haven't given as much attention to the organizations and procedures leading up to and including these developments.

This article argues that the challenge that technology governance needs to solve is best understood as one of information agency, and that an interpretation of the tech's governance is predicated on an understanding of AI as the production of "artificial agents." It explains how a conceptual framework based on the fundamental principles of artificial agents can be used to evaluate governance in a methodical way across a wide range of Ai technologies. Consequently, it serves as a link between the governance and AI literatures, which enhances the current corpus in two crucial ways. Firstly, a rising body of research (e.g. Barocas, Hood, & Ziewitz, 2013; Diakopoulos, 2015) offers crucial insights on the wide spectrum of social difficulties that come with algorithmic systems like AI.

The study shows that the governance difficulty lies not so much in the system's absolute capabilities but rather in the material agency it demonstrates in a particular environment by linking these works to the governance of AI. In this sense, the concept of "intelligence" is essentially just an ill-defined system performance indicator, and artificial agency is a better term to express the main governance issue. Second, although significant research has examined the ethical issues of transparency in government and in relation to algorithms and AI governance (e.g. Mittelstadt, 2016; Sandvig, Hamilton, Karahalios, & Langbort, 2014), compatibility with current legal frameworks (e.g. Leiman,

2020; Pagallo, 2017; Veale, Binns, & Edwards, 2018), and specific applications such autonomous vehicles (Taeihagh & Lim, 2019), it appears that the area lacks both a lens for the methodical investigation of AI governance and a grasp of its larger governance framework. In order to present a conceptual framework that can be used to any kind of artificial agent, the study draws on the governance literature and uses the idea of artificial agents as the common denominator across many applications. By doing this, it will be possible to operationalize AI governance in terms of intersubjectively accepted norms that specify, limit, and mold preconceptions on the essential characteristics of an artificial representative.

II. AI as the development of artificial entities

Artificial Intelligence (AI) lacks a clear definition that is acknowledged by all (Stone et al., 2016). According to Nilsson (2009), the field is instead generally defined as "devoted to making machines intelligent," yet it suffers from the ironic fate of any advancement "inevitably getting drawn inside the frontier" as humans grow accustomed to new technologies (Stone et al., 2016). The overall concept of artificial intelligence (AI) is to build robots that can replicate cognitive processes like learning, processing natural language, reasoning, and environment perception—all while being a shifting target in terms of frontier perceptions. In turn, algorithms that direct a computer's behaviour to behave in a "intelligent" manner conceptualize the "mimicking" of intellectual ability (Acemoglu & Restrepo, 2020).

Algorithms play a crucial role in the concept of artificial intelligence, since they are defined as sets of defined processes that analyse data and produce a desired outcome (Kitchin, 2017). Algorithms are reliant on their external architecture, which includes hardware and programming languages, as well as the data they process, because they are implemented through computer code.

This is especially true in the field of "machine learning," in which computers are trained by automatically identifying significant patterns in data through the use of "learning algorithms," which create new guidance.

III. Fundamental properties of an artificial agent-Governance AI

The most fundamental stage in creating an artificial agent, according to Russell and Norvig's landmark AI textbook (2009, p. 40), is defining the "task environment," which is defined as the "issues" that the artificial agent is meant to "solve." The PEAS abbreviation serves as a summary of the task environment specification, which includes the following:

- Performance metric: What constitutes an agent's excellent behaviour?
- Environment: With what surroundings does the agent engage in interaction?
- Actuators: What impact does the agent have on its surroundings?
- Sensors: How does the agent gather data about its surroundings?

Academics throughout the world first expressed concern that this new technology might allow students to cheat on their papers, but it soon became apparent that generative AI had more significant effects on the knowledge economy, maybe similar to how the industrial revolution affected industry. The phrase "knowledge workers" was coined in 1959 by management expert Peter Drucker to describe individuals who address non-routine problems (Drucker, 1959). Individuals who "think for a living" are compensated for their analytical and writing skills, which ChatGPT can easily and inexpensively duplicate. Journalists are already suffering as readers shift from traditional to social media, and now they have to worry about technology taking over the job of writing. However, that same threat faces professionals who analyse or write for a living, including academics and, gasp, lawyers. Large language models (LLMs) have shown expertise in both coding and poetry, indicating that their

applications are not restricted to prose (Dwivedi et al., 2023). The art industry has been rocked by similar events, as generative AI images are proliferating on social media and, more and more, in traditional media. Multimodal and video content follow closely behind.

In light of the potential effects of generative AI on the knowledge economy and the creative industries, this study will analyse two policy issues that governments worldwide must address. Whether data creators or owners who are "scraped" (either legally or illegally, with or without permission) should be paid for their use is the first question, which relates to how we think about training such models. Second, as generative AI is producing ever-greater-quality results on ever-larger scales, the question of who should own the output (if anyone) arises. These problems are related to intellectual property, a set of regulations designed to encourage and honour human ingenuity and creativity. The third section of the paper examines the wider ramifications of the responses to those questions, balancing the potential loss of sustainability for a variety of professions and economic sectors against the advantages of reducing the cost of creativity and the value of expertise (D'Auria & Sundararajan, 2023; Mims, 2023).

A constituency's behaviour in response to the laws is described by the relational idea of governance, which is essentially a social interaction between the governed and a governing authority (ibid). The crucial conclusion is that, as long as they are accepted by the governed constituency as legitimate and "ought to be obeyed," private actors may equally be the authors of rules in a governance system, rather than the state (Hurd, 1999). The study of governance is thus neither normative nor prescriptive but rather focused on the purposeful order as a social fact. This is significant since governance is related to an observable phenomenon of rules that control conduct in a particular issue area (Hufty, 2011). For instance, in the study of transnational organized crime,

governance may even be carried out by a "illicit authority" that fills a power void left by a weak state since they have legitimate societal acceptance (Williams, 2002). So, to regulate this agency means to govern the design and implementation of the technology, for which key factors can be seen via the prism of an agent's fundamental properties.

One prominent example of (reach a point). governance regulation that directly affects the performance measure is the attempts create standard that explicitly forbids the employment of "robotics and artificial intelligence," or completely autonomous deadly weapon systems that harm humans .The United Nations Group of Governmental Experts on Lethal Autonomous Weapons Systems is now debating this kind of standard in order to come to a consensus on recommendations on the employment of autonomous weapons systems in accordance with international law. Regulations similar to these have existed since the 1970s, when the US passed the Equal Credit Opportunity Act and the Fair Credit Reporting Act, ensuring that consumers would always be informed of the reasons behind any negative actions, including those resulting from automated scoring systems.

Access to data has always been necessary for AI (Roberts et al., 2021). Large datasets, including both publicly accessible and online copyrighted and pirated content, are used to train LLMs in particular (O'Leary, 2013; Zikopoulos et al., 2012). When OpenAI released ChatGPT in November 2022, it changed the public discourse on the effects of AI. Competitors like Google's Gemini, Anthropic's Claude, and Meta's Llama swiftly followed. When and how should authors' rights be acknowledged and paid for their work, whose words and images serve as the basis for these models? Although it might be challenging to prove, using content that has been unlawfully or stolen seems like a straightforward case of intellectual property theft. Concepts such as fair use are being strained globally due to the mass consumption of images, publications,

and other resources. The interests of developers and creators have been balanced in certain jurisdictions through the introduction of new data ownership rights.

Fair use is a defence that equals the rights of authors with the interests of the general public in disseminating and using their works, even in cases when infringement can be proven. In general, it takes into account the intended use, the type of work, the quantity used, and the impact on the original work's market. Fair use may be applied, for instance, when someone tapes a television show to see at a later time. On the other hand, showing such a recording to an audience and collecting money for acknowledgment would not constitute (Beebe, 2008). A clear example of the present issue is the 2023 US Supreme Court case involving two distinct photos of the late musician Prince. Lynn Goldsmith took the original picture back in 1981. Three years later, Andy Warhol obtained a license from Vanity Fair to use the photo as inspiration for an artwork for an article titled "Purple Fame." Even though Goldsmith received $400 for the license, which allowed Warhol to generate more than a dozen silk screen images, it could only be used once in the print edition-(Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 2023).

When it comes to generative AI, a crucial concern arises: Does the utilization of data to train models, which are then employed to create works that directly rival the original creators of that data, qualify as fair use? It seems that this is different from other types of data analysis. In 2002, Google started scanning a large number of books, raising concerns about copyright infringement. For the most part, Google was successful in claiming that although it made the content public, it did not pose a threat to the market for the original works or offer a meaningful replacement (Authors Guild v. Google, 2015; Maguire, 2020). A number of the ongoing lawsuits centre on the potential for generative AI to generate text and images that could actually directly

compete with the past and present works created by the authors and artists whose works trained those models. Significant authors like Jonathan Franzen, Elin Hilderbrand, and John Grisham are among those suing OpenAI, the company behind ChatGPT (Alter & Harris, 2023; Reisner, 2023b). The New York Times filed a second complaint, claiming that the model directly competes with the Times as a source of trustworthy data and study, for which a subscription is typically required, by using millions of articles for training (Metz, 2024).

Lawsuits will increase if there is no legislative reform. One country that has attempted to address this issue through law is Singapore. In 2021, the Copyright Act was amended to allow for the making of copies of works for the purpose of "computational data analysis," which is defined as collecting information and analysis for the goal of "improving the functioning of a computer program in relation to that type of information or data" (Copyright Act, 2021, ss. 243–244). Although the provision still needs legal access to the data underneath, it seems to be more permissive to analyse data and model training than traditional concepts of fair use (Lim, 2023); the UK's 2014 adoption of the "non-commercial" text and data analysis exemption (Copyright, Designs and Patents Act, 1988, s. 29A); or the European Union's 2019 adoption of the "text and data mining" (TDM) exception (EU Directive on Copyright in the Digital Single Market 2019).

The clause is specifically meant to facilitate "training machine learning," according to an information sheet created by the Intellectual Property Office of Singapore (IPOS). However, utilizing text or picture analysis to produce new content or images is not the same as using it to analyse existing text or photos in order to provide suggestions or optimize workflows. Not only is copying a crucial part of the process, but there is also an economic consequence associated with that utilization, which makes a difference. This is not a

hypothetical issue anymore. It is likely that the amount of generative AI generated would simply overshadow the works written by human authors, therefore diminishing their worth. One of the first instances of this was the science fiction publication Clarkes world, which was inundated with AI content and was forced to cease accepting unsolicited contributions (Silberling, 2023). One of the biggest book publishers in the world today, Amazon, was being so swamped with submissions that it set a restriction, allowing its self-published writers to publish “only” three books every day (Creamer, 2023).

In regards to the legal access issue, a large portion of the material that LLMs utilize for training is initially obtained through piracy. It is not a genuine suggestion made by anyone that generative AI shouldn't be trained. However, it is sense to assume that models are not trained on stolen data, and that the people who benefit from this technology at least acknowledge and give credit to the inventors whose creations drive it. Another area of inquiry is to the ownership of the results produced by generative artificial intelligence. As part of an unscientific experiment, the author opted to interview ChatGPT directly and received two contrasting responses. ChatGPT first responded by stating that it lacks the capacity to possess intellectual property or any other legal rights. Since I am the tool's inventor and owner, whatever text or other content I produce belongs to OpenAI.

The author brought attention to the fact that OpenAI has now made it clear that it would not assert copyright over any material produced by ChatGPT (Ellison, 2022; Guadamuz, 2022; Schade, 2023). As a result, the response was changed to say that the content produced was not the model's original intellectual property. Rather, whomever hired the model to create the text is the rightful owner of the intellectual property. The majority of nations do not provide any copyright protection at all for text that is generated automatically. According to the US Copyright Office, only works that are "developed by an

individual" are eligible for legal protection as "original works of authorship" (17 USC § 102(a)).

According to the Compendium of U.S. Copyright Office Practices, Third Edition, 2019 (emphasis added), it will not register works that are "produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." The term "any" is crucial since it raises the question of how much human interaction is necessary in order to claim authorship (Gervais, 2020; Phelan & Carey, 2023). For example, early pictures were not protected since it was not considered real "authorship" to simply capture light via a camera obscura's lens (de Cock Buning, 2018, p. 524). Before copyright for works created by machines was acknowledged, a famous portrait of Oscar Wilde had to be brought all the way to the US Supreme Court (Burrow-Giles Lithographic Co v. Sarony, 1884).

These days, the question is not so much about whether a photographer can possess pictures that were taken by a machine in a passive manner as it is about who can own newly generated works that were made actively by one. Similar to how a pen does not own the phrases it writes, software programs such as word processors do not own the content that is written on them. However, AI systems are currently used to create melodies, paint images, and write news articles. According to Chesterman (2021, p.133) “one may contend that it is more like to a student's or parent's work than it is to a pen or a mechanical function. Can and should these valuable acts be legally protected?” At the moment, the majority of places say no. Copyright will not be applicable unless the author can be identified as a human being. It's well knowledge that the underlying policy of this encourages and rewards innovation. For a long time, this was written off as unneeded or inadequate for laptops. In fact, preserving such works could discourage innovation, at least in the human race.

In the art business, artificial intelligence has already caused a financial whirlwind, drastically reducing the cost of creating creative artwork (Menéndez, 2023).

One may argue that human inventions should be protected whereas machine creations should not be if we want an effective arts industry that employs people profitably. The owner of edited and selected content that incorporates automatically generated information may not be able to claim copyright protection; nonetheless, the content author may still retain ownership of the work. The author entered it into ChatGPT, which acknowledged that it was accurate and logically added that in the event that there were any more queries, legal counsel should be informed. A different strategy that was used in Britain gives "computer-generated" work, whose "author" is defined as the person who made "the processes necessary for the development of the work," fewer ownership rights. According to the Copyright, Designs and Patents Act of 1988, a work is considered "computer-generated" if it was "generated by computer in circumstances such that there is no human author of the work."

Similar laws have been passed in Ireland (Copyright and Related Rights Act, 2000), Hong Kong (Copyright Ordinance, 1997), India (Copyright Amendment Act, 1994), and New Zealand (Copyright Act, 1994). The only outcomes that remain are ownership by a recognized legal entity or by no one at all, despite disagreements on who took the "the contracts required" (Brown et al., 2019, pp. 100–01). In most cases, the duration is shorter, and the person who is considered the "author" is not allowed to claim moral rights, such as the right to be recognized as the author of the piece (Copyright, Designs and Patents Act, 1988). The problem was acknowledged in an issues paper published by the World Intellectual Property Organization (WIPO), which pointed out that if these works were excluded, "the dignity of human creativity over machine creativity" would be upheld at the price of giving consumers

access to the greatest amount of creative works. According to the revised issues paper on intellectual property policy and artificial intelligence (2020), providing "a reduced duration of protection and other constraints" was an appropriate compromise.

A similar proposal was made by the Law Reform Committee of the Singapore Academy of Law in 2020 (Rethinking Database Rights and Data Ownership in an AI World, 2020). However, the new Copyright Act that was implemented the following year only acknowledged conventional human authorship. Even so, the courts will have to decide what constitutes a reasonable threshold for a human exerting input or control in order to determine if AI-assisted works still qualify for protection. In an attempt to convince courts and intellectual property authorities that AI systems themselves are capable of creating and possessing patents and works protected by copyright, it has been a frequent petitioner. For the time being, it is still the case that AI systems cannot independently generate or own copyrighted or patented works, notwithstanding brief victories in Australia and South Africa (the former reversed on appeal) (Chesterman, 2020).

1.AI and world beyond the Imagination?

AI generative has the potential to revolutionize both the knowledge-based economy and the world of art. The exact impact is still unknown; however, recent research (Dell'Acqua et al., 2023) suggests that innovation is occurring on a "sharp frontier" across several areas. This is based on a survey of positions that are realistic, complicated, and need a lot of knowledge. A strong interpretation of IP rights might hinder the creation of new tools and AI-enhanced works; a permissive interpretation could make millions of employments unsustainable and jeopardize the survival of the arts industry in specifically. As we can see in the picture(below), it provides a schematic representation of how these policy decisions may go, depending on the answers

provided by the policy to the issues brought up by AI training and output ownership.

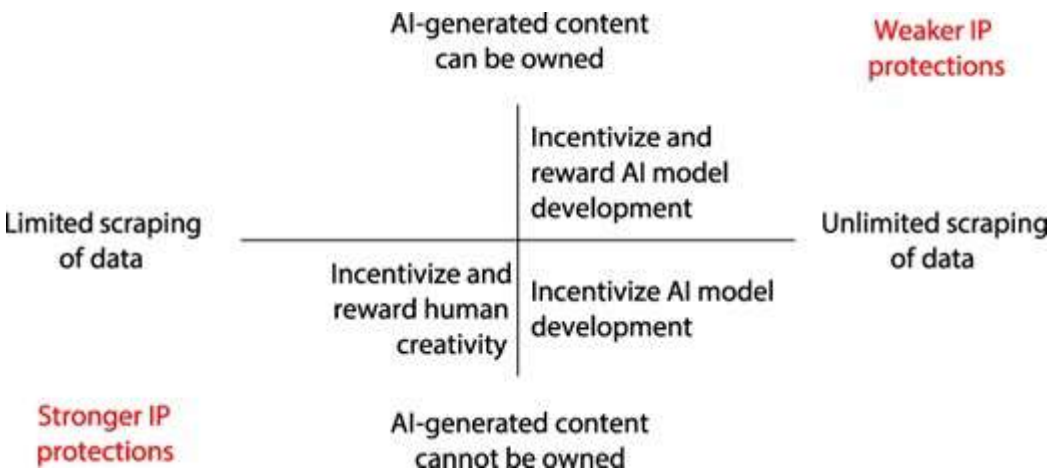

Figure 1: (Simon Chesterman, 2024)

A widespread issue in developing nations is the over-protection of intellectual property rights. Historically, the Vaccine Alliance (Gavi) and other organizations played a major role in mediating disputes over access to copyrighted medications (Editorial, 2022). Regarding AI, in addition to concerns about technological misuse, there are concerns about "missed uses"—that is, the potential for harm if the Global South is unable to benefit from AI. Access to the people, data, and computing powering AI is therefore necessary for this (UN AI Advisory Body, 2023). There are intriguing similarities between the music business and development and economic sustainability (Huber, 2023). During the early digital era, it also saw an unregulated period of piracy that drastically changed the economics of copying and gave rise to file-sharing services like Napster (Tan, 2017). Most media platforms adopted copyright rules and takedown procedures as a result of

lawsuits and legal reforms (Digital Millennium Copyright Act [DMCA], 1998; Seng, 2014), while some, like Napster, were shut down entirely (Menn, 2003).

There's a chance that AI may evolve similarly, at least in terms of LLMs. Despite worries that IP protection may impede the creation of new models, it seems that the demand for "legitimate" models is expanding. For instance, Adobe solely used training sets made out of licensed and public domain materials while creating its Firefly tools. This relates to the more general issue of whether or not customers should be aware of whether a certain work was produced by a machine or a person when it comes to the use of AI models. Though AI-assisted decision-making progressively blurs the boundaries, it may seem like a straightforward question. Over the course of several years, some customer service chatbots have progressed from answering simple questions automatically to providing human-vetted suggested solutions. For more complicated or uncommon interactions, some chatbots can even put users in direct contact with a person.

At least, it ought to be feasible to identify the source of AI-generated visuals and text. Various attempts are being made to use anti-plagiarism software to identify text created by AI in order to prevent misrepresentation, but the results have been uneven at best (Barrett et al., 2023). It seems sense that the idea of one AI system monitoring another is alluring. This would only be feasible if mandated by law, given the likelihood of the underlying malware spreading. Governments from all around the globe are mostly supporting this discussion because they are worried about generative AI being used to create ever-more realistic material on an ever-larger scale. The term "fake news" predates Donald Trump by at least 1894 (The "A.P." News, 1894) and was used in a headline by 1901 (Bartlett, 1901). Further, according to Harari (2023), these applications of generative AI put democracy itself in jeopardy. All hyperbole aside, by knowing more about the types of material generated by AI

and how they work, authorities worldwide could make smarter decisions instead of depending solely on the market and the goodwill of tech businesses.

IV. Conclusion

This article focuses primarily on the medium-term social and economic effects of the models' operations. Further about the first topic under consideration, it could appear ineffective to contend that AI models ought to reimburse for data usage given that the Internet has already been fully ingested (Guadamuz, 2023). Yet, there is evidence that the training of new models and the enhancement of existing ones, in addition to the market for "legal" models, rely not only on the quantity but also on the quality of the data. Specifically, initial proposals that LLMs may enhance their performance using artificial data that they create themselves have been founded on the assumption that such AI-generated data will negatively impact more advanced models. The rights of human creators seem to be adequately protected by the present laws, at least when it comes to work created by AI. A significant portion of governmental concern is directed on the risks associated with the size and quality of artificial content, as well as its capacity to manipulate public opinion through trickery or completely dominate the market.

The question is how societies choose to govern the industry lies at the core of all of this. Theoretically, governments control some activities to correct market imperfections or to promote social or other agendas. In reality, politicians may act—or withhold from acting—in less morally sound ways due to their connections to business and political interests. The paper centres on the principles that regulators should follow, rather than the interests that might really influence regulatory and policy decisions, notwithstanding the well-documented problematic connection between Big Tech and the government.

In terms of the market, lessening the motivation for more human creations would result from either providing too much protection to computer-generated outputs or failing to protect human-authored works that are used to train generative AI. It's possible that if AI content more than offsets the budget deficit, there wouldn't be a significant loss. Of course, there are much bigger ramifications related to our relationship with knowledge. Over the last twenty years, the phrase "to Google" has come to represent the volume of questions asked. The responses were accompanied by a ranked list of solutions, which had the helpful side effect of demonstrating that there were several viable answers—as well as hints that some of them might have been backed by sponsors who covered the entire cost of the project. At this stage, there will be political and economic ramifications to comprehending the inputs into generative AI and who is accountable for its outcomes.

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APPRAISAL AND REVIEW OF THE LAW AND PRACTICE OF INDOORS MANAGEMENT RULES

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Abstract

The article intends to critically review the current position of the indoor management rule in Nigeria since it was enunciated in the Royal British Bank v Turguand over a century ago. This is necessary given the fact that the doctrine of constructive notice which precipitated the rule which became known as the Turguand rule has been abolished by section 92 of the Companies and Allied Matters Act 2020 and a rule incorporating the Turguand rule has been enacted in section 92 of the Act. The objective and purpose of the article is to review the indoor management rule in Nigeria by examining the statutory provisions of Companies and Allied Matters Act and relevant judicial decisions and the mischief which created the indoor management rule. The article adopts the doctrinal approach of analytically and comparatively used of legal rules founded in primary sources; case law and statutes to critic rational behind the presumption and inside management postulation. The article concludes and recommends that there is need for the Corporate Affairs Commission to make registered documents of companies readily available by making them accessible online. This approach has been adopted in the United Kingdom where it is possible to check a company's registered

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information online besides creating a conducive business environment it will to a large extent reduce litigation arising from lack of authority of company's officers.

Keywords: *company, director, indoor management, resolution, constructive notice*

I. Introduction

In *Royal British Bank v. Turguand*[1], the rule that became known as the Indoor Management rule was established. The indoor management rule states that a third party[2] dealing with a company is not deemed to know or obligated to ensure that conditions set in the articles or memorandum of association subject to which a power of an officer is to be exercised has been complied with by the company. The rule ameliorated the strictness of the doctrine of constructive notice which presumes that a third party knows and understands the content of every public document with regards to the powers of the company and authority of its officers. Under the doctrine of constructive notice, it became obligatory for a third party dealing with a registered company to ensure that the powers exercised by officers of a company are not only granted in the articles, but that internal regularities subject to which such powers are to be exercised have been complied with.

The purpose of the article is to review the indoor management rule in Nigeria by examining the statutory provisions of Companies and Allied Matters Act[3] and relevant judicial decisions. The article will first consider the doctrine of constrictive notice -the mischief which created the indoor management rule. This will be followed by a review of the present position of the doctrine of constructive notice and the indoor management rule both under common law and the Act in the light of judicial application of the statutory provisions.

[1] (1856) 6 E&B 372
[2] Third party and outsider is used interchangeably
[3] C20, LFN 2004, Also referred to as CAMA in the work

Finally, the article will take a panoramic view of these twin concepts in the company statutes of other jurisdictions.[4]

This rule is known as the "internal management" rule and it is a fall-out from the erstwhile constructive notice doctrine. The thrust of this rule is that even if the outsider has read and understood the memorandum and articles, he may not necessarily know whether those purporting to act for and on behalf of the company have authority to do so. The board or general meeting may not have been convened; a quorum may not have passed. The managing director or some directors may not have been properly appointed. Under this seemingly complex situation, the law is that the outsider dealing with the company is not bound to ensure that all the internal regulations of the company have been complied with. In the case of *Royal British Bank v. Turquand,* the boards of directors of the company were authorized to borrow such sums as may from time to time be authorized by a resolution of the general meeting. The directors borrowed money from the bank without a resolution being passed. It was held that the company was bound even if no resolution was passed. Simply, the rule in this case states that when a person deals with the company in a transaction which is not inconsistent with the registered documents, he can enforce the transaction against the company despite any irregularity of internal management.

The rule is now codified in the Act.[5] The section provides that anyone dealing with the company is entitled to assume that the memorandum and article have been complied with, that every person named as a managing director, director, secretary, officer or agent of the company has been duly appointed and perform duties customarily exercised or performed by a person occupying such a position.

[4] Ibid
[5] S.93 CAMA, 20 20

In *Victor Vanni v. Niger Park Ltd*.[6] the plaintiffs sued the defendant company to re- cover sums due to him on a contract under which he supplied security services for the defendants. The defendants denied liability on the ground that one Mr Bello, their personnel/Administrative. Manager, who executed the contract on behalf of the defendants, had no authority to do so. It was held that the action succeeded as the plaintiff was entitled to assume that the Personnel manager had such power.

II. Exceptions of the Rule

The Nigeria legal system statutorily provides an exception when it stated thus, that the rule cannot be relied up if:[7]

(a) The person seeking to rely on it has actual knowledge of the true facts or if by virtue of his position with or relationship to the company, he ought to have known the true positions e.g. a director[8]

(b) The document relied upon by the outsider is a forgery.

(c) The outsider was put on enquiry and the irregularity is such that he would have discovered if he had made enquires.

In *Underwood Ltd. vs. Bank of Liverpool*[9], Cheque was issued in favour of a company but the managing director paid it into his personal account. When the company sought to recover from the bank, the bank argued it was entitled to assume that the cheque belongs to the managing director. But the court held that the bank was liable because the suspicious circumstances put the bank on enquiry.

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[6] (1979) 4-6 CCHCJ 148

[7] Section 92, 93, and pursuant to the provision of section 36 (4) (c) 319, and 337 of the Companies and Allied Matters Act, 2020

[8] S.93 (d) (i)

[9] (1924) 1 KB 775, duties to verify the instruments or any apparent defect in the instruments, the managing director of the company paid into his private account large number of cheque which were to be paid into the company's account and the bank was held negligent since he did not make any inquiries as to whether the managing director was in fact entitled to the amounts represented by the cheque.

III. The Doctrine of Constructive Notice

The provision of Act has abolished this doctrine of constructive notice. Before the abolition, it used to be the law that anyone having dealings with a company is deemed to have notice of its public documents filed at the companies' registry (principally, the memorandum and articles) whether or not he has actually seen or read any of these and therefore bear the consequence of ultra vires transactions. Under the Act[10] however, a person shall not be deemed to have constructive notice of the content of the memorandum and articles.[11]

The doctrine of constructive notice is one of the legal fictions in law that deems something to have occurred despite the fact that it did not[12]. The doctrine of constructive notice is the deemed presumption that a person has actual knowledge and understanding of documents which reasonably ought to be known to him if he had exercised reasonable diligence since such documents are in public domain. This doctrine was first extended to companies in the case of *Ernest v Nichol*[13] where the House of lords laid down the rule that a person dealing with a company should be deemed to have notice of company registered constitutional document[14] which would usually contain the object and powers of the companies as well as powers of the officials of the company. Apart from notice, the third party is presumed to have read and understood the intendment of the documents.[15]

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[10] Ibid

[11] S.92 CAMA

[12] Nancy Knauer, "Legal Fictions and Juristic Truth" (October 2009):1, St. Thomas Law Review, Vol. 23,
2010, http://papers.ssrn.com/sol3/papers.cfm?abstract id=1486228(accessed May 5th 2023)

[13] (1857) 6 HL Cas 401, Lord Wensleydale stated "members of the public should acquaint themselves with nature of the company from its public documents before dealing with it. Person dealing with the company are expected to inspect their public documents to ascertain that the transactions falls within the competence or object clause of the company, else he should have himself to blame"

[14] In Modern Company law this means the memorandum and articles of association

[15] *Ibid*

In modern company law, the registered constitutional documents include the articles of association and memorandum of association which a company is obligated to file before incorporation. The former contains rules governing the management of the internal affairs of the company while the latter deals with the powers of the company. Besides the articles and memorandum of association certain other documents which are required to be filed with the registrar of companies from time to time also fall within the scope of this doctrine. Under the doctrine of constructive notice, the fact that these documents can be accessed and read they are deemed to have been read and understood by third parties who have dealings with that particular company.[16] The doctrine of Constructive notice was the bedrock of the ultra vires doctrine by rendering 'a potentially defensible position completely indefensible'[17]. The powers of a company and its organs are created and restricted by two documents: the memorandum and articles of association.[18] An act will be considered to be ultra vires if: it is outside the object clause of the company as provided by the memorandum of association or if it is outside the authority of the officers of the company as provided by the articles of association. Such acts were unenforceable against the company or by the company and third parties could not claim ignorance as the doctrine has effectively removed the element of fault. The doctrine of constructive was explained by Justice Idigbe in *Metalimpex v. A.G Leventis and Co (Nig.) Ltd*[19] where he stated thus:

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[17] *Ibid*

[18] The capacity and the liabilities of the companies is that the registration of the memorandum and articles of association makes such documents a public document and the effect is that any person dealing with the company is deemed to have a constructive notice of the insider dealings of the company business, whether such documents are inspected or not. Re. Jon Beaufort (London) Limited (1953) Ch. D 131

[19] (1976) 2 SC 91, at 102, here the court laid down the principle of apparent authority, that is to say that the doctrine of constructive notice would not apply where there are suspicious circumstances sufficient to place a person dealing with company on inquiry

"The memorandum and articles of a company are registered with the Registrar of Companies and may be inspected by any member of the public; consequently, any member of the public who deals with a company is deemed to have notice of its memorandum and articles and therefore the power and limitations of its directors. If a member of the (public) therefore, deals with the company in matters inconsistent with the powers given in the memorandum and articles and the consequences are unpleasant he must abide by such consequences".

On the basis of this, the doctrine of constructive notice suffered severe criticism from both legal scholars and courts alike. According to Alubo, the doctrine of constructive notice made it possible for the company to 'shirk liability since the doctrine……..foist knowledge of actual or presumed notice of the company's constitution……' thus an injured third party could not plead ignorance of the power of the company or in case of a restriction on the power of an officer of the company.[20] The doctrine was also dismissed as 'an expensive parlor games for lawyers[21,] as it was neither welcomed by the shareholder nor by the creditors for whom the doctrine was intended to protect. In no case was the harshness of the doctrine more exposed than the case of *Ashbury Railway Carriage and Iron Company v Richie*[22], where the company repudiated the contract because of its risky nature and yet escaped liability because the third-party ought to have known it was ultra vires the company.

"Despite the shortcoming of the doctrine in company law it served a purpose at the time. It protected the interest of shareholders by coercing third party dealing with company to make prudent investigation to ensure that the company did not enter into ultra vires contract which was not within the contemplation of

[20] Gower & Davies: Principles of Modern Company Law (Sweet & Maxwell,2012) 9th, 927
[21] Okoh Alubo, "The doctrines of ultra vires and constructive notice under Nigeria company law: an appraisal",
(2020) http://dspace.unijos.edu.ng/handle/10485/1332 accessed 4th May 2023
[22] (1875) LR 7 HL 653

shareholders or creditors of the company. It perhaps also served as a caveat for third parties to be more circumspect when dealing with officials of company. These were achieved by 'punishing' those who failed to exercise due diligence by inquiring concerning the affairs of the company. Although the doctrine may bring about unpleasant results, requiring third parties to be prudent and circumspect especially where the transactions involve large capital contribution is not unreasonable".[23]

III. The Deconstruction of Constructive Notice and the Emergence of Indoor Management Rule

Under the doctrine off constructive notice a third party is deemed to know the objects of the company as set out in the memorandum of association and the powers of the officers of the company as provided for in the articles of association both being public documents.[24] Outside the several justifications adduced for the extension of the doctrine of constructive notice to company law, it should not be considered burdensome for third parties having dealings with company to make due enquiry whether put on notice or not. But the potential for harshness, unfairness and even absurdity of the doctrine of constructive notice has necessitated several judicial interventions.

The indoor management rule is a judicial intervention established to mitigate the unfairness that may result from strictly applying the doctrine of constructive notice in respect to where the officers of a company appear to be exercising authority granted by the articles of association whereas a condition of subject to which such power is to be exercised has not been fulfilled by the company.

In *Royal British Bank v Turquand* where the rule was first enunciated, the case involved an action for the return of money borrowed from the plaintiff by the official member of the company. The company argued that it was not bound by the actions of the official manager on the ground that the prerequisite required

[23] *Ibid*

[24] Janet Dine, Company Law (Palgrave Macmillan: Hounds Mill)2001,91

by deed of settlement has not been complied with. The relevant clause provides thus:

> "That the Board of Directors may borrow on mortgage, bond or bill in the name of, and if necessary under the common seal of the company such sum or sums of money as shall from time to time, by resolution passed at a general meeting of the Company, be authorized to be borrowed: provided that the total amount of the sum or sums of money so borrowed shall not at any time exceed two thirds of the total amount on the installments on the capital of the Company paid up or called for and actually due and payable at the time of, the passing of such resolutions"[25]

Since no resolution was passed, the company attempted to avoid liability. The court held for the plaintiffs. According to Jervis C.J:

" The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed and the replication shows a resolution passed at a general meeting, authorizing the directors to borrow on bonds such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and Act of Parliament; but the resolution does not define the amount to be borrowed. That seems to be enough…We may now take for granted that the dealings with these companies are not like dealing with other partnerships, and the parties dealing with them are bound to do more. And the party here on reading the deed of settlement, would find, not a prohibition from borrowing but a permission to do so on certain conditions. Finding that the authority might be made complete by a

[25] *Ibid*, note 1

resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appear to be legitimately done."

The fulcrum of the judgment is that it would be unfair and unreasonable to expect third parties to inquire into the affairs of the company which in the above case was not a matter in the public sphere. But Gower seems to disagree to the rule as a 'benign interpretation[26]'of the constructive notice doctrine. In *Turquand* the article states that the power to borrow may be exercised after a resolution passed at a general meeting. It therefore follows since the third party has been put on notice, he ought to make due inquiry which should be expected from a prudent man of business. This 'benign interpretation' heralded the demise of the doctrine of constructive notice. It must however be stated that *Turquand* may not have been predicated not on fairness alone but on business exigencies and convenience required in the age where time is of essence and where many third parties may be dealing with several companies.

This rule became further established as part of the legal regime of company law when it was given recognition by the House of Lords in *Mahoney v East Holyford Mining Co[27]*.

The Nigeria courts borrowed a leaf from their English counterparts in applying the indoor management rule even though in a manner that would seem to be overzealous[16]. In *Metalimpex v. A.G Leventis and Co (Nig) Ltd[28]*, the supreme relied on the indoor management rule in deciding that the respondent where liable to pay a negotiable instrument signed by *Mr. Myrianthousis*, a director, of the respondent company. The respondent had in their defense denied the

[26] *Ibid*

[27] *Ibid*, note 19, (1976) 2 SC 91, at 102

[28] (1875) LR 7 HL 869, the doctrine of indoor management, as established, will protect a third party or parties who have entered into transactions with a company in good faith and without knowledge of any irregularities in the company's internal affairs.

authority of Mr. Myrianthousis authority to bind the company. But the Supreme Court differed. According to the Supreme Court:

> "...the circumstances fall within the well-known rule in Royal British Bank v. Turquand (1856) 6 E. & B 327 which put shortly is this: a person dealing with a company is assumed to be aware of the powers of the company which are set out in its public documents (i.e. the memorandum and articles of association) filed with the Registrar since he has access to these documents, and although it is his duty to see that any contracts he proposes to enter with the company are within its powers he is not bound to do more. He needs not inquire into the internal working of the company; and he is entitled to assume that everything is been done properly or constitutionally".[29]

Again, in *Trenco (Nig) Ltd v. African Real Estate and Investment Company Ltd and Anor*[30], where the chairman of the respondent company commission the appellant to build a hotel. The chairman also instructed the bank (the second respondent to pay the sum of 12,710 pounds from the funds of the first respondent. When the second respondent could not get the first respondent to execute the documents to regularize the order, it debited the account of the appellant. In an action to declare the purported loan invalid in the Supreme Court held inter alia that the *Turquand* rule applied even though it was not referred to by the parties.[31]

[29] Ibid
[30] [1875] LR 7 HL 869. 6.
[31] The appellant pleaded Estoppel on the ground that the respondent had honoured on of the bills of exchange.
There was no evidence that they knew of the provisions of the article which gave the director the power to sign
Such instrument

From the foregoing, we argue that in the bid to do equity and make promote economic growth the courts are quick to make fall back on the *Turquand* rule.[32]

1V. The Scope of Indoor Management Rule under Common Law

The rule which has become known as the indoor management rule or the rule *Turquand* case is a ubiquitous rule in company law jurisprudence in many countries of the world. Since the emergence of the indoor management rule, various theories have been postulated to explain the rule. Some legal scholars anchor the rule on the maxim *omnia praesumuntur rite esse actar* i.e all things are presumed to have been done correctly. Others are of the opinion that it is merely the extension of the ostensible authority under the principles of agencies, some others on the impracticality of having companies' internal management issues. Whatever the basis of the rule, the rule essentially states that:

> "Where the persons conducting the affairs of the company do so in a manner which appears to consistent with its articles of association and other public documents including the memorandum and the list of directors, then those dealing with them are entitled to assume that all has been done regularly and those are not affected by any internal irregularity"[33]

An examination reveals most importantly that the rule did not abolish the doctrine of constructive notice but confines it to such matters that may be known without further inquiry from the company's public document. Thus the third party is still duty bound to make proper inquiries authorities of its officers

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[32] Ibid, (1978) 4 S.C 8

[33] T.E Cain "The Rule in British Bank v. Turquand in 1989" Bonds law review Vol 1[1989] iss 2, art.8, www.
*Epublications.**bond.**edu.au/cgi/viewcontent.cgi? **article**=1015&context. Accessed 4th May 2013*

but he is no longer obligated to find out if any internal precondition for exercising such powers have been fulfilled. It therefore excludes constructive notice of internal machinery of company. Thus, if the contract is consistent with the public document, the person contracting will not be prejudiced by irregularities that may beset the indoor work of the company[34]

The indoor management rule is not a magic wand for curing all irregularities in relation to third party dealings with the company. The indoor management rule is therefore subject to the following limitations:[35]

(a) Cases of forgery or "non-genuine" transactions;

(b) Where the person seeking to rely on the rule is himself aware or has knowledge of the irregularities; or

(c) Where the transaction is such an unusual nature that the person dealing with the officers of a company might reasonably be expected to make inquiries to 'assure himself that those with whom he is dealing are acing regularly and within the authority of the company; or

(d) Where the person seeking to rely on it was not aware of the contents of the memorandum and articles of association of the company.

The last condition has hardly been considered by Nigerian courts as the cases referred above indicate.

V. The Indoor Management Rule and the Doctrine if Constructive Notice under CAMA

The CAMA which was enacted into law in 2020 adopted both judicial interventions by law reform committees to ensure that it did not replicate the shortcomings and harshness associated with the common law and the old company law positions on some critical issues. The issues of concern include

[34] Ibid

[35] As stated in the case of Metalimpex v. A.G Leventis and Co (Nig.) Ltd

that of constructive notice and the indoor management rule. Consequently, the issues of constructive notice and the indoor management rule where incorporated into the Nigeria Companies and Allied Matters Act, 2020.

Section 92 provides thus:

except as mentioned in section 223 of this Act regarding particulars in the register of particulars of charges shall not be deemed to have knowledge of the contents of the memorandum and articles of company or any other particulars, documents or the contents of documents because such particulars or documents are registered by the Commission or referred to in any particulars or documents so registered or are available for inspection at an office of the company

An examination of Section 92 reveals that the doctrine of constructive notice except for the charges has been abolished. This suggests that the indoor management rule has become irrelevant or a surplus-age in Nigeria company law jurisprudence. With the abolition of the doctrine of constructive notice, the need for an indoor management rule would seem to be supercilious since the indoor management rule was merely a sort of judicial remedy for the perceived harshness of the doctrine of constructive notice. Interestingly, despite the abolition of the doctrine of constructive notice, the legislature has gone further in section 92 to extend the frontiers of indoor management rule. Section 92 provides as follows:

(a) Any person having dealings with a company or with someone deriving title under the company shall be entitled to make following assumptions and the company and those deriving title under it shall be stopped denying their truth that-

(b) The company's memorandum and articles have been duly complied with;

(c) every person described in the particulars filed with the Commission pursuant to section 36 and 319, and 337 of this Act as a director, managing director, secretary of the company, or represented by the company, acting

through its members in general meeting, board of directors, or managing director, as an officer or agent of the company, has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director, managing director, or secretary of a company carrying on business of the type carried on by the company or customarily exercised or performed by an officer or agent of the type concerned;

(d) The secretary of the company, and every officer or agent of the company having authority to issue documents or certified copies of documents on behalf of the company has authority to warrant the genuineness of the documents or the accuracy of the copies so issued;

(e) A document has been duly sealed by the company if it bears what purports to be the seal of the company attested by what purports to be the signatures of two persons who, in accordance with paragraph (b) of this section, can be assumed to be a director and the secretary of the company, provided that-

i. a person shall not be entitled to make such assumptions as aforesaid, if he had actual knowledge of the contrary or if, having regard to his position with or relationship to the company, he ought to have known the contrary;

ii. a person shall not be entitled to assume that any one or more of the directors of the company have been appointed to act as a committee of the board of directors or that an officer or agent of the company has the company's authority merely because the company's articles provided that authority to act in the matter may be delegated to a committee or to an officer or agent.

The only explanation for section 92 is that the legislature has moved from unnecessarily protecting the interest of shareholders to protecting third party. Another plausible reason is that legislature wishes to remove the discretion and

inconsistencies[36] that may arise if these decisions were left in the hands of the judiciary. It has however been argued by Griffin that the Turquand rule[37] may still be relevant despite the incorporation of the rule into the company Statute. This may arise where there is no appointment of a company officer or where the restriction placed on the officer is not contained in the article of association. In Nigeria, recent reported cases decided after the Act suggests that the courts in Nigeria continue to rely on the indoor management rule than the explicit provisions of section 92 of the Companies and Allied Matters Act. In *J.A Obanor & Co. Ltd v Co-op Bank Ltd*[38], no reference was made to the Act, rather the court relied on the indoor management rule. In that case, the appellant's director signed a loan agreement with the respondent bank for the sum of two hundred and fifty thousand on the 26th of July 1976. When the appellant failed to repay the loan, the respondent attempted to sell the appellant properties which were used to obtain the loan. The appellant at the High court filed an action to set aside the mortgage on several grounds.[39] One of the grounds was that Mr. Obanor ceased to be a director of the plaintiff company as from 14th July 1976. The High court dismissed the case. On appeal to the Court of Appeal, the case was also dismissed. In the Supreme Court, while affirming the decision of the lower courts stated on the issue of the capacity of Mr. Obanor to bind the company that:

> "…Even if the respondent had the knowledge (which has not been proved) that Mr. J.A. Obanor had been removed as a director, under the rule enunciated in the case of *Royal British Bank v. Turquand (1843-1860) A.E.R Rep 435 at 437 to 438*, the appellant would still

[36] Ibid
[37] Ibid
[38] (1995) 4 N.W.L.R(pt. 388)
[39] One of the conditions of the application of the indoor management rule is that the third party must have read the articles of association. This condition has frequently been ignored by the court.

> be liable for the amount advanced to the company. The learned trial judge applied the rule in *Royal British Bank v. Turquand (supra).* The rule is reproduced as follows: "According to this rule, while persons dealing with a company are assumed to have read the public the public document of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings…"

The parties neither pleaded section 92 of the Act nor the *Turquand rule*. Yet as earlier observed, the *Turquand* rule was relied upon in deciding the matter.

However, in *Spasco Vehicle and Plant Hire Co. Ltd v. Alraine (Nigeria) Ltd*[40], the court referred extensively to the *Turquand* rule while ignoring the provisions of section 69 of cam. In that case the plaintiff/appellant sued the defendant/respondent for the sum of ₦1, 476,000.00 and other ancillary remedies for the use and detention of its machinery.[41]

The defendant's case was that it bought the crane from the appellant's managing director. The plaintiff contended that the purported managing director was the workshop manager but did not argue that he did not have authority to sell. The defendant on his part argued that; 'there was no circumstances on the particular facts of this transaction under which the sale in issues may be said not to be covered by the well-established principle in *Royal British Bank v. Turquand'*

The Supreme Court held for the respondent on the ground that barring any suspicious circumstances the respondent was 'perfectly entitled to assume that the said Mr. Ian Usher, being the Managing Director of the appellant's company, possessed the necessary authority to sell the crane pursuant to the well-established principle of law enunciated in *Royal British Bank v. Turquand'*

[40] (1995) 8 NWLR (Pt. 416)
[41] Ibid

VI. Constructive Notice and the Indoor Management Rule in other Jurisdictions

The doctrine of constructive notice which birthed the indoor management rule has been abolished in many countries of the world except for charges. On the other hand, the indoor management rule is part of the laws of all common wealth countries and most European countries. Indian incorporated the principles established in the indoor management rule in the Indian Companies Act of 1956.

> In England and other members of the European Union the law regulating company law is almost the same particularly on the issue of constructive notice and indoor management rule. According to section 9(1) of the European Communities Act 1972[42]:
>
> "In favor of a person dealing with a company in good faith, transaction decided on by the director shall be deemed to be one which is within the capacity of the company to enter into and the power of the directors to bind the company shall be deemed free of any limitation under the memorandum or articles of association and a party to a transaction so decided shall not be bound to enquire as to the capacity of the company to enter into it or as to any such limitation on the power of the directors and shall be presumed to have acted in good faith unless the contrary is proved".

England has since domesticated this provision in its Companies Act since 1985. Section 35B exemplifies this. According to section 35B of the Act:

> "…a party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as

[42] Section 9 (1) and (2) United Kingdom General Acts, 1972, C.68, Part II, Clause 5 of the Companies Bill 1973

> to any limitation on the powers of the board of directors to bind the company or authorize others to do so."[43]

The ubiquitous nature of the indoor management rule across jurisdiction is explained by the need to sustain international trade and investment.

VIII. Conclusion and suggestions

It has been observed that Nigerian courts and even legal practitioners have continued to rely on the *Turquand* rule whenever confronted with issues of ultra vires exercise of authority by an officer of a company. This is rather unfortunate given the extensive provision of the CAMA which have not only incorporated agency principles but also the *Turquand* rule.

Although the need to read and understand the articles and memorandum have been obviated by statute, there is need for the Corporate Affairs Commission to make registered documents of companies readily available by making them accessible online. This approach has been adopted in the United Kingdom where it is possible to check a company's registered information online besides creating a conducive business environment it will to a large extent reduce litigation arising from lack of authority of company's officers.

[43] No duty to enquire as to capacity of company or authority of directors, totaling 27 countries, Amended in 2006 but retained the provision.

THE VIBE SHIFTS FROM ROE TO DOBBS: THROUGH THE DWORKINIAN LENS

Parvathi Balachandran[*]

Abstract

The overruling of Roe v. Wade and Planned Parenthood v. Casey in Dobbs v. Jackson Women's Health Organization by the U.S. Supreme Court is a grave setback for women's rights, particularly reproductive justice. In doing so, the court annulled settled precedents of over fifty years, which protected women's right to bodily autonomy. This will undoubtedly pose barriers to women's access to healthcare, education, etc. This is incongruent with several United Nations Conventions, which recognise and stress protections for reproductive autonomy. It may be a useful reminder that reproductive coercion is oppressive and discriminatory and interacts with other forms of discrimination to perpetuate inequality and injustice. The paper proposes to understand and examine, against the backcloth of the vibe shift from Roe to Dobbs, the Dworkinian perspectives on the dynamics of the interpretation of the American Constitution. The paper discusses historicism and passivism and analyses its reflections in Dobbs. It argues that the decision in Dobbs is incompatible with the principle of integrity and violates fundamental constitutional principles. Integrity in adjudication would require the judges to adhere to all basic principles of agency and privacy. It demands an interpretation that fits the Constitution's history, practice, and

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values. The decision in Dobbs reduces women to second-class citizens and imposes the morality of the state upon them. The paper also maintains that in the long run, such opinions can be detrimental to the legitimacy of the Court because a violation of integrity would send a message to the people that the Court is just a political body.

Keywords: *Dworkin, Historicism, Passivism, Principle of Integrity, Procreative autonomy, Dobbs*

I. Introduction

The overturning of Roe by the American Supreme Court and the consequent denial of the constitutional right to abortion has, without a doubt, turned the clock back by at least half a century. It has undone any progress in procreational autonomy, thus posing a grave setback to women's empowerment. This article proposes to understand and examine, against the backcloth of the vibe shift from Roe to Dobbs, the Dworkinian perspectives on the dynamics of the interpretation of the American Constitution. It relies on the principle of integrity put forth by Dworkin to foster a moral reading of the Constitution and provide a critique of Dobbs through the Dworkinian lens.

Dworkin suggests a **communal conception of democracy** as the backdrop of his moral reading of the Constitution.[1] A communal conception of democracy means that a society where the majority shows contempt for the needs and prospects of some minorities in unjust and an illegitimate manner. He points out that inequalities directly influence unequal political power in wealth. His idea of the communal conception of democracy requires that citizens have an equal place in government concern and respect. Majority tyranny is not just a possible vice of democracy but is a denial of it.[2] A group

[1] Ronald Dworkin, Freedom'slaw: The Moral Reading Of The American Constitution, p.19-21 (Oxford University Press 1996).

of autonomous moral and political actors forms a true political community. It should encourage citizens to think for themselves about morality and ethics to arrive at these decisions based on their convictions. The overruling of Roe resulted in the authority to regulate abortion being returned to the people's representatives, in other words, what Dworkin called majority tyranny. Women's choices are being undermined once again. We are witnessing how unequal political and economic empowerment comes full circle to affect the realisation of fundamental human freedoms and the dignity of women. Women are being robbed of moral and political agency. In Roe, the court had held that despite the Constitution not having it explicitly stated, the right to abortion could be read into the right to privacy. This drew upon what Dworkin proposed as an approach to interpreting the Constitution, called the ***moral reading*** **of the Constitution**. In his opinion, the abstract guarantees in the Bill of Rights refer to moral principles. A judge is supposed to interpret these abstract rights through independent moral judgment. The end to be attained is justice. It may not be in sync with popular mores of a particular time. While deciding on ***Dobbs,***[3] this independent moral judgment went amiss. The moral reading suggests that Constitutional opinion is sensitive to political conviction. Dworkin explains that it is no surprise that a constitution does reflect a moral stance. It is a surprise if it does not. Many Constitutions declare rights in a very abstract form. According to the moral reading, we should consider these clauses as principles for justice and decency in politics. It blends constitutional law with political morality. An argument can be raised that it gives absolute power to judges to impose their moral convictions on the public. In Dworkin's opinion, when it comes to political morality, judges' views influence their judgments, but that is never openly recognized. Moral reading argues that there is a

[2] *Id*. at 12-21.

[3] *Thomas E Dobbs, State Health Officer of the Mississippi Department of Health, et al. v Jackson Women's Health Organization, et al., No 19 – 1392*, 2022 SCC Online US SC 9.

misunderstanding among the public that Constitutional law questions can be answered morally neutrally, keeping faith in the Constitution's text. This position is somewhat shaky, considering the rapidly changing world scenario. For a constitution to retain relevance, it must keep pace with the changing mores. Moral reading is discredited by arguing that it subjects law to whatever moral principles appeal to the judges of that time. It argues that rather than people, an unelected elite group gets the power to decide the issues of political morality. But then, is that not how the judicial process works? Can the ends of justice be attained by mob rule/ochlocracy? Isn't justice better served when the sober judgement of courts, by those trained in law, comes into play? Dworkin concedes that moral reading should be restricted to provisions that describe abstract general principles but not to provisions that create any concrete application. He argues that certain guarantees specified in the Fundamental Rights are like points on a graph that the judges join by a line to describe a coherent and rationally compelling function.[4] Based on this, it may be inferred that the right to decide the course of pregnancy, including the right to terminate the same, is one such point that is in line with the right to health, life, personal liberty, dignity, etc. and during Dobbs,[5] the judges missed this.

II. Dworkinian Critique of Historicism and Its Reincarnation In Dobbs

Historicists would argue that the declaration of the framers of the Constitution is decisive because they intended it to be decisive.[6] They might argue that statesmen the people have selected to establish, bring into place, and sustain a Constitution should also have the power to interpret the meanings and values it seeks to uphold. However, Dworkin points out rightly that the framers of the Constitution were remarkably unrepresentative of the people. He

[4]*Supra* note 1.
[5]*Supra* note 3.
[6]Ronald Dworkin, Law's Empire 355 (2002).

continues to observe that significant sections of the population, including women, slaves, and the poor, were excluded from the process that selected the framers of the Constitution as also the ratification of the Constitution. Also, it does not answer why the political convictions of officials elected long ago, when social and cultural norms, economic circumstances, etc., were completely different, should govern people of the current generation. He says it is absurd to consider the views of individuals who cast the first ballots on the Fourteenth Amendment to be indicative of US public morals a century later. Historicists would still argue that the law must be clear-cut and reliable to best serve the community's interests. Hence, constitutional interpretation should be tied to some historical facts to be immune from shifting convictions and alliances. Dworkin summarises the argument of historicists in the following way- In the long term, a written constitution will benefit a political society more if it ensures stability by basing the right interpretation of the document on the actual opinions of its drafters, irrespective of how dated they may be. Dworkin concedes that when it comes to certain constitutional matters, it does matter more that the law is settled than the content of the law. Certainty is of the essence in some issues, but not all constitutional problems are like that. Dworkin argues that rights must be interpreted as far as possible to further the ends of justice. Historicism will fail to meet this requirement since it binds judges to the opinion of historical statesmen who first conceived each right. There could be situations they never contemplated or where their opinion is lost to history.[7]

While deciding Dobbs, the court examined whether the claim to obtain an abortion can be viewed as stemming from the nation’s history and tradition rather than focusing on whether the needs of justice are met. It arrived at the ludicrous position that the reasoning in Roe is not in tune with the same and,

[7]*Id.*

therefore, not essential to the scheme of "ordered liberty." The court thus necessitates historical enquiries as essential in determining liberty interests. Guided by this, the court went on to make observations on how abortion was criminalized for most of history to sanctify its present reasoning. It held that Roe could be overturned precisely because this history had been ignored, misstated, or faultily analysed. It relied on criminal liability in the past to justify its ruling, which can have devastating consequences if applied in matters of the rights of the LGBTQ community. This has demonstrably attenuated the scope and ambit of liberty interests. Here, the question is whether the courts must seek to attain the ends of justice or if justice can be expended at the altar of historical tradition/cultural norms of the past. While deciding ***Dobbs***, the court cites authorities, including Coke, Bracton, Hale and Blackstone, but unfortunately fails to incorporate any feminist standpoint.

The court also considers whether it is the segment of a more deeply ingrained right as argued in Roe and goes into a baseless, irrational denial of the same. It seeks to justify its present position by a play of words. It furthers this line of reasoning by throwing in seemingly moral questions on the value of a potential life or unborn human being in absolute disregard of the life of the hapless woman who rushes to the court seeking to exercise bodily autonomy! While the court slaps the responsibility of motherhood on the woman can the court slap the responsibility of the fatherhood on the male who has been responsible for the pregnancy for the entire duration of the pregnancy and thereafter?

The Court in *Casey*[8] had already acknowledged women's inherent capacity to make choices about their private lives that are vital to their autonomy and sense of dignity. This seems to pose a problem for the court now. To overcome

[8]*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1994 SCC Online U.S. SC 11.

this problem the court thereafter relies on *Pearson v. Callahan*[9] to establish how precedent is not an inexorable command, especially within the context of constitutional interpretation. Examples of precedents being overruled are given to reinforce this position. The court also goes on to identify cases which list out the grounds when a precedent may be overruled. Dobbs shows how a court can arbitrarily reject well-established precedents on the basis of fictitious arguments such as the quality of reasoning, workability effect on other areas of law, reliance interests etc. despite the fact that the case has been settled for the past 50 years. The court exclusively focused on how they could mitigate the setback suffered by the losing side in *Roe*[10] and missed out completely on the larger picture of justice between the parties, which the case was about. The court's concern is clearly what it perceived as the subversion of the democratic process (read "pro-majoritarian") and their disenchantment with the inability to have policies of their choice. In a matter where women are the stakeholders, should this logic reign? Most importantly by presenting abortion as a purely moral question and expressly stating that it returns the power to regulate the same to the people and their representatives, the court once again relegates women's bodies as repositories over which everyone else, but the woman has a say.

III. Dobbs: A Passivist Approach?

Dworkin also discussed another theory of constitutional practice called passivism. They contend that because constitutional clauses are drafted in vague terms, various people will interpret them differently. The framers' intentions could be challenging to find, and they would often have no pertinent intention.[11] Therefore, the passivists maintain that the people should determine whether the Constitution forbids the death sentence, ensures the right to an

[9]2009 SCC Online U.S. SC 7.
[10]1973 SCC Online US SC 11.

abortion, or makes racial segregation illegal. It entails giving the national and state legislatures the final say on these matters. They hold that individual rights forbid only what their language unambiguously prohibits. Dworkin notes that decisions such as Brown's would be viewed as errors and could not be supported by a passivist perspective.

If this were to be the case, new forms of invidious discrimination that we recognise today may not have been addressed. According to him, justice demands that respect be given to the core, enduring components of the country's political culture rather than the opinions of a transient or local political majority while acknowledging that some constitutional rights are specifically created to prevent majorities from acting on their convictions about what justice demands. Roe was not a fly-by-night decision, and in Dobbs, by overturning Roe, the judiciary succumbed to quench the clamour of a transient political majority.

IV. Reconciling the Antipodean Using the Principle of Integrity

Dworkin seems to believe that justice and fairness are two principles that can pull in opposite directions. Dworkin rejects justice as fairness, which, like roulette, holds that whatever happens through a fair procedure is just. Additionally, he disapproves of the opposing viewpoint on fairness as justice, which holds that a process cannot be deemed fair unless it is likely to result in judgments that satisfy an independent standard of justice. He thinks that integrity is a different ideal people rely on when fairness and justice clash. The question of whether justice is done can be answered only based on outcomes achieved: when politico-judicial processes deny a person access to a resource, liberty, or an opportunity that they are legally entitled to, regardless of how fair the processes leading up to the decision were, injustice has occurred. It is this justice that is being denied to women when ***Dobbs*** deprives

[11]*Supra* note 3, at 369.

them of the bodily autonomy to decide to continue with a pregnancy to its full term or to have an abortion. The liberty to make choices she is comfortable with and to decide the course of her life. Dworkin divides integrity into the integrity of legislation and the integrity of adjudication. The integrity principle must serve as the legislature's compass, and judges must take our system of public standards as a coherent system and interpret them to identify implicit standards that lie between and below the stated ones to maintain the integrity of adjudication.[12] A Supreme Court judge deciding a scenario like in *Brown*[13] would ask himself a lot of questions about the practicality of the enforcement of such a decision. He would be worried about the dramatic change in the social structure and the backlash it produces. Juxtaposing Dobbs with Brown, one finds neither pragmatism nor ratiocination to back such a decision. But there is less space for such kinds of practical thinking regarding integrity. When the plaintiff successfully demonstrates that key provisions of the law are at odds with more fundamental ideas that the law must uphold, integrity becomes demanding. The decision in Dobbs undoubtedly conflicts with privacy and agency guaranteed to all, irrespective of gender.

The principle of integrity holds vertically as well as horizontally. Dworkin argues that a judge who maintains that a certain right to liberty is essential must demonstrate that his position is consistent with most prior cases. He is also expected to carry the same weight in his other decisions. According to Dworkin, the moral interpretation of the Constitution may be constrained by Constitutional integrity. The moral judgment that the judge's favour should be consistent with the Constitution's ethos and prior constitutional interpretations unless they lead to blatant injustices. Their contribution should fit with the rest. An interpretation should fit with history, practice, and the rest of the

[12]*Supra* note 6 at 217.
[13]*Brown v Board of Education of Topeka* 1968 SCC OnLine US SC 225.

Constitution. Dworkin clarifies that the moral reading does not ask them to follow the whispering of their consciences.[14]

V. Conclusion

Before *Roe v Wade*[15], among the states with anti-abortion laws, none punished abortion as equivalent to murder, which should have been the case if the fetus was considered a constitutional person. No State used to punish women who would get an abortion from other nations like Britain. Similarly, abortion cannot be disentangled from questions related to the use of contraceptives. The State also agreed that *Griswold v Connecticut*[16], which upheld the use of contraceptives, was right and should not be disturbed. The idea that a fetus does not qualify as a person under the Constitution is more consistent with other provisions of US law. It can only protect the fetus by taking measures that impede the mother's rights, a parallel to which cannot be found in the US legal system. Supreme Court rulings have consistently affirmed the constitutional freedom to exercise autonomy regarding the birth process. The right to an abortion follows logically if the fetus is not considered a person under the Constitution. Dworkin suggests that in *Roe v Wade*[17], it was held that the State may not invade personal liberty when it is not acting to protect the interest of another person but instead to protect an intrinsic value. This is especially so when the community is divided regarding understanding the value. Dworkin assumes such a stance because such a decision will have a disparate impact on a person whose choice is thus overturned. A pregnant woman can decide what the sanctity of life means to her when it comes to her pregnancy. Also, the decision in *Griswold v Connecticut*,[18] wherein it was held that states do not have the power to prohibit the use of contraceptives, can be

[14]*Supra* note 1, at 39-117.
[15]1973 SCC OnLine US SC 20.
[16]1965 SCC OnLine US SC 124.
[17]*Supra* note 10.
[18]*Supra* note 16.

defended only by assuming that states do not have a general power to dictate to all citizens what the inherent value of human life means.

The law of integrity demands that the principle of procreative autonomy apply to both decisions regarding the sale of contraceptives and abortion. The principle of integrity does not require that every principle in past decisions be followed. A principle inconsistent with the foundational values of the Constitution can be declared invalid. However, it is also important to maintain continuity with the past, and not all standpoints from the past can be declared mistakes. The power to disregard past decisions should be used modestly.

Dworkin opines that reversing the decision in *Roe v Wade*[19] now would damage the integrity of the law and the legitimacy of the Supreme Court.[20] State regulation would become unconstitutional if it imposes an undue burden on the woman or creates substantial obstacles in her path to getting an abortion. However, the viability point draws a line that effectively serves the legitimate state purpose of promoting a responsible attitude towards the intrinsic value of human life since fetal development may be sufficient to feel pain at the point of viability. Understanding the point of viability gives the pregnant woman a choice to decide the course that is best suited to her circumstances. Point of viability is that stage in development of the fetus from which point onwards it can survive outside the womb. Dworkin argues that by choosing the viability stage as cut off for the right to abortion, the state can balance between the autonomy of the woman and the state's interest in protecting life, which was the decision in Roe. Until the point of viability, the fetus lacks sufficient development to survive outside the womb, so it need not be considered as a person. But as the fetus approaches full term, the higher the state's interest in protecting it.

[19]*Supra* note 10.
[20]*Supra* note 14.

The decision in *Dobbs v Jackson Women's Health Organization*[21] has turned out to be everything Dworkin warned it would be. The majority decided that the right to abortion is not a right guaranteed by the U.S. Constitution as it does not align with the country's tradition and heritage. The court held that historical inquiries are essential when the Court is required to recognize a new aspect of liberty, and such inquiry in the present case indicates that *Roe* mistook history. By a narrow reading of the Constitution, the SC held that there exists no right to abortion under the ambit of the Fourteenth Amendment or any other provision of the Constitution. The problem with such a construction, as predicted by Dworkin years back, is also echoed in the dissenting judgment.[22] Such an interpretation goes against fifty years of precedents. It goes against foundational constitutional principles and violates the principle of integrity. When a message is sent to the masses that the Supreme Court decides cases not according to principles but according to who decides the matter and who has the majority on the bench, nothing separates the judiciary from other branches of the government. Violation of integrity results in the loss of legitimacy of the institution and reduces it to a political body. Even more shocking is the concurring judgment delivered by Justice Thomas. He has sought a complete reconsideration of all substantive due process cases because, according to him, the due process clause does not secure any substantive rights.[23] He describes *Griswold v Connecticut,* [24]*Lawrence v. Texas*[25] *and Obergefell v Hodges*[26] as erroneous and asks to reconsider these decisions.[27] He even doubts whether the Fourteenth Amendment is supposed to protect unenumerated rights. In his opinion, identifying such unenumerated rights is judicial policymaking, and he

[21]*Supra* note 3.
[22] (Breyer, Sotomayor and Kagan, JJ., dissenting) slip op., at 1-60.
[23](Thomas,J., concurring) slip op., at 2.
[24]*Supra* note 16.
[25] 2003 SCC OnLine US SC 73.
[26] 2015 SCC OnLine US SC 6.
[27]*Supra* note 23, at 3.

holds that substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments. He ends his opinion by stating, "*the substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.*"[28] A decision which prioritizes state interest over individual autonomy in matters of procreation and abortion has no place in the modern understanding of liberty. By overruling Roe and permitting legislative assemblies to interfere, the Court has relegated women to inferior status and deprived them of autonomy. Abortion is a morally contested issue, but the State cannot impose its morality on women in such matters because, ultimately, they are the ones who must pay the price. They are the ones whose freedom is restricted, they are the ones whose health is at risk, and they are the ones who make sacrifices in their social and professional life to give birth. Pregnancy restricts their choices and limits their freedom, so they should make the call. As the dissent rightly noted, "…*the constitutional regime we have lived in for the last 50 years recognized competing interests and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's. When the majority says that we must read our foundational charter as viewed at the time of ratification, it consigns women to second-class citizenship.*"[29]

[28]*Id*. at 7.
[29]*Supra* note 22, at 12.

DOMESTIC DRIVERS, DEMOCRACY PROMOTION AND INDIAN FOREIGN POLICY IN THE GLOBALIZING WORLD

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Abstract

Globalization has redefined the concept of modern statecraft. Visible interdependency and networking of nation-states have reached greater heights. This has impacted the structuring and interdependency to the extent that an action and policy decision of one state is likely to impact the adjoining states and inter-connected global order at large. This Transboundary interconnection has reduced the gap between the internal and external subjects, implying that the domestic issues are now not confined to internal matters but have greatly impacted its foreign policy. Global engagement and India's domestic developments are structurally intertwined, and India's strategic vision also enables domestic transformation. The chapter tries to analyse various aspects of democracy promotion and whether democracy promotion has become a leading determinant in the Indian foreign policy outlook.

Keywords**:** *Democracy Promotion, Indian Foreign Policy, Global Governance*

I. Introduction

Indian Foreign policy is passing through an interesting phase where there is a strong debate both in the academic and policy sector about the impact of democratic politics on Indian Foreign policy. Some think that there has been a

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fundamental transition in Indian external relations while some suggest that the change is minimal and at the superficial level. But there is no debating the fact that India is facing a unique and renewed world order with a unique set of challenges at multiple levels. The Rise of China is one of the contested realities of today's time. This comes with growing doubt about the US's hegemonic ability and willingness to play the role of the guarantor of the security architecture which was once created by its policy in the Post Cold War era. While India as an emerging power is trying to figure out its strategic position in this changing milieu. At the domestic level also India, Indian polity with the dominance of the Bhartiya Janta Party is now moved to right-leaning politics which in turn is trying to redefine the image of modern India on the Global stage challenging the old assumption about India's global role. With the G20 presidency in 2023, New Delhi is taking a distinct foreign policy approach, showcasing itself as a leading player in global governance and a rule maker. It comes with the basic pre-requisite of internal developmental policy and domestic good governance. In recent times, the way democratic ideals and values are implied and good governance is practised are vital and *sine qua non* to the overall growth and development of the nation and have a wider impact on the formulation and implementation of robust foreign policy. Therefore, domestic development and foreign policy become the main driver of economic growth and governance.

II. Conceptualizing the Foreign Policy Decision Making

Indian Foreign policy has embedded moral ethical values and bases, resulting from several cumulative factors. India's colonial legacy, the history of independence struggle movements, and post-colonial and socio-economic compulsions in the context of India's multi-ethnic and plural social structure. The ethical dimension of Indian foreign policy serves to protect both domestic necessities of integrity and unity and provides moral appendages to the

universal moral and rational base for its foreign relations. India, right from the time of independence was keen on embarking upon the path of democracy and social justice. The concepts of democratic institutionalism in India and the concept of social justice were inherent elements of India's historical legacy and struggle for Independence. The formation of the constituent Assembly and the adoption of the new constitution of India as early as 1949 was an example of the new leadership's commitment to constitutional democracy. Subsequently, the elections were held with the principle of Universal adult franchise forming the basis of India's utmost commitment towards a democratic form of government. This form of government further gave impetus to India's Non-alignment Policy. India's commitment to democracy, social justice, and economic welfare could have been compromised had India not opted for non-alignment and vis-à-vis. Nehru's aspiration to project India as a democratic country was very much visible through various initiatives like the Asian Relations Conference of 1949, the Bandung Conference of 1955, and the Belgrade Conference of 1961. Therefore, the moral democratic, and ethical base of Indian foreign policy is the cumulative result of India's struggle for independence, post-colonial socio-economic changes, and pluralistic societal structure. It is not wrong to claim that Indian foreign policy thus serves to protect both the domestic necessities of integrity and unity as universal moral values and rational bases for external relations. The elements like Tolerance, Democratic socialism, social justice, anti-imperialism anti-racialism, and multi-culturalism form the essence.

India's developmental vision in the post-independence era was understood as a third alternate model, between Western-style democracy and Soviet-style socialism. The Autonomous and independent foreign policy of India was carefully crafted as India signed 672 treaties, conventions and agreements along with 51 memberships in international organizations in 1947. (Menon 2021).

The optimistic and idealistic approach of Nehru's India carefully crafted the image of India as a new emerging world power with strong democratic and moral values. But what became equally interesting was understanding the role of the democratic institutions especially the executive and the legislature in the formulation of foreign policy.

III. Domestic Drivers in Foreign Policy Decision Making

From the inception of Indian foreign policy till today, Indian foreign policy is the main domain of the executive, and this was mainly evident from Nehru himself taking over not only the office of Prime Minister but also that of Foreign Minister. It is the Ministry of External Affairs which is primarily responsible to deal with most matters related to foreign affairs, but one cannot completely ignore the role of other agencies like the Cabinet, Prime Minister's office, Ministry of Defence and National Security Council, the Strategic Policy Group and the Parliament in India's external policy. The Indian Constitution provides very limited scope to Parliament in issues of foreign policy. Historically speaking the cabinet had very little role when it came to foreign policy decision making. (Appadurai 1981). Nehru's military intervention in Goa in December 1961 was only announced to the Cabinet at the last moment with limited discussion. The four Foreign Ministers who served Indira Gandhi in her first period in office further reconfirm how Indian Foreign Policy is confined to a small elite circle. (Mathur and Kamath 1996). But in the Chinese intervention of 1962 Prime Minister Nehru himself set up an "Emergency Committee" to deal with matters of national emergency which acted like an "inner Cabinet" and performed remarkable tasks on national and external issues. The pro-active nature of the committee which met almost every day, often tended to "virtually replaced the cabinet as the supreme decision-making body in the Government of India" (Becher 1966). Though its prominence

started gradually reducing after its peak in prominence during the time of the Rann of Kutch dispute with Pakistan in 1965.

Even though parliament enjoys complete authority and holds a strong influence in making laws on both domestic and foreign affairs of the country some scholars argue that Parliament enjoys limited inputs in foreign affairs when compared to domestic matters. While Globalization has reduced the line between domestic and international matters and has very well established that internal matters do contribute majorly to foreign policy decision-making. It is the Ministry of external affairs which has been successful in dealing with various spectrums related to foreign affairs in India. The Ministry of External Affairs also plays the crucial role of information gathering, processing and analysing its foreign missions and has the final say on any issues that decide on determining the course of India's foreign policy. Article 246 of the Indian Constitution which distributes powers between the Union Government and the states authorizes the Parliament to legislate on all aspects of the external affairs of this country (Bakshi & Kashyap 2002: 101). Item 10 of the Union List under the Seventh Scheduled of the Constitution specifically empowers the Parliament to formulate appropriate laws regarding foreign affairs (Constitution of India). In addition, items listed from serial numbers 9 to 21 of the union list and peace, diplomacy, matters regarding UN, international treaties and agreements and under the supervision of the Parliament. Most legislative matters related to foreign policy, security and defence come under the Union list so as international trade and inter-state trade. Parliament also influences foreign policy decision-making through various tools like using its budgetary control as it handles various allocations of budget on military, foreign aid and most important defence.

Though the decision-making power that the constitution provides in terms of foreign affairs remained unchanged since 1947, the evolutionary changes that

Indian politics have directly impacted foreign policymaking. The breakthrough from the centralizing tendencies from the 1970s onwards. The political centralization that continued between 1947 and the late 1960s came under severe stress leading to the rise of regional parties. VP Singh's government witnessed a coalition of twenty-seven political parties' coalition and the 1991 elections saw a coalition of forty-three parties. The economic liberalization since 1991 along with the increasing fragmentation of the political parties have in principle certainly strengthened the influence of the corporate sector in global affairs. The controversial debate regarding India's planned membership in the World Trade Organization and Parliament's report concluding the negative consequence of WTO membership for the Indian economy further highlighted the limitation of Parliament in foreign policy decision-making. The debate and the report did not keep the government away from signing the agreement in 1994.

The complete reorientation of economic policies had far-reaching consequences for foreign affairs making economic issues became the focal point. With the "Look East Policy" Prime Minister Narasimha Rao intended to bridge stronger links between India's relationship with the emerging state of East and Southeast Asia. On the other hand, Gujral Doctrine's "Good neighbourhood policy" replaced Indira Gandhi's policy. But the question of democracy promotion still did not figure in any of the foreign policy doctrines till then. The Gujral Doctrine emphasized the amiable relationship with Indian neighbours while avoiding interfering in their internal affairs. The Doctrine shaped New Delhi's foreign policy discourse in South Asia.

The foreign affair in India is strongly executive driven and it is a feature which is evident from the limited formal power that has been practised by the Indian Parliament in foreign affairs. This to some extent has witnessed a change after India's economic integration with the world economy took shape in the 1990s.

The strict division between domestic and foreign policy which prevailed before the 1990s blurred out. India's foreign policy is therefore transiting between the new necessities and changes induced by globalisation and the traditional principles of foreign policy as national sovereignty and non-intervention.

IV. Democracy Promotion

India's success in constructing and sustaining a democratic political system directly impacts its foreign policy discourse. The world is witnessing a rapid transition and there is a seismic shift in the distribution of world power during this century from the West to the East. It is important thus to understand the major parameters of India's Foreign policy in Asia as a democratic nation. In the past two decades, significant changes have occurred in Indian domestic politics but there still lies a consensus among the elites and masses that a democratic political system offers the best possible means to manage differences and govern a country of diverse social practices. On the domestic front, the transition to a multi-party system was gradual from the dominant party system under the Congress at the national level. India's equation with the Soviet Union during the cold war was also far deeper than with the democratic US. Even though both countries had a similar democratic form of government, Indo-US relations improved only in the Post Cold War era.

Democracy promotion has never been an integral element of India's foreign policy. Rather a democracy promotion has always generated some form of suspicion in the global south as there has been much debate regarding the real intentions and design for the advancement of the interest of the West led by the US. India's security Imperatives mainly guided India's relations with the other states in the international platform. Shaped by the anti-colonial movements, cold war dynamics and other strategic factors India had very limited intentions for keeping democracy promotion as a key agenda in India's engagement in the international order. However, in recent times, India has witnessed many

proactive stances in propagating and supporting democracy, especially in the South Asian subcontinent. The Realist approach in International Politics studies the relevance of great powers as effective actors in the anarchic world and the survival of a state is dependent on their relations with the great powers. The most relevant aspect to align with the great power structure is to align with the ideas advocated by them. Mallavarappu (2010), argues that democracy promotion in India's context, observes "that the realist stance would support a fair degree of suspicion when it comes to endorsing democracy-promotion projects, while simultaneously not missing an opportunity to consolidate ties with the major powers". It is also true that India's status as the world's largest democracy and its international market economy rises the expectation to be an active promotor of democracy. The regional setting and the unstable political situation of its neighbourhood, also raise the expectation from India to be an ardent promotor of democratic governance in the region. To strike the balance between the expectation of the West and its security imperatives and the ethical base of foreign policy, India has taken a very defensive approach to promoting democracy in the South Asian region. India's involvement in democracy promotion very well secures its position without costing much politically. Since 2000 India's membership in the "Community of Democracies" and its sponsorship of UN Democracy Funds can be stated as an example. Apart from this various multilateral and bilateral platform has been created like economic assistance programme to develop institutional capacity to create an environment conducive to allowing democracy to thrive. But India's relationship with its neighbours is challenged by multi-layered dilemmas and border conflicts. India's New South Asian Policy though has improved the regional setting, but the South Asian region is not economically interdependent, and the structural political obstacles of the neighbouring states limit India's regional outreach. India also lacks institutional mechanisms to promote

democracy abroad. India has no equivalent counterpart to government agencies like United States Agency for International Development (USAID), the UK's Department for International Development (DFID), and the Canadian International Development Agency (CIDA) or NGOs or think tanks like the Carnegie Endowment for International Peace (CEIP), and Freedom House that promotes education related to democratic governance. The institutional limitation along with the shortage of staff in the Indian bureaucracy and Ministry of External Affairs also affects various aspects of democracy promotion abroad. India's Federal structure and the political implications of coalition government also enhance the involvement of the state government in foreign policy decision-making, lacking consensus on long-term objectives. The nature of ad-hoc-ism in efforts to promote democracy is a futile effort as the process of inculcating the values of democracy, abiding by the rule of law and respecting humans requires a long-term commitment.

In recent years, India has been supportive of democracy within the context of its neighbouring state like Bhutan, Nepal, Myanmar etc. With Chinese strong presence in South Asia India has largely abandoned its suspicion of US-led Western countries. The evolution of India's revised democracy promotion journey can be traced back to Atal Bihari Vajpayee in the 2000s which was later consolidated by Prime Minister Manmohan Singh. Starting with PM Vajpayee Indian leaders have frequently expressed their support for democracy by the turn of the present century. India has time and again emphasized the need of supporting democracy as a deterrent against international terrorism. Initial India's linkage to the Western idea of promoting democracy was reflected in the Indo-US Vision Statement of March 2020 and was further reflected in Prime Minister Vajpayee's speech in Singapore on 9 April 2002, in which he reiterated: 'It is not surprising that terrorism is supported and sponsored only

by undemocratic societies and totalitarian regimes'[1] (Muni 2009,11). Prime Minister Manmohan Singh's constructive viewpoint is frequently quoted to denote the new approach of India towards democracy promotion where he openly praised liberal democracies by stating that "democracy is the natural order of political organization in today's world. All alternate systems, authoritarian and majoritarian in varying degrees, are an aberration." (Prime Minister's official Speech). The historical absence of any policy on democracy promotion throughout the 20th century is based on the suspicion of the global south. However, with the changed position following the 2000s resulted from the natural tendency of India to ally with the West, especially the US. Even though India's status as the world's largest democracy, citizens' preference and acceptance of global economic interdependence have fostered cooperation with the US, India still is reluctant to define democracy promotion as a major tool of its foreign policy. Indian foreign policy is still dominated by the country's traditional insistence on the principles of non-intervention and national sovereignty.

There are some strong defence mechanisms which the policymakers often associate with while proactively pursuing democracy promotions. Promoting democratic values as an ally of the advanced developed Western democratic nations can weaken India's traditional role of an anti-imperial, non-aligned rising power that defends the Global South concerns and often defends developing Countries' claim to self-determination. By proactively promoting democracy at the regional level, the possibility of regarding India as an interventionist would strain India's image and bilateral relations. Since the 1990s India's approach towards its neighbourhood has improved but many virulent domestic conflicts in India's neighbouring countries are closely linked

[1] Muni, S D 2009, India's Foreign Policy: The Democracy Dimension, Foundatio7n Books, Delhi

to their relations with India. Also, active democracy promotion may trigger a domestic debate on the democratic values maintained in India. Any successful strategic attempt to influence another country's domestic order needs a successful discussion on generating a larger consensus based on soft power. Despite creating a successful democratic model in Indian politics after so much independence is struggling with clientelism, poverty, corruption, political violence and social marginalization. So, India's incorporation of active democracy promotion in its foreign policy may further trigger critical domestic debates.

With the establishment of the Public Diplomacy Division by the Ministry of External Affairs the Indian Government tries to showcase a democratic outlook to its foreign policy formulation. The projection of India's soft power, levering its extraordinary cultural and intellectual inheritance, the government sought to reclaim the idea of India as a normative power (Hall 2017)

V. Conclusion

Indian foreign policy right from the Nehruvian era to the present Modi period creates a roadmap to analyse the crucial linkages between internal and external matters, the geopolitical consequences and the security implication. The elements of continuity and chances in Indian Foreign Policy regarding India's stand on democracy promotion are evident. Even though India has recently made a tilt towards active democracy promotional activities, it is very cautious about the same. India's socio-political cultural narratives effectively form a strong foundation for its foreign policy goals by also recontextualizing the relevance of the non-alignment movement crafted by the primary architect of Indian Foreign policy. Having considered a strong Partnership with the US, India still refrains from aligning with the world's sole superpower. India is still suspicious of the strong interventionist approach of West democracies and would never risk its standing as a strong face of developing countries. Although

the strict sense of non-alignment which was prevalent during the cold war era is not highly relevant, the North-South divide and the socio-economic justice are much debated and need to be addressed more pragmatically. India has always treated the problems in the neighbourhood on a case-by-case basis and was mostly taken to advance its strategic interests or to preserve regional stability. Democracies theoretically must be peaceful towards each other for institutional and normative reasons, but India never has experienced this peace when it comes to the Asian neighbourhood. India's change of position though highlighted a strong shift in New Delhi's approach towards South Asia when India began to prioritise the proposition that democratic government serve better economic and security interests than authoritarian regimes. New Delhi's inclination for democracy promotion in the region is also linked with China's growing influence in the neighbourhood. India by projecting its soft power is also trying to project itself as an emerging power with strong democratic values, commitment to the principles of sovereignty, and non-intervention. India may come across as an ideal Asian partner for Western democracies for democracy promotion, but a close analysis highlights Indian civilizational values, the norms of non-interference are the traditional watchdog of Indian Foreign policy. India has chosen to pursue its version of democracy promotion with is distinct from the Western version. India's democratic assistance is an asset as it smoothens the process of closer alignment with the US and helps in wider efforts to manage China's growing influence in Asia. Also, democracy assistance adds to India's soft power, especially among the Global South and helps in catering to wider global governance issues.

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EXPLORING CULTURAL PROPERTY PROTECTION IN NIGERIA: THE KEEPING OF THE RETURNED ARTEFACTS IN FOCUS

Temitope Olorunnipa[*] and Bankole Sodipo[**]

Abstract

Traditional communities are as innovative as contemporary society and they have their customary means of protecting the intangible property in their trade or products in the similitude of contemporary intellectual property. Benin Kingdom is known for bronze carvings and other artworks. When the Europeans colonized Nigeria, the Kingdom of Benin was a target for exploitation of natural resource and intellectual works in arts. The devastating effect of the invasion of Benin Kingdom in 1897 is still felt in the twenty-first century. In the light of subsequent developments in international and national laws protecting cultural property, Nigeria began to make calls for return of the looted artefacts which in recent times has begun to yield results but there seems to be a disconnect as to the rightful place to put the returned artefacts. This work seeks to study the legal protection of such returned property vis-a-vis safety of the properties. It is a qualitative study engaging doctrinal method of study to deduce relevant data from primary and secondary sources of law to achieve the aim of the study. It

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finds that both contemporary law and traditional 'IP' recognize the Benin Kingdom as the traditional owners who should determine where their property should be kept in conjunction with the federal government. What would then be the issue will be the safety of the artefacts wherever they are kept.

Keywords: *Artefacts, cultural property, Benin, museum*

I- Introduction

The plea, pressure and appeal for return of looted artefacts began to yield positive results in recent times with the Jesus College, Cambridge University taking the lead to return the 'Okukor' – Cockerel bronze sculpture on 27th September 2021 and closely followed by Aberdeen University's return of the Benin bronze head of an O*ba* (ruler) on 28th September 2021[1] following the active discussion and negotiation between the Universities and the Nigerian stakeholders – the Oba's Palace and the Federal and State Governments through Bankole Sodipo[2] who actively sorted long-standing issues between University of Cambridge and the Oba's Palace.[3] The learned Professor opined that the return of the artefacts was 'a remarkable and exciting moment for Africa, its creativity, innovation and history'.[4] He stated further that the return showed that holding on to stolen artefacts

[1] Alex Marshall, 'Who Owns the Benin Bronzes? The Answer Just Got More Complicated' *The New York Times* <https://www.nytimes.com> accessed 25 November 2023

[2] Bankole Sodipo (SAN) is a Professor of Law who had gone on leave at Queen Mary University of London and University of Cambridge between 2019 and 2020 where he encountered Neil Curtis, (Head, University of Aberdeen Museums and Special Collections. Curtis had reached out to him to facilitate the return of the artefacts sequel to which Cambridge University revealed their plans to and made move to be the first to return the looted artefact in their possession.

[3] Titilayo Adebola and Bankole Sodipo, 'The Return of Looted Benin Bronzes: Art, History and the Law' *Afronomicslaw.org* < https://www.afronomicslaw.org> accessed 25 November 2023; see also Titilayo Adebola and Neil Curtis, 'The Repatriation of Benin Bronze and Decolonisation of Museums: Views from the University of Aberdeen' <https://www.abdn.ac.uk> accessed 25 November 2023.

was baseless. African arts tell the story of the people and is as much spiritual. As such, the Benin Bronzes were cast by designate Igun clan and unless a person was initiated into the cult, he could not be a bronze caster. Thus, customary system was in place to protect innovations and creativity.

Following an acknowledgement of the looting of the artefacts in the Horniman Museum in South London, the Management of the museum returned some of artefacts to Nigeria with an agreement to return the rest in other phases.[5] In the past months, Nigeria has witnessed the return of some of the artefacts that were looted during the 1897 Benin War in the colonial era by the colonial government which were dispersed across Europe and America. The Federal Government of Nigeria had entered into an agreement with the United States government to prevent looting of artefacts in January 2022 and later that year, the United State Consulate returned of 30 of the stolen Benin Bronzes which were displayed in two museums, 29 bronzes from the Smithsonian National Museum of African Art and one from the National Gallery of Art.[6] Germany also returned some twenty-two artefacts to Nigeria.[7] The artefacts were handed over to the National Commission for Museums and

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[4] ibid.

[5] Harriet Sherwood, 'London museum returns looted Benin City artefacts to Nigeria' *The Guardian* (Africa, 28 November 2022) < https://www.theguardian.com/culture/2022/nov/28/london-museum-returns-looted-benin-city-artefacts-to-nigeria> accessed 13 November, 2023

[6]Michael Laff, '30 Benin Bronzes Returned to Nigeria' (US Mission Nigeria,17 October 2022) <https://ng.usembassy.gov/30-benin-bronzes-returned-to-nigeria/ > accessed 9 November 2023.

[7] BBC, 'Benin Bronzes: Germany returns looted artefacts to Nigeria' *BBC News* (Africa,20 December, 2022) <https://www.bbc.com/news/world-africa-64038626 > accessed 15 November 2023

Monuments (NCMM), a federal parastatal and body charged with management of museums, monuments and artefacts.

However, on 28 March 2023, the Federal Government of Nigeria made the Oba of Benin the official custodian of the returned bronzes for Benin Kingdom. This means that the Oba became the owner, for the people of Benin and as such took the responsibility of managing the places where they are kept.[8] Earlier, the Oba of Benin had in a 'Statement at the Meeting of His Royal Majesty Omo N'Oba N'Edo, Ewuare II, Oba of Benin with Palace Chiefs and Enigies on the Repatriation of the Looted Benin Artifacts', revealed the plans (as the traditional owners) that the bronzes and other artefacts to be returned would be kept in the Benin Royal Museum because they belong to the people of Benin and so the Oba would be the custodian for the people and not some private company named Legacy Restoration Trust Limited nor were they supposed to be kept in the planned museum.[9] The traditional stool speaking for the Benin people believed that since the artefacts were taking from the royal court, they should be returned there but that the federal government should be the body that would negotiate the return of artefacts on behalf of Benin people. The NCMM and some other British institutions who had wanted to return some 116 artefacts seemed to have been thrown into confusion as to which body to relate with and thus a postponement of its intended return was announced.[10]. There is thus back and forth concerning the

[8] Federal Government's Notice No.25 in the official Gazette No.57, dated 23 March 2023

[9] Edo Museum of West African Art targeted for opening by the year 2025; Kwame Opoku, 'Oba of Benin Speaks on the Return of Artefacts' *Modern Ghana*, (Ghana, 12 July 2021) <https://www.modernghana.com/news/1092994/obaof-benin-speaks-on-the-return-of-artefacts.htm. > accessed 20 November, 2023.

certainty of the continuity of the Edo Museum of West Africa project – the name being changed to Museum of West African Art, Edo (MOWAA) and the architect facing allegations leading to dissociation of many clients from him.[11] If the Oba of Benin is the owner, how did the condition of these cultural properties get to this point? What is the legal position on the artefacts? What is the issue with the Royal Palace museum and the safety of the artefacts? What could be the effect on the returned artefacts and the proposed return? All these and more are the reason for this study.

II. Ownership of Benin Artefacts

The ownership of the Benin Bronzes and other artworks resides in the communities and groups that made them both in contemporary law and the traditional practices.[12] The Intellectual Property (IP) system is a contemporary regime that came through the western dominance of the colonised territories but before the colonial invasion of the local communities that now make up the Nigerian State and even other parts of the world, there were existing technological developments which were not devoid of protection through the traditional systems of governance and societal control. According to Prof. Sodipo in his 'Piracy and Counterfeiting: The Freedom to Copy vs Intellectual Property Rights[13]

[10] Macdonald Dzirutwe, 'Return of Benin Bronzes Delayed After Nigerian President's Decree' *Reuters* (Africa, 10 May, 2023).
<https://www.reuters.com> accessed 20 November, 2023.
[11] Returning Heritage, 'Cultural Restitution' *Returning Heritage (*Jul 20, 2023) <https://www.returningheritage.com/new-museum-in-benin-city-navigates-a-fresh-agenda > accessed 15 November 2023.
[12] See for Instance Copyright Act, 2023 s. 74; the UNESCO Convention 1970 among others.

‘some activities in some pre-literate societies, in particular: pre-colonial Nigeria and among the Aborigines of Australia…there have always been certain forms of proprietary rights (often communal) in intangibles in those societies… the regimes, are to a limited extent, comparable with modern intellectual property protection. Hence, the latter is not "alien" to those societies.

He established that in the era before colonisation, communities had proprietary rights in intangibles ‘vested exclusively in groups such as families, clans, age or sex groups, cults, professional guilds, or individuals such as particular elders of chiefs or the kings’ the enforcement which was based on magical or religious beliefs, or punishments administered by the groups. Thus, there was protection of proprietary rights in intangibles similar to the intellectual property rights – copyright, patent, trademark - even though the owners may not have intellectual property in mind. Such works as carvings, works of art, painting sculptures and intangible cultural properties like song, folklore were existing in precolonial Nigeria which are now protected by the Copyrights Acts among other laws. He further established that trademark and patent were also in use.

Royal decrees and taboos were used to protect works. The kings wielded so much power and were highly revered as representatives of the gods. They maintained order in their society through their council’s advice. They made and repealed laws, pardoned or punished offenders (even by death), declared

[13] Thesis submitted in undertaking the degree of Ph.D. at the University of London Queen Mary and Westfield College (February 1995).

war or peace, liberated slaves or suspend titled chiefs and execute or expel offenders. The society operated in strata - the family, age groups, clan and even the king – so the enforcement of the royal decrees and taboo was through these strata. For instance, each age groups know the intangible property that belonged to them and would not take over another's. In addition, religious beliefs and cultic superstition from which causation was developed in most communities were also used for enforcement and ensure adherence to the societal norms. Also, to ensure that monopolies were maintained, professional guilds were used to protect proprietary rights in intangibles. This was applied specifically for the Benin art. The Oba (King) had specialist guilds of craftsmen that were maintained who only provided for his ceremonial needs and for religious festivities. They carved bronze heads of past Obas amongst others in place of pictorial representation in the recent times.

Guilds were a common feature in many communities before contact was made with Europeans. They were usually organised in small family or age groups with a system of hierarchical administration. The guilds were identified by the products or skills, or industrial groupings such as soap making, black-smithery, ceramics, carving, and textiles. The head of the guilds took large orders and represented the guild before the rulers of the community. Members of a trade were often initiated into a guild with a god or ancestral spirit which protected them and which it was believed would punish erring members or interfering outsiders. Given the religious belief discussed below and the fear of the ancestral spirit which protected members of

the guild, it was inconceivable for non-members of the lineage or families in the guild to undertake their activities.[14]

It is no news that the European countries, part of which is the British government, at some point in history sought to expand their political and commercial influence through colonization of different territory part of the world, of which is the area now known as Nigeria is among. Not all the ethnic nationals were willingly succumbed to British rule and trade on their terms. Some were forced to be subject to colonial rule. One of such is the Benin Kingdom which was eventually forcefully invaded and several devastations caused because the Oba would not yield to their terms as allegedly agreed and because of some alleged human rituals, the effect of which is still being felt and discussed till date.[15] In the word of Folarin Shyllon,[16]

In 1897 a great tragedy befell the kingdom of Benin when a British punitive expedition looted the treasury of treasures in the royal palace and plundered artefacts including those of great spirituality to the Bini people. And although this is often glossed over or never mentioned the so-called punitive expedition entailed "the death of untold numbers of its [Benin City] inhabitants". The Oba Ovoramwen Nogbaisi was humiliated and sent into exile where he died. Benin kingdom is now part of Nigeria and, since Independence in 1960, Nigeria and also the

[14] Sodipo (n 12) 64.
[15] Carsten Stahn, 'Beyond "to Return or Not to Return" - The Benin Bronzes as a Game Changer?' (2022) 2022 Santander Art and Culture L Rev 49.
[16] Folarin Shyllon, 'Benin Bronzes: Something Grave Happened and Imperial Rule of Law Is Sustaining It!' (2019) 24 Art Antiquity and L 274.

Benin Royal Court have been anxious for the return of iconic and spiritual items among the plundered cultural objects.

He chronicled the event leading to the brutal expedition as follows:

In 1897 a British expedition led by Consul James R. Phillips tried to reach Benin City in today's Nigeria. It was motivated by the British desire to put an end to the restriction on British trade which had been imposed by the Oba (King) of Benin. In a letter written in November 1896 to the Under-Secretary of State in London, Phillips indicated that "sufficient ivory may be found in the King's house to pay for the expenses incurred in removing the King from his stool.'" The expedition was ambushed on its way to Benin City and seven out of nine members were killed. The British reaction was swift. The city was invaded and the palace where some tens of thousands of works of art in wood, ivory and bronze were kept was looted and eventually burnt down. Untold numbers of Africans were massacred. The King was banished. The thousands of art pieces involved were first removed to London as spoils of war from where they were dispersed throughout the world. Many of the bronzes were sold by the British at auction to defray the expenses of the expedition. And "it was really owing to the initiative of the Germans, who secured the majority of the work for their own museums, that Benin became famous." The importance of the Benin pieces was immediately recognised by the early German Africanist Felix von Luschan. Writing in 1919, he described them in glowing terms: Benvenuto Cellini could not have cast them better and nobody else either, before or since Cellini ... These bronzes are

technically of the highest quality possible.'" The result of the auction is that the bronzes and plaques have been scattered all over the world in museums and private collections, and they are almost inaccessible to an African audience.

III. Law on Pillage

As at the time of sacking Benin, the international rules prevented pillage in European countries.[17] The customary international law rules became codified in 1899 (two years after the attack on Benin) by the Hague Convention on the Laws of War ('Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land') which the 1907 Hague Convention on Laws and Customs of War on Land supplemented.[18] The then international law craftily excluded non-Europeans to operate by double standard.[19] Discussion for the repatriation of the Benin bronzes began in 1930 but became intense in recent times.[20]

IV. The UNESCO Initiatives

The United Nations Educational, Scientific and Cultural Organization (UNESCO) was established in 1946. Its mission is to contribute to peace and security through the promotion of international collaboration in education, sciences and culture.

[17] For instance, French confiscations of cultural properties was said to be against the rule of law following liberation of occupied territories – see Ana Vrdoljak, International Law, Museums and the Return of Cultural Objects 12 (Cambridge University Press, 2008).
[18] ibid; Carsten Stahn, 'Beyond "to Return or Not to Return" - The Benin Bronzes as a Game Changer?' (2022) 2022 Santander Art and Culture L Rev 49.
[19] ibid 27.
[20] Emma Gregg. 'The story of Nigeria's stolen Benin Bronzes, and the London museum returning them' (National Geography Traveller, UK September 17, 2022) <https://www.nationalgeographic.com/travel/article/nigeria-stolen-benin-bronzes-london-museum#:~:text=With%20London's%20Horniman%20Museum%20announcing,West%20African%20Art%20(EMOWAA).> accessed 15 October 2023.

Following the devastating effect of World War II, there was vigorous move to protect cultural property which resulted in the treaty called the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted on 14th May 1954 and entered into force on 7th August 1956. On 14th November 1970, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted and entered into force on 24th April 1972. However, the colonial powers were quick to advocate for the non-retroactive effect the treaty to protect their museums which are filled with African artefacts. The result is that the Convention allows for bilateral negotiations to resolve claims for cultural objects removed before the entry into force of the Convention but did not include outright provision on return of looted artefacts.[21] Evidently, many European countries who are in possession of such objects were reluctant to join the train of the 1970 Convention. For instance, France joined in 1997 while the United Kingdom joined 2002. To complement the 1970 Convention, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was adopted in 1995. The European nations subscribe more to the 1970 Convention than the UNIDROIT Convention because of its provisions on restitution of cultural property especially when it has entered the art market.

The pieces of Benin arts looted are scattered in Europe and America and are put up for exhibitions. In one of such, the late Oba of Benin, Omo N'Oba Erediauwa, highlighted the

[21] See Art. 15.

trampling of the human right of the original owners of the work by the continued retention of the works in museums while underscoring the purpose of the works and how they were meant to be used:

As you step into the exhibition hall today, you will behold some of Africa's most exquisite works. But it is important to note that they were not originally meant to be mere museum pieces simply to be displayed for art lovers to admire. They were objects with religious and archival value to my people. They were made only under royal command. Whenever an event of significance took place, the Oba (King) commissioned the Igun-Eronmwon (members of the guild of bronze casters) to make a bronze-cast of it. Thus, the bronzes were records of events in the absence of photography. Those of the works, which were not made for record keeping, were made for a religious purpose and kept on altars. So, as you step into the hall today, you will be reading, as it were, the pages tom off from the book of a people's life history; you will be viewing objects of our spirituality, albeit, you may not fully understand its import.[22]

Also, Prince Edun Akenzua, said in "The Treasures of Benin are more than Art, They are the Life of the People" Museum of Ethnography Stockholm, Whose Objects? Art Treasures from the Kingdom of Benin in the Collection of the Museum of Ethnography, Stockholm,[23]

[22] Barbara Plankensteiner (ed.), Benin Kings and Rituals: Court Arts from Nigeria, (Snoek 2007), 17.

[23] Edun Akenzua, "The Treasures of Benin are more than Art, They are the Life of the People" Museum of Ethnography Stockholm, Whose Objects? Art Treasures from the Kingdom of Benin in the Collection of the Museum of Ethnography, Stockholm, Stockholm, 2010, 19.

I should like to point out the works were not intended for museums or galleries. Most of them were made to record events in the lives of the people. In other words, they were records of our people's life. The others were made for religious purpose and kept on altars.

Perhaps the above quoted statements explains the motive of the Oba of Benin to have the artefacts in the Royal Museum. However, it is clear that the former colonialist, especially Britain were more concerned with their museum and the gains than the human and property right nature of the bronzes. While other colonial powers are open to restitution to their former colonies, the looted artefacts – as championed by the French president, the British government is dragging about it which has brought the British museum under scrutiny.[24] There had been pleas and pressure from the Nigerian government, the head of the Nigerian Commission for Museums and Monuments, the Oba's palace and even considerations by the Benin Dialogue Group but the British authorities hide under the British Museum Act 1963 and safety of the artefacts to argue against repatriation. [25] Interestingly, recent alleged theft in the museum has instigated calls for a repeal of the law and proactive measure by

[24] Anna Codrea-Rado, 'Emmanuel Macron Says Return of African Artifacts Is a Top Priority', *New York Times*,(New York, 29 Nov. 2017) <https://www.nytimes.com> accessed 15 November 2023; Anna Codrea-Rado, 'Macron Pledges Return of African Artifacts' *New York Times* (New York, Nov. 30, 2017, Section C, Page 3; .Beneddicte Savoy, 'The Restitution Revolution' *Begins'Art Newspaper*, (16 Feb. 2018) <https://www.theartnewspaper.com> accessed 15 November 2023; Annalisa Quinn, 'After a Promise to Return African Artifacts, France Moves Toward a Plan' *New York Times*, (6 March 2018) <https://www.nytimes.com> accessed 15 November 2023; Naomi Rea, 'On the Heels of a Dramatic Restitution Report, France is Returning 26 Artifacts to Benin. Will Other Countries Follow Suit? *Artnet News* (26 Nov. 2018) < https://news.artnet.com> accessed 15 November 2023; Victoria Stapley-Brown, 'Benin Gets €20m Loan for New Museum to Show Restituted Heritage' *The Art Newspaper*, (18 July, 2019) <https://www.theartnewspaper.com> accessed 15 November 2023.

Britain to return the cultural properties.[26] The reluctance of Britain has been criticised as emanating from bad faith as British parliament can easily amend that law to ease restitution.[27] Shyllon argued for the propriety of restitution by ascertaining that the disposition of the British government towards restitution is a show of qualifying illegality with the rule of law. The claims of most western nations has been on the theories of internationalism rendered by John Henry Merryman, in 'Two Ways of Thinking about Cultural Property'[28] as against nationalism approach of those arguing for their return place of origin – nationalism.[29]

Irrespective of theoretical notion, the looting and calls for return of Benin artefacts has paved way for stance being taking on the colonial relationship with their colonies and the cultural stripping that is manifested in the treatment of Benin.[30] The attack was well planned and the looting was deliberate. The colonialist stripped Benin of their cultural properties because of their raw materials and somewhat defence of their sovereignty. The British army planned to use the artefacts to defray the cost

[25] David Batty and Mark Brown, 'Thefts Expose British Museum's "Ridiculous" Stance on Return of Artefacts, Says MP' *The Guardian* (27 August 2023) <https://www.theguardian.com> accessed 15 November 2023.
[26] ibid.
[27] Shyllon (n 16) 284.
[28] John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 AJIL 831, 831-32; See also Manlio Frigo, 'Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?' (2004) 86 International Review of the Red Cross 367,370 <https://doi.org/10.1017/S1560775500180861> accessed 14 October 2023; Sabrina Ferrazzi, 'The Notion of "Cultural Heritage" in the International Field: Behind Origin and Evolution of a Concept' (2021) 34 Int'l J Semiotics L 743.
[29] Panayiotis Aris Vassilas, 'Cultural Property Preservation: Legal Perspectives and Realities at the National Regional and International Levels' (2020) 10 Aberdeen Student Law Review 137.
[30] Shyllon (n 16) and Stahn (n 15).

of their expedition and had to sell some and kept others after the war. All these have been viewed as inhumane treatment that requires even an apology besides the return of the lootings. Sodipo succinctly puts it that withholding looted artefacts on the ground that it would not be well kept is disparaging. [31] Even western museum stakeholders also support the position that the West has no business in how Benin and in fact Nigeria deals with bronzes after they are handed to them as it is not in their position to so do.[32]

V. Conclusion and Recommendations

There is no gain saying the fact that corruption is endemic in the Nigerian society and museum and the management of artefacts is not spared in its scourge.[33] It permeates every section of the Nigerian society. It could involve secret sales of artefacts and/or diversion of proceed of museum operation.[34] Therefore, the need to secure the returned artefacts and those to be returned was paramount to the initiators of the movement for the return, hence their plight for public private partnership through the establishment of the EMOWAA which involved the palace (particularly the first son of the Oba of Benin). But such initiative was naturally attended with suspicion especially because the palace had always laid claims to the ownership of the artefacts and thus expects to take possession of them

[31] Adebola and Sodipo (n 3) 5.
[32] Marshall (n 1).
[33] Jos Van Beurden, 'Benin Dialogue Group: A Model for A European Approach?' in Jos Van Beurden, '*Inconvenient Heritage: Colonial Collections and Restitution in the Netherlands and Belgium'* (Amsterdam University Press, 2022) 164.
[34] See for instance Jesusegun Alagbe, 'Benin Bronzes: Divergent views on repatriation of artefacts' *universityworldnews* (11 August 2022) <https://www.universityworldnews.com> accessed 24 November 2023 particularly the assertion of Ifeyinwa Emejulu, Professor of Archaeology and Tourism Studies, Nnamdi Azikiwe University, Awka, Anambra State.

naturally and not some initiative that might not directly benefit the palace.[35] Spiritual and cultural essence of the artefacts were given as reasons for the decision to have the artefacts in the Royal palace museum which the Federal government bowed to as resolution of the tension between the palace and the NCMM on the appropriate custody for the artefacts. That being done raises the curiosity as to the extent of security in the Royal museum or are the artefacts being exposed to the danger of theft and illicit trade? Can the Nigerian State adopt the Royal Museum instead of the proposed Museum? What is the fate of the yet to be returned artefacts with this development?

It is worthy of being stated that artefacts were looted from other parts of the territories that now make up Nigeria. For instance, an Ikere-Ekiti artefact was discovered to be in France.[36] The issue may arise as to the ownership of a returned artefact among the local communities in Nigeria. For example, because of some similarity of custom and culture, an Ife artefact may be identical with Benin artefacts. Such situation is an indication that there is indeed need for a central museum such as the EMOWAA that will house the returned artefacts.

It is thus recommended that NCMM should take charge by ensuring the materialisation of the construction of a central museum in collaboration with the communities. The NCMM should also prepare a memorandum of understanding that will clearly state and ensure fair and equitable benefit sharing of the

[35] Beurden (n 34) 171-172.

[36] See Nigeria (UNESCO, 1979) <https://unesdoc.unesco.org/ark> accessed 2 June 2023 on the location of South West Nigeria's artefacts in foreign museum - the Ikerre Ekiti artefact was alleged to be a gift.

proceeds of such museum with and among the local communities' royal palace or traditional owners where they can be traced and where they cannot be traced, the benefit should go to the government. In addition to this, the NCMM should engage the Benin Royal palace museum to serve as monitor of the museum and also liaise with the security agencies to ensure adequate protection of the Royal museum (and even the proposed central museum) by providing for the safety of the artefacts through stationing of security surveillance in and around the Royal Museum as though they were in a government facility. Also the National Commission for Museums and Monuments should not shy away from responsibility to facilitate the return of the remaining artefacts that are to be returned. There is need for NCMM to partner with private individuals and/or academia in the field to serve as liaison to ensure smooth return of the artefacts as the learned Professor did with the returned artefacts.

SHAPING EQUALITY FROM COLONIAL REPRESSION TO LEGAL LIBERATION: INDIA'S JOURNEY TOWARDS PROTECTING RIGHTS OF LGBTQIA+ COMMUNITY

Dr. Prabhdeep Kaur Malhotra [*] *and Rajshree Ghosh* [**]

ABSTRACT

Homosexuality was deemed to be a criminal activity before the historical verdict of 2018 which decriminalised section 377 of the Indian Penal Code making consensual homosexual relations legal. Before 2018, the homosexual community assumed this change would bring a great effect in their lives and in their struggle to be a part of society. Even after this judgment was passed, there has been increase in suicide cases of homosexuals, and this draws our awareness on the fact that decriminalization of this provision has not caused the fulfilling effect that it was anticipated to bring. The present research highlights the history of homosexuals and their struggle to bring the necessary changes to our legal system with a primary focus on tolerance for this community in our society and significant change in the lives of homosexuals of the nation concerning their present needs. The 5-Judge Constitution Bench, consisting of renowned judges like CJ Dipak Mishra, Dr D.Y. Chandrachud etc in their landmark judgment, held Section 377 of IPC unconstitutional, decriminalising sex between consenting adults of the same gender in the case of Navtej Singh Johar & Ors. v. Union of India (AIR 2018 SC 4321). This research paper talks about the disorder in the homosexual community in India and how it was affected before and after the decriminalization of Section 377 of the Indian Penal Code.

Keywords: *equality, constitution, fundamental right, homosexuality.*

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I. INTRODUCTION

In 2001, some NGOs filed a petition in the Delhi High Court challenging the constitutionality of Section 377 under Articles 14, 15, and 19 of the Constitution of India. In July 2006, in assistance to the Delhi High Court petition, a national AIDS control body put forward an affidavit asserting that "Section 377 acted as an impediment to HIV prevention efforts". In 2009, a landmark decision was passed by the Delhi High Court criminalising Section 377 as it adult consensual sexual acts. Few comprehended that this was not in contest to Indian culture and that the rule of the Victorian era was simply a legacy of European preconceptions against homosexuality. On 11 December 2013, the Delhi High Court decided that decriminalized consensual sex between adult homosexual men was overturned by the Supreme Court in a judgement made by Justice G.S. Singhvi, who retired on the same day. But the Supreme Court was also of the view that the government can, through legislation, repeal the statute.

II. HISTORY OF HOMOSEXUALITY IN INDIA

Homosexuality is a quality or characteristic of human being who is sexually or romantically attracted exclusively to people of one's own sex, in other words same gender. Section 377(3)[1] mentioned 'unnatural offenses' and stipulates that whoever voluntarily has carnal intercourse in contrary to the order of nature with any man, woman or animal, shall be penalized with imprisonment for life, or with imprisonment of either descriptive term which may extend to 10 years, and shall also be accountable to pay a fine.

The Supreme Court of India decriminalised homosexuality in the month of September 2018. This judgment however led to the uproar that India is adopting western ideologies and concepts of liberalism. But historians and mythology experts disagree. They are of the believe that this judgment revived the old

[1] Indian Penal Code, 1860

India, where love was rejoiced and accepted in all its forms. The Britishers prohibited consensual 'homosexuality' by introducing Section 377 in the Indian Penal Code in 1861. On the other hand, criminalisation of homosexuality denoted European ideology based on religious beliefs (specifically Christian beliefs) more than Indian instincts.

Ancient India proves the presence of diverse sexual orientations and the distinctiveness of transgender persons. With the help of religious texts and history, pre-colonial India seemed much more open-minded towards owning sexuality. One of the main arguments against homosexuality states that it challenges Indian cultural values and morals, terming it unnatural. Hence, it is necessary to understand the history of homosexuality in India and its incidence in Indian values and culture.[2]

III. LITERARY EVIDENCE

1. Hindu Scriptures

The variability in gender, for humans and yakshas, is a recognized concept in ancient India. Such peculiarity in gender can be trailed back to Indian history, from ancient epics and scriptures to medieval prose, poetry, art and architecture. There are certain instances highlighting the existence of homosexuality and the acceptance of homoeroticism in India.

In Valmiki's Ramayana it is stated that when Lord Hanuman was returning from Lanka after visiting Goddess Sita, he saw rakshasa women kissing and embracing each other. Krittivasa Ramayana speaks the tale of King Bhagiratha (the king to be known for bringing River Ganga from heaven to earth), that King Dilip had two wives, and he died without having an heir. Further, Lord Shiva emerged in the dreams of the queens and informed them that they would

[2] Deepanshi Mehrotra, *The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western*, https://www.lawctopus.com/academike/history-of-homosexuality-in-india/, Accessed: 4th September 2024.

bear a child if they made love to each other. The widowed queens did as been told, and one of them got pregnant, in the end giving birth to King Bhagiratha. Mahabharatha narrates the story of Shikhandini or Shikandi, who was accountable for the death of Deveratt Bhishma. She was born as a daughter to King Drupad and was brought up as man. As women were not allowed to fight in war of Mahabharata, she took the help of a yaksha to transform herself into a man to enter the battlefield of Kurukshetra and defeat eventually kill Bhishma. Matsya Purana has an enthralling story of Lord Vishnu who transitioned into a beautiful woman, 'Mohini'. He planned to trick the demons so that gods can drink all the amrut (holy water). After seeing Mohini, Lord Shiva fell in love with her, and their union led to the birth of Lord Ayyappa.

Chapter nine of Kamasutra by Vatsyayana deliberates on oral sexual acts, termed as 'Auparashtika', homosexuality and sexual activities amid transgender persons. Chapter Purushayita also pints towards 'svairini', a self-willed and liberated woman engaged in sexual activities with other women. The book also gives reference of men who are sexually fascinated by the same gender. The text denotes these individuals as Tritiya-Prakriti or the third nature/gender. Furthermore, Kamasutra acknowledges eight types of marriages. For example, the term 'gandharva vivah' refers to gay marriage or lesbian marriage. It literally translates into a union or living together without the approval of parents. The Rig Veda portrays the tale of Varun and Mitra, perpetually cited as Mitra-Varun. They are a same-sex couple held to be the representatives of the two halves of the moon.

2. Muslim Literature

The originator of the Mughal Empire was not himself devoid of attraction with respect to the same sex. In his Biography, Baburnama, Babur voices out about his attraction towards a boy named Baburi in Kabul. Babur talked about him in his biography and wrote the poem:

"May none be as I, humbled and wretched and love-sick; No beloved as thou art to me, cruel and careless."

Several Sufi poetries also reveal homoerotic or same-sex attraction:

- Sufi Saint Bulleh Shah had pre-modern ideas of sexuality and religion and described them in his writings. His poems flaunted the variability of his sexuality and his love for his murshid, Shah Inayat.
- Sarmad Kashani, an Armenian merchant who eventually became a Sufi Saint, while travelling in India for trade, he fell in love with a Hindu boy named Abhai Chand. He dumped his business and started living in Thatta with Abhai Chand as his student and later was arrested by Aurangzeb and beheaded.
- Sufi Saint Shah Hussain declares his love for a Hindu boy named Madho Lal in his works. Ultimately, Shah Hussain and Madho Lal were buried together in Lahore. Their work remains as the symbol of their divine love.
- Johan Stavorinus, wrote: "The sin of Sodom is not only universal in practice among them, but extends to a bestial communication with brutes, and in particular, sheep. Women even abandon themselves to the commission of unnatural crimes." He was a Dutch traveller, who wrote about male homosexuality among Mughals in Bengal in his Expeditions to the East Indies.[3]

3. Graphic Evidence

Apart from literary evidence, Indian history has plentiful of visual traces of homosexuality in India. Such records exist as art, paintings, sculptures all over the country.

[3] Deepanshi Mehrotra, *The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western*, https://www.lawctopus.com/academike/history-of-homosexuality-in-india/, Accessed: 4th September 2024.

- One of such chronicles is conserved in the temples of Khajuraho. The Khajuraho temple sculptures, fabricated by the Chandela dynasty between 950 to 1050 AD, display images of men exposing their genitals to other men and women who are erotically infolding each other. Scholars and historians have deciphered this as a recognition of homosexuality and same-sex love in those times. These sculptures stand as a proclamation of the sexual mutability of men, women and the third gender.
- Thirteenth-century Sun temple situated in Konark, eastern Orissa, also called Surya Devalaya, demonstrates similar imageries. The Sun temple is bestowed to the Hindu Sun god, with an outdoor appearance covered in sculptures portraying erotic scenes from the Kamasutra.
- Temples of Puri and Tanjore also represent explicit images of homosexual couples. Rajrani temple located at Bhubaneswar has a statue depicting two women pleasing each other in oral sex.
- Images at the caves of Ajanta and Ellora of Buddhist monas depicts the life of Gautam Buddha. The sculptures and paintings are apparent architecture of a high order. The critical aspect is that among the paintings of Budha are some other paintings exhibiting sensuality and erotic scenes. These paintings portray men and women are taking part in lovemaking with the same sex.

These visual records oppose any and every belief conjoined with the absence of homosexuality from the Indian culture. Moreover, these illustrations of one's sexuality were quite astonishing for the British colonisers, who anticipated to control such vivid displays of sexuality. Thus, the British colonisers affected India's understanding of sexuality beyond the interdiction of 'perverse' sex. Among other things, they also anglicised India's moral perspectives.

IV. SUPPORT FOR DECRIMINALISATION

On August 24, 2017, India's Supreme Court affirmed that the LGBTQ community has the right to express their sexual preferences under the Right to Privacy, but did not immediately overturn laws criminalizing same-sex relationships. On September 6, 2018, the Court decriminalized consensual gay sex. Section 377 of the Indian Penal Code (1861), which had criminalized homosexual acts and imposed severe penalties, was contested. Historically, similar laws included harsh punishments under Mughal rule and the Goa Inquisition for sodomy in Portuguese India, though lesbian acts were not addressed. [4]

1. ***Gay Pride March in Bangalore (2013)***

Akkai Padmashali, a key figure in the movement to repeal Section 377 of the Indian Penal Code, established "Ondede" in 2014 to advocate for a society that is inclusive and fair with regard to gender. Ondede, which translates to "union" in Kannada, seeks to provide a platform for discussions and support concerning the issues of dignity, voice, and sexuality, particularly for children, women, and sexual minorities.

Several organizations, such as the Naz Foundation and the National Human Rights Commission of India, backed efforts to decriminalize homosexuality. Influential personalities like Amartya Sen and Vikram Seth also publicly demanded the repeal of Section 377. Despite initial resistance from some government bodies, the Law Commission of India's 172nd report in 2000 recommended the law's repeal.

The United Nations[5] has urged India to decriminalize homosexuality, arguing that it would improve HIV/AIDS prevention efforts, as seen in countries where

[4] Ashok Row Kavi, *Expose the Hindu Taliban*, https://m.rediff.com/news/1998/dec/04fire.htm, Accessed: 3rd September 2024.

[5] Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity Report of the United Nations High Commissioner for

legal protections exist for men who have sex with men. In 2014, the release of a book on LGBTQIA and genderqueer rights, supported by Vanathi Srinivasan of the BJP in Tamil Nadu, was viewed positively by the LGBTQIA community.

V. COURT PROCEEDINGS AND RECENT POLITICAL LEGISLATION

In 2002, the Naz Foundation[6] filed a Public Interest Litigation (PIL) in the Delhi High Court challenging Section 377 of the Indian Penal Code (IPC). In 2009, the Delhi High Court ruled in favor of the Naz Foundation, declaring that criminalizing consensual non-vaginal sex between adults violated the fundamental rights guaranteed by Articles 14, 15, and 21 of the Constitution. However, the court upheld the section for non-consensual acts and acts involving minors.

On December 11, 2013, the Supreme Court overturned this decision[7] upholding the constitutionality of Section 377 and leaving any changes to the law to the Parliament. The Court dismissed a review petition against its verdict in January 2014, and by October 2014, 778 cases had been registered under Section 377, with 587 arrests. Efforts by Shashi Tharoor in 2015 and 2016 to introduce a Private Members Bill to decriminalize Section 377 failed.

In February 2016, the Supreme Court agreed to revisit its 2013 judgment. In August 2017, the Court declared the right to privacy a fundamental right, including the protection of sexual orientation under Articles 14, 15, and 21. On September 6, 2018, the Supreme Court invalidated the part of Section 377 criminalizing consensual homosexual acts but retained penalties for non-consensual acts and those involving minors or animals.

Human Rights, https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf, A/HRC/19/41, Accessed: 3rd September 2024.

[6] 2009 SCC Online Del 1762.

[7] Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1.

In 2017, the Ministry of Health and Family Welfare introduced educational materials through the Saathiya initiative, recognizing homosexuality as a natural form of attraction among adolescents and promoting respectful discussions about such feelings.[8]

VI. CONVERSION THERAPY

In February 2014, the Indian Psychiatric Society (IPS) released a statement in which it specified that there is no evidence to confirm that homosexuality is unnatural: "Based on existing scientific evidence and good practice guidelines from the field of psychiatry, the Indian Psychiatric Society would like to state that there is no evidence to substantiate the belief that homosexuality is a mental illness or a disease." In June 2018, IPS repeated its stance on homosexuality saying: "Certain people are not cut out to be heterosexual and we don't need to castigate them, we don't need to punish them, to ostracize them". Regardless of passing this statement by the IPS, conversion therapies are still performed in India. These practices usually comprise of electroconvulsive therapy (which may result in memory loss), the administration of nausea-inducing drugs, hypnosis, or more frequently used talk therapy where the individual is told that homosexuality is instigated by "insufficient male affirmation in childhood" or "an uncaring father and an overbearing mother". Conversion therapy can lead to depression, anxiety, seizures, drug use and suicidal tendencies among human beings.

1. Naz Foundation V. Govt. of NCT of Delhi (2009)

On July 2, 2009, the Delhi High Court ruled that parts of Section 377, which criminalized consensual sex between adults, were unconstitutional. This decision followed earlier advocacy by AIDS Bhedbhav Virodhi Andolan in 1991 and later efforts by the Naz Foundation (India) Trust in 2001.

[8] Dipak Kumar Dash & Sanjay Yadav /*The Times Of India, "Gurgaon court recognizes lesbian marriage"*, https://timesofindia.indiatimes.com/city/gurgaon/in-a-first-gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms, Accessed: 4th September 2024.

Initially, the Delhi High Court dismissed the case on technical grounds, but the Supreme Court intervened, allowing the case to proceed and recognizing the Naz Foundation's right to file it. Support also came from the group 'Voices Against 377'.

In its historic judgment, the Delhi High Court, led by Chief Justice Ajit Prakash Shah and Justice S. Muralidhar, ruled that Section 377 violated Article 14 of the Indian Constitution, which guarantees equality before the law. The Court stressed the importance of inclusivity and dignity for all. Although the Supreme Court later reserved its judgment on appeals against this ruling, the Attorney General acknowledged that Section 377's criminalization stemmed from colonial-era moral views.

2. Suresh Kumar Koushal v. Naz Foundation (2013)

Suresh Kumar Koushal and another v. NAZ Foundation and others is a 2013 two-judge Supreme Court case, comprising of G. S. Singhvi and S. J. Mukhopadhaya reversed the Delhi High Court *Case (Naz Foundation Supra)* and restored Section 377 of the Indian Penal Code.

This ruling was notwithstanding the urging of a group of mental health professionals who filed a set of written submissions to the Supreme court with explanation on the case based in their expert believes. The mental health professionals noticed observed that they frequently see LGBT or queer clients who suffer major psychological distress depression, anxiety, and more due to the threat and social condemnation posed by IPC Section 377. These mental health professionals claimed that IPC 377 causes LGBT and queer people to feel that they are "criminals," and that such reputation is a substantial part of their psychological distress.

3. Naz Foundation Curative Petition (2016)

On 2 February 2016, the final hearing of the curative petition put forward by the Naz Foundation and others came for trial in the Supreme Court. The three-

member bench supervised by the Chief Justice of India T. S. Thakur said that all the 8 curative petitions presented will be studied afresh by a five-member constitutional bench.

4. Right to Privacy verdict

On August 24, 2017, the Supreme Court of India ruled in (Retd.) Justice *K. S. Puttaswamy* v. *Union of India*[9][10] that the Right to Privacy is a fundamental right protected by Article 21 of the Indian Constitution. The court criticized Section 377 for being out of step with the constitutional principles of privacy, noting that sexual orientation is a key component of this right. It stated that discrimination based on sexual orientation violates personal dignity and equality.

The ruling affirmed that privacy and the protection of sexual orientation are central to the fundamental rights outlined in Articles 14, 15, and 21. While the curative petition challenging Section 377 is still under consideration, this decision sets the stage for potentially revisiting and possibly overturning the criminalization of homosexual sex, following the precedent set by the 2009 Delhi High Court decision.

5. Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice (2018)

This is a landmark case[11] of the Supreme Court of India in which it decriminalised all consensual sex among adults, including homosexual sex. The court was asked to define the constitutionality of Section 377 of the Indian Penal Code, a colonial-era law which, criminalised homosexual acts as an "unnatural offence" along with some other things. While the law criminalises all anal sex and oral sex, even between opposite-sex couples, it mainly affected

[9].

[10] AIR 2017 SC 4161.

[11] Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice AIR 2018 SC 4321.

same-sex relationships. On 6 September 2018, the court collectively declared the law unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". The decision was greeted as a landmark judgment for LGBT rights in India, with activists waiting outside the court cheering after the verdict was made prominent. Meanwhile the other elements of Section 377 concerning to sex with minors, non-consensual sexual acts such as rape, and bestiality remain in force.

On 27 April 2016, five people filed a new writ petition in the Supreme Court of India confronting the constitutionality of Section 377 of the Indian Penal Code. The petitioners appealed that the issues which they raised in their petition were unlike and distinct from those raised in the pending curative petition in the 2013, *Koushal v. Naz case*, in which the Supreme Court had sustained the constitutionality of Section 377.

This case was the first occurrence wherein the petitioners argued that they had all been directly distressed because of Section 377, claiming it to be a direct violation of fundamental rights. The disagreement to decriminalisation petitions was directed by Apostolic Alliance of Churches, Utkal Christian Council and Trust God Ministries. Advocate Manoj George stood on behalf of the first two and Senior Advocate KS Radhakrishnan represented on behalf of the third. The NDA government took a neutral perspective, leaving the verdict to the “wisdom of the court” as long as it applies to “consensual acts of adults in private”.

On 6 September 2018, the court gave its undisputed verdict, declaring portions of the law/rules relating to consensual sexual acts between adults unconstitutional. This decision turned over the ruling of 2013 in *Suresh Kumar Koushal v. Naz Foundation case (Supra)* in which the court supported the law. However, other parts of Section 377 relating to sex with minors, non-consensual sexual acts, and bestiality remained effective.

The court found that criminalizing consensual sexual acts among adults violated the constitutional right to equality. Chief Justice Dipak Misra described this criminalization as "irrational, arbitrary, and manifestly unconstitutional." The ruling affirmed that LGBT individuals are entitled to all constitutional rights, including protection from discrimination and the freedom to choose their partners. Justice Indu Malhotra noted that history owes an apology for the past mistreatment of the LGBT community and recognized that homosexuality is a natural aspect of human sexuality. The decision underscored that LGBT individuals are entitled to equal citizenship and legal protection.

6. Public opinion and specific reactions

The Government of India opted to abstain from the hearings, leaving the decision to the court's discretion.[12] The ruling Bharatiya Janata Party (BJP) largely refrained from commenting, though some members expressed opinions. BJP spokesperson G. V. L. Narasimha Rao supported the decision if it reflected global progress in gay rights, while Subramanian Swamy criticized it, worried about potential negative outcomes.

Human Rights Watch and Amnesty International lauded the ruling, and the United Nations viewed it as a significant step toward ensuring full rights for LGBTI individuals. The decision also motivated activists in neighbouring South Asian countries, where similar colonial-era laws might be challenged. For instance, Sri Lanka's analogous law is inactive but still on the books, while countries like Bangladesh, Myanmar, and Pakistan continue to grapple with public discrimination against LGBT individuals despite legal restrictions.

7. S. Sushma v. Commissioner of Police

[12] Menaka Guruswamy, *Section 377 Supreme Court hearing: Centre defers to 'wisdom of court'*; says IPC section violates Article 15, https://www.firstpost.com/india/section-377-supreme-court-hearing-centre-defers-to-wisdom-of-court-menaka-guruswamy-says-ipc-section-violates-article-15-4713811.html, Accessed: 3rd September 2024..

On April 28, 2021, Justice N Anand Venkatesh of the Madras High Court issued an interim order regarding a petition from two young women in a same-sex relationship. He took an unusual step of undergoing psycho-education to better understand homosexuality before making his decision. In his judgment, he stated that the duty to overcome ignorance and understand the LGBTQIA+ community falls on society, not just on queer individuals. On June 7, 2021, Justice Venkatesh banned Conversion Therapy in Tamil Nadu and Puducherry and recommended societal and institutional reforms to address prejudice against the LGBTQIA+ community, including updates to school and university curricula.

VII. CONCLUSION

Homophobia is widespread in India, where conversations about sexuality, including homosexuality, are uncommon. However, attitudes are gradually changing, with increased visibility of homosexuality in the media. Before the colonial-era law was repealed, several organizations pushed for the decriminalization of homosexuality and advocated for LGBTQ+ equality.

While India recognizes a third gender, LGBTQ+ individuals still suffer from violence and discrimination. Many gay rape victims don't report crimes due to lack of support. Although official data is limited, the government estimated 2.5 million self-identified gay individuals in 2012, but the actual number is likely higher due to fear of discrimination.

Article 14 of the Indian Constitution promises equality before the law and forbids discrimination, but it's uncertain if this fully covers homosexuals. The repeal of Section 377 offered hope to the LGBTQ+ community, who had endured considerable mistreatment under the law.

Prior to the repeal, LGBTQ+ individuals faced harassment, detention, and blackmail, and were often deterred from seeking medical help due to stigma and fear of exposure. While acceptance has increased since decriminalization,

social stigma remains, leading many to stay in the closet due to family and societal pressures. Homosexuality is still widely regarded as taboo in many parts of India.

Four years after the repeal of Section 377, LGBTQ+ individuals in India still face major challenges. They live in fear of being outed, experience bullying and blackmail at school and work, and worry about finding love. Although the legal change permitted consensual sex, societal acceptance and dignity are still lacking.[13]

The lack of specific laws for LGBTQ+ issues, such as rape and assault, underscores the need for gender-neutral legislation and better healthcare services. The rise in LGBTQ+ suicides signal a critical need for increased support and awareness. While repealing Section 377 was a significant step forward, genuine progress requires continued efforts to achieve full acceptance and equality for LGBTQ+ people in India.

[13] Ruth Vanita, *Homosexuality in India: Past and Present*, https://scholarworks.umt.edu/libstudies_pubs/5/, Accessed: 4th September 2024.

INTERNAL COMPLAINTS COMMITTEE IN HIGHER EDUCATIONAL INSTITUTIONS

Debajit Kumar Sarmah[*]

ABSTRACT

Internal Complaints Committee (ICC) in Higher Educational Institutions has an important role in protecting and upholding rights of women against sexual harassment. Every higher educational institution in the country mandatorily need to constitute an Internal Complaints Committee as per the UGC (Prevention, Prohibition and Redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015. An inquiry being conducted by the ICC must be in accordance with the provisions of the said regulations and procedure laid down therein. Court may set aside a finding of ICC on the issues of procedural infirmities; non-observance of the principles of natural justice in proceedings and on the question of proportionality of punishment, which is awarded by disciplinary authority based on gravity of the offence. In cases of sexual harassment inquired by ICC it is sufficient if there is an impact on the victim without probing into the intent of an offender. However, in doing so there are numerous procedures to be followed at every stage of inquiry. Failing to conform with the laid down procedures may result in procedural infirmities that are subject to judicial review. Though the POSH Act and the UGC Regulations provide a broad framework under which ICC functions, there are many details that are not very clearly stated therein. This paper endeavors to shed light on such details that are important for an inquiry by ICC. Some of the appeal cases of sexual harassment against

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the findings of ICC are also cited in appropriate places for detailed description.

Key words: *Internal Complaints Committee, Higher Education, Sexual Harassment, Inquiry, Punishment*

I. Introduction

Sexual harassment of women at workplace is a worst form of human rights violation as well as violation of her fundamental rights given in the Constitution. International Convention such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) as well as Article 14, Article 15, Article 21, and Article 19(g) of the Constitution are directly infringed by an act of sexual harassment at workplace. Such acts amount to the impairment of the right to live with dignity of a victim and create a hostile environment at workplace, thereby affecting the entire environment thereto. In the case of *Vishakha and Others vs. State of Rajasthan*[1], the Supreme Court of India gave a momentous judgement defining sexual harassment as well as setting some guidelines and norms to be followed at all workplaces or other institutions, until a legislation was enacted for the purpose. Though the judgement did spell out about disciplinary action, complaints mechanism, complaints committee etc. apart from the other directives to be strictly followed in cases of sexual harassment, service rules such as the Central Civil Services (CCA) Rules, 1965 were subsequently amended in furtherance of the spirit of this important judgement. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is the first legislation of its kind in India and the *Rules* under the Act were also made in the same year by the Central Government. In two years', the University Grants Commission (UGC) also came up with the UGC (Prevention, Prohibition and

[1] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013

Redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015 which is applicable to all Higher Educational Institutions (HEI) in India.

II. What amounts to Sexual Harassment at workplace?

The UGC (Prevention, Prohibition and Redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015 defines sexual harassment in as follows:

(i)"An unwanted conduct with sexual undertones if it occurs or which is persistent and which demeans, humiliates, or creates a hostile and intimidating environment or is calculated to induce submissions by actual or threatened adverse consequences and includes one or more or all of the following unwelcome acts or behaviour (whether directly or by implication), namely:

(a) any unwelcome physical, verbal, or non-verbal conduct of sexual nature.
(b) demand or request for sexual favours.
(c) making sexually coloured remarks
(d) physical contact and advances; or
(e) showing pornography

(ii)Anyone (or more than one or all) of the following circumstances if it occurs or is present in relation or connected with any behaviour that has explicit or implicit sexual undertones-

(a) Implied or explicit promise of preferential treatment as quid quo for sexual favours.
(b) Implied or explicit threat of detrimental treatment in the conduct of work.
(c) Implied or explicit threat about present or future status of the person concerned.

(d) Creating an intimidating offensive or hostile learning environment.

(e) Humiliating treatment likely to affect the health, safety, dignity, or physical integrity of the person concerned.

It needs mentioned here that an allegation of sexual harassment would have to fall within the ambit of any/all the ingredients in the aforesaid definition which is to be probed through an inquiry as per laid down procedure to ascertain the veracity of the allegation. Further, the word *'including'* in Regulation no. 2(o) implies that a particular place would be a workplace within the meaning of the aforesaid *Regulations* if it is situated in the campus of a HEI but not mentioned in the definition of workplace. Moreover, though the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 also defines *'sexual harassment'* as well as *'workplace'* in its provisions, however, the definitions mentioned in the *Regulations* would be directly applicable to all HEIs in this connection.

III. Internal Complaints Committee (ICC)

As per provision of the Regulation (4)[2] , the executive authority of a HEI shall constitute an Internal Complaints Committee (ICC) in accordance with the prescribed composition laid down therein. The *Regulations* restricts persons in senior administrative positions to be inducted as members of ICC to ensure autonomy in their functioning. It is also mentioned that an ICC can be constituted for a term of three year and a member, once appointed, cannot be removed until he/she completes three-year tenure except on specific grounds. But one-third the members may change every year, according to the *Regulations*.

[2] UGC (Prevention, Prohibition and Redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015

Composition of the ICC as laid down in the UGC (Prevention, prohibition, and redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015 needs to be strictly followed, failing which competent court may declare any finding of such an ICC as null and void. In this connection, the Hon'ble Supreme Court in the case *of Aureliano Fernandes. Appellant Versus State of Goa and Others*[3], directed as under:

> *The Union of India, all State Governments and Union Territories are directed to undertake a timebound exercise to verify as to whether all the concerned Ministries, Departments, Government organizations, authorities, Public Sector Undertakings, institutions, bodies, etc. have constituted ICCs/LCs/ICs, as the case may be and that the composition of the said Committees are strictly in terms of the provisions of the PoSH Act.*

Reference can be made here to Regulation. 4(d) which stipulates that the Internal Complaints Committee shall have a member from amongst non-government organizations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment[4], nominated by the Executive Authority. The idea behind such an external member as part of ICC is to ensure neutrality and impartiality of the proceedings and to avoid any extraneous consideration that may arise during inquiry. In the case of *Ruchika Singh Chhabra vs. M/S Air France India and Another*[5]**,** the appellant contended that the constitution of the ICC was contrary to the provisions of the POSH Act as the external member appointed on the committee was not associated with any non-governmental organization as such. The Court in this

[3] CIVIL appeal No. 2482 of 2014
[4] Rule 4. Of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013-
[5] LPA 237/2018, C.M. APPL.16802-03/2018, Delhi High Court

case while invalidating the composition of said ICC, along with the findings on the ground of procedural lapse, held as under:

> *It is important here to recollect and underline Parliamentary intent in enacting the Workplace Harassment Prohibition Act. The objective behind the requirement of a member from non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment in the Workplace Harassment Prohibition Act is to prevent the possibility of any undue pressure or influence from senior levels as was laid down by the Supreme Court in the case of Vishaka (supra). In fact, Parliamentary objective of providing a NGO member is to keep in ICC, an independent and impartial person in position to command respect and compliance from influential management This court in U.S. Verma, Principal and Delhi Public School Society Vs.*

The High Court of Delhi, in this connection, in the case of National Commission for Women and Ors[6]., also held as under:

> *"that the entire thrust of the complaints committee procedure and its underlying premise is that the complainant employees are assured objectivity and neutrality in the inquiry, insulated from the employers' possible intrusions. To achieve that end, the requirement under law with respect to the qualification of the independent member on the ICC is an indispensable necessity for meting out justice under the Workplace Harassment Prohibition Act."*

IV. Inquiry by the Internal Complaints Committee (ICC)

[6] 163 (2009) DLT 557)

In a landmark judgement in the case of *Medha Kotwal Lele and Others* v. *Union of India and Others*[7] the Supreme Court held that the complaints committee under the Vishaka Guidelines shall be deemed to be the Inquiry Authority. The relevant portion of the judgement in this regard is reproduced below:

> *"Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka case*[8] *will be deemed to be an inquiry authority for the purposes of the Central Civil Services (Conduct) Rules, 1964 (hereinafter call the CCS Rules) and the report of the Complaints Committee shall be deemed to be an inquiry report under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the Rules."*

Secondly, any inquiry into a complaint of sexual harassment by the ICC relies on preponderance of probability as the standard of proof. This is because an inquiry proceeding by the ICC is also a disciplinary proceeding within the meaning of proviso to Rule 14(2) of the CCS(CCA) Rules, 1965. The proviso to Rule 14(2) of the CCS(CCA) Rules, 1965 reads as follows:

> *" provided that where there is a complaint of sexual harassment within the meaning of rule 3 C of the Central Civil Services (Conduct) Rules, 1964, the Complaints Committee established in each Ministry or Department or Office for inquiring into such complaints, shall be deemed to be the inquiring authority appointed by the disciplinary authority for the purpose of these rules and the Complaints Committee shall hold, if separate procedure has not been prescribed for the Complaints Committee for holding the inquiry into the complaints of sexual harassment, the inquiry as far*

[7] (2013) 1 SCC 311
[8] (1997) 6 SCC 241: 1997 SCC (Cri) 932, SCC at p. 253,

> *as practicable in accordance with the procedure laid down in these rules.*

All departmental proceedings, including ICC, are civil proceedings and in such civil proceedings standard of proof required is preponderance of probability not beyond reasonable doubt. The preponderance of probability as standard of proof in departmental proceedings was laid down by the Supreme Court for the first time in the case of *Union of India vs Sardar Bahadur*[9], in which the matter pertained to borrowing of money by a central government employee from a representative of a firm which was an applicant for licences, and though the application was made to a section in which the respondent was not working, it would in due course have to be dealt with by the section in which the respondent was working. The charge was that he borrowed a sum of money without obtaining previous sanction of the Government and placed himself under pecuniary obligation to the lender and thereby contravened r. 13(5) of the Central Civil Services (Conduct) Rules. The court held:

> *A disciplinary proceeding is not a criminal trial and therefore the standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt. If the inference that the lender was a person likely to have official dealings with the respondent was one which a reasonable person would draw from the proved 'facts of the case, the High Court was wrong in sitting as a court of appeal over a decision based upon it.*

In this connection, it may be also useful to refer to section 11(3) of the POSH Act that provides as under:

[9] Sardar Bahadur (1972) 4 SCC 618)

For the purpose of making an inquiry under sub-section (/), the Internal Committee. or the Local Committee, as the case may be, shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents; and

(c) any other matter which may be prescribed.

Thirdly, Sub-rule (4) of Rule 7 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 stipulates that the Complaints Committee shall make an inquiry into the complaints *"in accordance with the principles of natural justice"*. The Supreme Court in *State Bank of India vs. P.K. Narayan Kutty*[10] *held that* the principles of natural justice must be read into the service rules and for the application of the rules of natural justice it is not necessary that some prejudice must be caused. The court further in the case of *Aureliano Fernandes. Appellant Versus State of Goa and Others*[11] reiterated on the principles of natural justice in the following manner:

'The twin anchors on which the principles of natural justice rest in the judicial process, whether quasi-judicial or administrative in nature, are Nemo Judex In Causa Sua, i.e., no person shall be a judge in his own cause as justice should not only be done, but should manifestly be seen to be done or the rule against bias and Audi Alteram Partem, i.e. a person affected by a judicial, quasi-

[10] 2003 (2) SCC 449

[11] CIVIL appeal No. 2482 of 2014

judicial or administrative action must be afforded an opportunity of hearing before any decision is taken'

Thus, in an inquiry into a sexual harassment complaint by the ICC it is very important to see that a person against whom a complaint of sexual harassment is alleged has got the right to know the evidence against him and there should not be decision post-haste i.e., no decision should be taken in a hurried manner without complying with the prescribed procedure laid down in law. In this connection, the ICC is duty bound to comply with the procedure prescribed in the *Regulations*[12] and the Act[13] for making a complaint and inquiring into the complaint in a time bound manner. Sufficient safeguards in the form of responsibilities have also been imposed upon the ICC to ensure that the complainant, victims, witnesses, or covered individuals feel safe during inquiry by the ICC. Interim redressal measures have also been provided during the pendency of an inquiry by the ICC.

V. Suspension of an employee during ICC inquiry

A disciplinary authority may also like to place on suspension an employee against whom a complaint of sexual harassment is received until inquiry by ICC is completed or upon initiation of proceedings. It is primarily because in any educational institution there may be people who might feel uncomfortable if such an employee continues taking classes or attending office unless the allegation is not proved or found to be frivolous in nature by the ICC. It is also that sexual harassment amounts to 'misconduct' in accordance with service rules applicable to large no. of HEIs. In this regard, Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 needs a mention here:

[12] UGC Regulations, 2015

[13] As per regulation 2(b) of the UGC Regulations, 2015 'Act' means the Sexual Harassment of Women at Workplace(Prevention, Prohibition and Redressal) Act, 2013.

Rule 10. (CCS(CCA) Rules, 1965: Suspension

(1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the President, by general or special order, may place a Government servant under suspension-

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(aa) where, in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest of the security of the State; or

(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial:

Provided that, except in case of an order of suspension made by the Comptroller and Auditor - General in regard to a member of the Indian Audit and Accounts Service and in regard to an Assistant Accountant General or equivalent (other than a regular member of the Indian Audit and Accounts Service), where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.

However, 'Suspension' as an interim redressal measure does not figure in regulation no. (9.), UGC regulations[14] that deals with measures of interim redressal. There is also no explicit provision under the Act of 2013[15] for placing an employee under suspension but under Section 11(1) it is mentioned that the Internal Committee or the Local Committee, as the case may be, shall, where the respondent is an employee, proceed to make inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent. As mentioned earlier, inquiry proceedings of sexual harassment

[14] The UGC (Prevention, Prohibition and Redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015

[15] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

are exclusively governed by the Act of 2013 along with the Rules and Regulations being framed thereunder. The Internal Complaints Committee alone has the jurisdiction to inquire into complaints of sexual harassment at workplace by virtue of an amendment to the CCS(CCA) Rules[16], which may also be the case with respect of service rules applicable to State Universities. The aforesaid amendment in the CCS (CCA) Rules is reproduced below:

> *The proviso to Rule 14(2) of the CCS (CCA) Rules 1965 provides that the complaints committee established in each Ministry or Department or office enquiring into such complaints shall be deemed to be the inquiring authority appointed by the disciplinary authority and the committee shall hold the inquiry so far as practicable in accordance with the procedure laid down in those rules. Similar provisions exist in the relevant service rules of the Central Government servants not, governed by CCS (Conduct) Rules / CCS (CCA) Rules.*

In the case of *Ananta Prasad vs The Gauhati High Court*[17] the respondent lodged a written complaint u/s 9 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 against the petitioner and the said written complaint had resulted in a proceeding under the Act. When the said proceeding was already initiated, an independent disciplinary proceeding under the Assam Services (Discipline and Appeal) Rules, 1964 (in short, the Rules of 1964) was also initiated against the petitioner, purportedly on the same cause of action, wherein an order of suspension was also passed against the petitioner.

The issues for consideration by the court were at what stage the Rules of 1964 stands invoked in a case where the ICC begins its inquiry under the Act of 2013

[16] The Central Civil Services (Classification, Control and Appeal) Rules, 1965
[17] WP(C)/1604/2020

and whether the suspension order in the present case is justified in case the Rules of 1964 stands invoked from the stage where the ICC proceedings are initiated. After examining rival contentions from both the parties, the court came to the conclusion that even in respect of a proceeding under the Act of 2013, a person against whom there is an allegation of sexual harassment can be placed under suspension provided the appointing authority or the disciplinary authority or the authority concerned has reasons to believe that further allowing the employee to remain present in the work place would adversely affect the proceeding that had been initiated. Although Section 12 of the Act of 2013 i.e. action during pendency of inquiry does not include 'suspension' but proceedings by the ICC are also disciplinary proceedings within meaning of proviso to Rule 14(2) of the CCS(CCA) Rules, 1965. Therefore, even when such a proceeding against allegation of sexual harassment is pending, competent authority can place an employee under suspension because special law shall prevail over the general law to the extent the special law is a deviation from the general law but beyond that for matters special law does not exclude by express provision, the General Law shall prevail. The court also held that:

> *"Section 12 of the Act of 2013 is to save the woman from the immediate situation, whereas the power to suspend an employee under Rule 6 of the Rules of 1964 is for disciplinary authority to prevent the employee concerned from interfering with the proceeding. The purport and purpose of the two provisions being different, it cannot be said that Section 12 of the Act of 2013 would take away the power under Rule 6 of the Rules of 1964".*

VI. Right to know the evidence by the parties to be used against them in ICC inquiry

Rule of fair hearing requires that every person before an administrative authority exercising adjudicatory powers has the right to know the evidence to

be used against him. This principle of natural justice was established in the case of *Dhakeshwari Cotton Mills v. Commissioner of Income Tax.*[18] An ICC being an administrative authority vested with quasi-judicial powers, the above principle of natural justice is also applicable in sexual harassment inquiries by the ICC. But a question arises is that whether confidentiality of sexual harassment proceedings get compromised in allowing a respondent to know the evidence given by a complainant against him? Further, is it alone sufficient that the respondent inspects the evidence against him before the ICC without being supplied with the copies of the same? In this context, the Supreme Court in Aureliano *Fernandes. Appellant Versus State of Goa and Others*[19], held as under:

> *"However, women centric the Guidelines and the Act may have been, they both recognize the fact that any inquiry into a complaint of sexual harassment at the workplace must be in accordance with the relevant rules and in line with the principles of natural justice. The cardinal principle required to be borne in mind is that the person accused of misconduct must be informed of the case, must be supplied the evidence in support thereof and be given a reasonable opportunity to present his version before any adverse decision is taken."*

It is to be realized that the prohibition of publication or making known contents of complaint and inquiry proceedings as contemplated under Section 16 of the POSH Act is only in relation to the public, press and media. This prohibition and the non- obstante clause therein for the RTI Act cannot be stretched to putting any such restriction on seeking evidence by the parties, more so by the respondent who shall require them for defence as huge stakes are involved for

[18] AIR 1955 SC 65
[19] CIVIL appeal No. 2482 of 2014

him. All the evidence which are submitted to the ICC by a complainant in a complaint of sexual harassment are to be supplied to the respondent by the ICC. In case the ICC does not supply such evidence to the respondent and only allows inspection, it would be still open for the respondent to seek copies under the RTI Act as the same is not exempted from disclosure under Section 8 of the said Act. Moreover, as a matter of right in such sexual harassment proceedings, defence of the respondent such as his responses with respect to the complaint and supporting evidence, if any, must also be disclosed to complainant for fair inquiry.

VII. Punishment in Sexual Harassment cases inquired by ICC

The Internal Complaints Committee (ICC) is an inquiring authority, not a disciplinary authority, and therefore, cannot award any punishment. However, the ICC shall recommend punishment as per Regulation 10 of the UGC Regulations[20] which provides that punishment to be as per service rules if the offender is an employee, and in cases of students, four different forms of punishment can be awarded. Apart from punishment, there is the provision of compensation to be paid to the aggrieved woman under provision of the UGC Regulations[21].

ICC has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 by virtue of Section 11, sub-section (3), of the Act[22]. However, it is important to realize that the power is limited for the purpose of making an inquiry into an allegation of sexual harassment in respect of summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of documents and any other matter which may be

[20] The UGC (Prevention, Prohibition and Redressal of sexual harassment of women employees and students in higher educational institutions) Regulations, 2015
[21] *Ibid*
[22] *Supra note 15, page 8*

prescribed only. Like any civil court, ICC cannot impose any punishment as such.

On the question of punishment, the Hon'ble Supreme Court in the case of *State of U.P. and others* Vs. *Nand Kishore Shukla and another*[23], held that:

> *"It is settled law that the court is not a court of appeal to go into the question of imposition of the punishment. It is for the disciplinary authority to consider what would be the nature of the punishment to be imposed on a Government servant based upon the proved misconduct against the Government servant. Its proportionality also cannot be gone into by the Court. The only question is: whether the disciplinary authority would have passed such an order. It is settled law that even one of the charges, if held proved and sufficient for imposition of penalty by the disciplinary authority or by the appellate authority, the Court would be loath to interfere with that part of the order. "*

In the case of *Deputy Commissioner, KV Sangathan* vs. *J. Hussain*[24] *, the apex court held* as below:

> *"The penalty should not only be excessive but disproportionate as well, that too the extent that it shocks the conscience of the Court, and the Court is forced to find it as totally unreasonable and arbitrary thereby offending the provision of Article 14 of the Constitution. It is stated at the cost of the repetition that discretion lies with the disciplinary/appellate authority to impose a particular penalty keeping in view the nature and gravity of charge. Once, it is found that the penalty is not shockingly disproportionate, merely*

[23] AIR 1996 SC 1561
[24] 2013 (10) SCC 106

because in the opinion of the Court lesser punishment could havebeen more justified, cannot be a reason to interfere with the said penalty".

In the case of Bhuwan Chandra Pandey vs Union Of India And Others[25]*, the court therefore held as under:*

"When charge(s) of misconduct are proved in an enquiry, the quantum of punishment to be imposed in a particular case is essentially in the domain of the departmental authorities. Courts would not take upon itself the task of the disciplinary/departmental authorities to decide the quantum of punishment or the nature of penalty to be awarded. Limited judicial review is available, to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty shocks the conscience of the Court".

Disciplinary authority while deciding on quantum of punishment on the cases of sexual harassment may consider the severity of sexual harassment caused apart from other factors deemed necessary and expedient from case-to-case basis. In this connection, reference may be also made to the CCS (CCA) Rules, 1965 which is being followed by many HEIs. As per Rule 11 of the said Rules, for good and sufficient reasons, penalties which may be imposed on a government servant range from Minor Penalty of Censure to Major Penalty of Dismissal from Service. Therefore, every misconduct of sexual harassment may not necessarily have good and sufficient reasons for dismissal of an employee from service also.

VIII. The court's interference on the findings of ICC

The writ jurisdiction of the High Court under Article 226 of the Constitution is limited in the matters of departmental proceedings that include ICC

[25] Writ Petition (S/B) No.153 of 2013

proceedings as well. Judicial review on findings of ICC, therefore, can happen only in three aspects, namely,

i. on the issues of procedural infirmities.
ii. non-observance of the principles of natural justice in proceedings.
iii. on the question of proportionality of punishment, which is awarded by disciplinary authority based on gravity of the offence.

There is a no. of judgements affirming the limitation of judicial review in departmental proceedings. In *Bhuwan Chandra Pandey vs Union Of India And Others*[26] it was held that:

> *"The High Court may also interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice, or in violation of the statutory rules prescribing the mode of enquiry, or where the authorities have disabled themselves from reaching a fair decision by some consideration extraneous to the evidence and the merits of the case, or by allowing themselves to be influenced by irrelevant considerations or where the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in proceedings for a writ under Article 226 of the Constitution".*

[26] Writ Petition (S/B) No.153 of 2013

Similarly, in the case of *Somnath Sahu* v. *the State of Orissa and Ors*[27] it has been held that:

> *"Where there is some evidence which the disciplinary or the appellate authority have accepted, and which evidence may reasonably support the conclusion that the officer was guilty of improper conduct, it is not the function of the High Court, in proceedings under Article 226, to review the evidence and to arrive at its own independent finding on the evidence. The High Court may interfere where the statutory authority has acted without or in excess of its jurisdiction or where it has committed an error of law apparent on the face of the record".*

In the landmark case of *Apparel Export Promotion Council vs. A.K. Chopra,* in a matter related to sexual harassment at the workplace, where, aggrieved by the decision taken by the disciplinary authority of accepting the report of the Inquiry Officer and removing the respondent therein from service on the ground that he had tried to molest a lady employee, the Supreme Court had set aside the order of the High Court that had narrowly interpreted the expression "sexual harassment" and held

> *"In departmental proceedings, the disciplinary authority is the sole judge of facts and once findings of fact, based on appreciation of evidence are recorded, the High Court in its writ jurisdiction should not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable".*

IX. Cognizance of Offence under the Act

The POSH Act provides as under:

[27] (1969) 3 SCC 384

Section 27: Cognizance of offence by courts. (1) No court shall take cognizance of any offence punishable under this Act or any rules made thereunder, save on a complaint made by the aggrieved woman or any person authorised by the Internal Committee or Local Committee in this behalf.
(2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Every offence under this Act shall be non-cognizable.

In view of the above, an obvious concern is also that can there is parallel proceedings of sexual harassment cases by Internal Complaints Committee as well as by regular criminal courts.? The answer is in affirmative as any proceeding by an ICC which may lead to disciplinary action does not necessarily percolate the right of a victim to file a police complaint that may lead to criminal action. Therefore, remedies can lie both from the ICC and Court at the same time should the victim so desires. Section 28 of the Act clearly mentions that provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

X. Limitation of Statutory Mandate

While conducting ICC enquiries it is also important to recognize that the mandate of the Act is limited to sexual harassment only and nothing beyond that. The Committee, as such, is neither competent nor have the necessary jurisdiction to give any finding or recommendation on any other conduct of the parties other than sexual harassment only, if found established. The ICC is strictly bound by the mandate laid down in the Act and Regulations framed thereunder. The role of the ICC is created by the statute and is also limited by the statute. In this regard Delhi High in the case of *Bibha Pandey vs Punjab*

National Bank & Ors,[28] held as under:

> *"Moral Policing' is not the job of the Management or of the ICC. Any consensual relationship among adults would not be the concern of the Management or of the ICC, so long as the said relationship does not affect the working and the discipline of the organisation and is not contrary to the Rules or code of conduct binding on the said employees. It is only if a complaint is made of sexual harassment under the Act that the Management can constitute the ICC to enquire into the same. The ICC cannot make comments on the personal conduct of the parties and the ICC's jurisdiction would be restricted to the allegations of sexual harassment and whether a complaint is made out or not, to that effect".*

In this case, the ICC recommended action against the parties on the ground that their conduct was inappropriate and unbecoming of officers or employees of the Bank that resulted in filling of a chargesheet against the petitioner.

XI. Frivolous complaint

It is laid down in the UGC Regulations[29] that for filling false or malicious complaints of sexual harassment a person may be given the same punishments as given to an offender of sexual harassment under the Regulations i.e. as per service rules for employees and specific punishments laid down in Regulation no.10(2) for students.

XII. Conclusion

In conclusion it can be said that every inquiry made by ICC should be fair and impartial. Fair and impartial inquiry is possible by following just and fair procedures only. Though the law may not explicitly state justness and fairness

[28] W.P.(C) 3249/2017 & CM APPL. 14126/2017
[29] *Supra note 20, page 11*

in categorical terms, cases decided by courts have laid down norms to be followed by ICC to maintain the sanctity of inquiry. At every stage of inquiry, it is also important to remember that the entire process should be transparent to the parties concerned, howsoever, without compromising the confidentiality of the proceedings as required to be maintained as per the Act.

BOOK REVIEW

Gautam Bhatia

Horizontal Rights: An Institutional Approach, Hart Publishing, 2023.

Reviewed by: Nikhil Erinjingat*

I. In the beginning

Gautam Bhatia says that the genesis of his book began with his DPhil thesis[1] at the University of Oxford between 2018 – 2021.[2] However, he had been writing on horizontality even prior to 2018 on his widely read blog 'Constitutional Law and Philosophy'.[3] In an article, he also engages with horizontality of Article 15(2) of the Constitution of India.[4] But one can trace fragments of this concept developing in his mind and writings, back to his article on State surveillance and the right to privacy, published in 2014.[5] In the conclusion of the article, he suggests the need to challenge the public-private law dichotomy vis a vis enforcement of fundamental rights. But since this inquiry was beyond the scope of that article, he leaves it there.[6]

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[1] Gautam Bhatia, 'Horizontal Rights: An Institutional Approach' (DPhil thesis, University of Oxford 2021).

[2] Gautam Bhatia, Horizontal Rights: An institutional approach (Hart Publishing 2023) vii.

[3] Gautam Bhatia, 'Horizontality under the Indian Constitution: A Schema' (*Constitutional Law and Philosophy*, 24 May 2015) <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/> accessed on 24 March 2024.

[4] Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 1(1) Asia Journal of Comparative Law 87-109.

[5] Gautam Bhatia, 'State Surveillance and the Right to Privacy in India: A Constitutional Biography' (2014) 26 National Law School of India Review 127, 154.

[6] ibid.

Bhatia has been thinking and writing on various facets of this topic for almost a decade before it culminated as this book in 2023. His journey with horizontality still continues on his blog with posts on judicial approach to horizontality across jurisdictions, specifically India and Kenya.[7]

Bhatia's book is not a just a theoretical exposition of a new model for horizontal enforcement of fundamental rights. Rather, he takes the readers from theory to application. Bhatia divides the book into two parts, broadly. In the first part he addresses the theoretical aspects- default verticality, State action, indirect and direct horizontality, and bounded direct horizontality. He ends Part I by laying down the theoretical foundation for his 'institutional framework'. In Part II he deals with the application of the institutional approach model he proposes. He takes two examples of contemporary significance- platform work, and domestic relationships and unpaid labour. He closes the book by offering the prospects of institutional approach. It must be noted that Bhatia considers this approach as a *"beginning of a solution"*.[8]

He begins the book by asking the first principal question on the assumptions of default verticality. He mentions three assumptions that are mutually reinforcing- unitary sovereignty, abstract freedom and individual responsibility. He arrives at these assumptions based on Frank

[7] Gautam Bhatia, 'Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors' (*Constitutional Law and Philosophy*, 27 January 2023) < https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/> accessed on 01 May 2024; Gautam Bhatia, 'Addressing Boundary and Transplant Issues in Horizontality: The Judgment of the Kenyan High Court in Busia Sugar Industry vs Agriculture and Food Authority' (*Constitutional Law and Philosophy*, 26 February 2024) < https://indconlawphil.wordpress.com/2024/02/26/addressing-boundary-and-transplant-issues-in-horizontality-the-judgment-of-the-kenyan-high-court-in-busia-sugar-industry-vs-agriculture-and-food-authority/> accessed 01 May 2024.

[8] *Bhatia* (n 2) 226.

Michelman's argument that it is the legitimate unitary concentration of coercive power in the State that makes the it a unique threat to the fundamental rights.[9] He goes on the to explain these concepts, to argue that, it is these assumptions that put the State at the center of fundamental rights enforcement. He takes the example of the Bill of Rights as the archetypical case for default verticality. He uses several US Supreme Court cases, primarily, the *Civil Rights cases*[10] and *Flagg Bros Inc v. Brooks*[11]. What is interesting is that while he is using these cases to build the argument that judges keep banking on the assumption of verticality, he is also highlighting the onset of the undercurrent of institutional approach in the dissenting opinions, such as of Justice Harlan[12] and Justice Frankfurter[13].

His depth of enquiry is truly noteworthy. After laying down the foundation for the book in the first chapter, he proceeds to unpacking how courts, while attempting to eschew assumptions of default verticality, keep going to back to it. But instead of just looking at case law, he asks the first principal question of form and function of private parties and the State. He heavily relies on US Supreme Court cases to illustrate that the courts attempt to relate the private party to either its ability to affect rights [14], or function equivalency[15] to the State, delegation,[16] and monopoly[17].

[9] Frank Michelman, 'Constitutions and the Public/Private Divide' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 305-306; *Bhatia* (n 2) 41.
[10] *The Civil Rights Cases* 109 US 3 (1883).
[11] *Flagg Bros Inc v. Brooks* 436 US 149 (1978).
[12] *The Civil Rights Cases* 109 US 3 (1883) 28.
[13] *Monroe v. Pape* 365 US 167, 225 (1961).
[14] *Marsh v. Alabama* 326 US 501 (1946).
[15] Bhatia refers to *Flaggs Bros Inc v. Brooks* (n 11) 168; *Rendell-Baker v. Kohn* 457 US 830 (1981) 842.
[16] Bhatia uses *Marsh v. Alabama* 326 US 501 (1946).

Bhatia also points out the shortcomings of the 'valuable interest diagnosis'.[18]

II. Insights from Van der Walt and Thomas

Bhatia's institutional approach is a refinement of both Van der Walt[19] and Thomas'[20] approach to horizontality. He chooses to build on their models since both the authors reject the assumptions of default verticality,[21] something which Bhatia considers indispensable to construct a horizontality framework. He instead of just summarizing their work and criticizing it, looks at their work through the lens of the assumptions of default verticality. This method prevents the reader from losing sight of the main objective (and argument) of the book without being lost in the works of other scholars.

Van der Walt argues that some private disputes are not merely dispute between private parties but are essentially disputes with an institutional set up. He takes the example of *Shelly v. Kraemer*[22] to say that such refusal of white property owners to sell to 'blacks', is not a private dispute but promotion of public inequality.[23] However, he qualifies the application of his bounded horizontality model by limiting its application to institutional conflict between social majorities and minorities.[24] Further, Thomas' model also proposes bounded horizontality. She bases it on the difference in power and vulnerability between the private parties

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[17] Bhatia refers to South African case- *Allpay Consolidated Investment Holdings (Pty) Ltd v. Chief Executive Officer of South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC).
[18] *Bhatia* (n 2) 45.
[19] Johan Van der Walt, *The Horizontal Effect Revolutions and the Question of Sovereignty* (De Gruyter, 2014).
[20] Jean Thomas, *Public Rights, Private Relations* (OUP 2015).
[21] *Bhatia* (n 2) 72.
[22] 333 US 1 (1948).
[23] *Van der Walt* (n 19) 180.
[24] ibid 117.

and the dependency of one on the other.[25] She specifies that the dependency must be in relation to the dominant party's control over the other party's access to goods,[26] and in relation to an 'undertaking' between the parties.[27]

Bhatia criticizes Thomas' approach for transplanting the assumptions of individual-State relationship (i.e. control and dependency) into private relationship.[28] He further says that her model applies only in cases of formal private relationship without giving due regard to cases where the goods are created out the private relationship (such a access to patented lifesaving medicine).[29] On the other hand, Bhatia argues that while Van der Walt successfully avoids the assumptions of default horizontality, he limits the application of his model to instances where the hierarchies in private relationship gives rise to an institutional conflict between the social majorities and minorities.[30] For Bhatia, Van der Walt firstly fails to justify why a private dispute should be the foreground to resolve an institutional conflict. And secondly, Bhatia says, terms like social majorities and minorities are not clearly defined.[31]

III. Bhatia's institutional approach

As previously mentioned, Bhatia's approach draws insights from Van der Walt and Thomas' models of bounded horizontality. He attempts to provide a framework that eschews the limitations of their models and also rejects the assumptions of default verticality.[32] He argues for his institutional approach by explaining what constitutes an 'institution' and

[25] *Thomas* (n 20) 19, 189.
[26] ibid 223; *See Bhatia* (n 2) 77.
[27] ibid 193; *See Bhatia* (n 2) 78.
[28] *Bhatia* (n 2) 82.
[29] ibid 81.
[30] ibid 83.
[31] ibid 84, 85.
[32] ibid ch 5.

secondly, the relation between the power differences between individuals in an institution and the enforceable rights and remedies.[33]

Bhatia engages with several scholars across political ideologies to define an institution, which is the trigger to invoke this approach of enforcement. He draws from Marx the idea of substantive relationship between individuals; placing them differently in the institutional structure.[34] Bhatia also uses Iris Young's understanding of justice in the context of 'domination and oppression'[35] and depersonalized power to locate the idea of justice within an institutional structure and relative locations within the framework, leading to structural injustice. [36] He also notes that Young's explication of power and justice from an institutional lens highlights how private relationship in an institutional scheme mutually reinforces the private relationship as well as the institution. [37] Following Young's argument, Bhatia picks up three examples from feminist literature of Sandra Fredman[38] (domestic relationship and unpaid work), [39] structural injustices in labour law,[40] and lastly the institutional and structural discrimination in scholarly literature.

i. A Comparative voyage

While Bhatia heavily relies on theory and scholarly literature, the book also looks at the judicial practice vis a vis horizontality in different

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[33] ibid 87.
[34] Bhatia refers to- Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality, and Rights* (Palgrave Macmillan 2019) ch 2.
[35] I M Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 3.
[36] *Bhatia* (n 2) 94, 95.
[37] *Young* (n 25) 52.
[38] Sandra Fredman, 'Endangering Socio-Economic Rights' (2009) 25 South African Journal of Human Rights 410, 423.
[39] *Bhatia* (n 2) 96.
[40] Virginia Mantouvalou, 'Legal Construction of Structures of Exploitation' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 188.

jurisdictions, giving the readers not just a taste of theory but also its practice. Bhatia briefly analyses judicial decisions from the United States of America, Africa and Germany to understand how judiciary has dealt with issues of institutional injustices. To explain the US experience, he refers to the *Civil Rights Cases*[41] where the majority did not place racial discrimination within an institutional framework. However, even though Justice Harlan (who dissented) went a bit further to hold that racial discrimination emanates from institutional inferiority, he still ended up equating private persons to government servants (i.e. the State).[42] Bhatia refers to *Shelly v. Kraemer*[43] and Justice Douglas' opinion in *Reitman v. Mulkey*[44] that recognized the institutional foundation of racial discrimination. He refers to recent decisions from the United States to show that the judges are now cognizant, even though partially, of inequality between the whites and blacks due to structural and institutional inequalities of racism.[45] He also refers to the South African decision in *Du Plessis*[46] where Mahomed DP linked racism to institutional injustice and racism by individuals as 'private and institutional desecration of constitutional values. But Bhatia comes to the conclusion that even in South Africa, the cases of horizontality were seldom touched by the Courts and often left to the Parliament.[47] He also explores the German experience briefly as an example of horizontality for issues other than race.[48]

ii. Indian currents

[41] 109 3 (1883) 7.
[42] ibid 62, 41; *Bhatia* (n 2) 99.
[43] 333 US 1 (1948).
[44] 387 US 369 (1967), 385 (Douglas J).
[45] *Bhatia* (n 2) 101; Bhatia cites- *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* 576 US 519 (2015); *Jones v. Alfred Mayer Co* 392 US 409 (1968) 423.
[46] *De Plessis v. De Klerk* 1996 (5) BCLR 658 [75] (Mohamed DP).
[47] *Bhatia* (n 2) 103.

Bhatia devotes significant time on explaining the approach of the Indian Constitution vis a vis horizontality of fundamental rights. He takes three rights that are textually horizontal- Article 15(2), 17, and 23. What is interesting here is that Sudhir Krishnaswamy considers Article 24 to be horizontal as well.[49] Even Seervai includes Article 24 in his list of horizontal rights in the Indian Constitution.[50] Whereas Granville Austin's enumeration of horizontal rights is identical to Bhatia's.[51] There is a difference of opinion among scholars on which rights have horizontal effect. Notwithstanding which rights have horizontality, Bhatia observes (w.r.t Articles 15(2), 17 and 23) that- i. these rights are specific (unlike a general clause in the Kenyan or South African Constitution); ii. Article 15(2) and 17 related to social institutions; iii. the language of these rights show that framers were prompted to make these rights horizontal by virtue of India's historical experiences with society and social institutions.[52] He then takes us through each of these three rights and analyses them through three decisions of the Supreme Court of India (one for each provision).

To analyze Article 15(2), he refers to the *Indian Medical Association v. Union of India*[53] *(IMA case)* and the Constituent Assembly Debates.[54] He remarks that the Court in this case identifies the institution of caste and also how individuals are relatively placed in the caste's institutional

[48] It is worth noting that Bhatia does not explain the principle of *Drittwirkung* (synonymous with indirect horizontality) which requires the courts to read private law in consonance with the German Basic Law and if it cannot be read in consonance, then strike down the private law.

[49] Sudhir Krishnaswamy, 'Horizontal application of fundamental rights and State action in India' in C Raj Kumar and K Chockalingam (eds), *Human Rights, Justice, And Constitutional Empowerment* (OUP 2007) 59.

[50] H M Seervai, Constitutional Law of India (4th edn, Universal Law Publication) 374.

[51] Granville Austin, The Indian Constitution: Cornerstone of a Nation (OUP 1966) 51.

[52] *Bhatia* (n 2) 105.

[53] (2011) 7 SCC 179.

[54] *Bhatia* (n 2) 108.

structure. And how the relative position creates economic and social disadvantages to individuals in the lower position.[55] In regard to Article 17, he primarily engages with Justice Chandrachud's (as he was then) decision in *Indian Young Lawyers' Association v. State of Kerala*[56] *(Sabarimala case)* where, Bhatia claims, that Justice Chandrachud without explaining in a lot of words, was dealing with the institution of patriarchy that creates power difference and hierarchical relation within the institutional structure based on gender.[57] He similarly elucidates that the 'institution' in an instance of violation of Article 23 is the market. He explains how the institutional norms and practices determine the freedom individuals had to freely set the terms of contract.[58] The court in such cases qualified its rationale by limiting the application of such approach to cases of minimum wages.[59] Bhatia also backs his argument on market being an 'institution' using not just case law but also the writings on Ambedkar,[60] which categorically proves his point. However, what Bhatia does not seem to have mentioned is that Ambedkar, though was concerned of the exploitative power of capitalism and private employers, later changed in his mind on enforceability of Directive Principles of State Policy, which is essentially the bedrock of socio-economic rights.[61]

[55] ibid 109-110.
[56] (2019) 11 SCC 1.
[57] *Bhatia* (n 2) 113.
[58] ibid 116.
[59] ibid 117.
[60] B R Ambedkar, 'Memorandum and Draft Articles on the Rights of States and Minorities, 24 March 1947' in B Shiva Rao (ed), *The Framing of India's Constitution: Select Documents*, vol 11 (Universal Law Publishing 1968) 100.
[61] *See* Constituent Assembly Debates 09 December 1948, vol 7, p 953; See also B R Ambedkar, 'Memorandum and Draft Articles on the Rights of States and Minorities' in B Shiva Rao and others, *The Framing of India's Constitution: Selected Documents* (Vol 2, Indian Institute of Public Administration 1966) 97

Bhatia's commitment to make his argument palatable even for a novice reader can be evidenced by the flow chart he presents to explain the reasoning in *IMA, Sabarimala* and *PUDR* case.[62]

Bhatia explains how his institutional approach moves away from the assumptions of default verticality. Firstly, while addressing the '*sovereignty'* assumption, he says that the institutional approach does not attempt to transplant existing individual-State relationship on private relationships. One of the triggers is to find an institutional structure that disallows the individual to exit from it. He refers to Robin and Gourevitch's example of the market as a workplace where no one individual has monopoly, yet there is monopoly.[63] Bhatia puts the right bearer at the center for the determination of monopoly and consequently, the institution.[64] Further, to counter the *'abstract freedom'* assumption of default verticality, Bhatia, firstly, relied on Grimm's conception of 'constituted freedom' as freedom within social institutions.[65] He argues that the relative location of an individual within the social institution must be taken into consideration if there is a normative violation of freedom. Secondly, he incorporates a wider understanding of coercion and compulsion vis a vis absence of meaningful freedom.[66] Lastly, to challenge the notion of the *'individual responsibility'* assumption through institutional approach he seeks insights from Lawrence Tribe's subjugation thesis[67]- where the power difference between the two party keeps one of them in a subjugation and hence private law is not

[62] ibid 114, 119.
[63] *Bhatia* (n 2) 125; Corey Robin and Alex Gourevitch, 'Freedom Now' (2020) 52 *University of Chicago Law Journal* 384, 388.
[64] *Bhatia* (n 2) 126.
[65] D Grimm, *Constitutionalism: Past, Present and Future* (OUP 2016) 190.
[66] *Bhatia* (n 2) 126.
[67] Lawrence Tribe, *American Constitutional Law* (2nd edn, Foundation Press 1988) 1718.

horizontal, as it is believed to be.[68] And this, he argues, avoids arbitrary balancing of rights of two parties, but rather assigns right on one and duty on the other, based on their relative position in the institutional hierarchy (re-horizontalisaiton[69]).[70] This also solves the issues of imposing fundamental rights (of duty) on an individual even though the inequality arises from the institution, since the attempt here is to create equality in the relationship that is unequal.[71]

IV. Theory Meets Application

In the second part of the book, Bhatia applies his institutional approach to 'institutions', namely, platform work, and domestic relationships and unpaid labor. His objective is to illustrate that institutional approach is not merely a theoretical exposition. This sets Bhatia's piece apart from other literature that argue for moving away from existing understanding of fundamental rights enforcement in the Indian context.[72] Although Bhatia does take example of *PUDR case* that applied Article 23 of the Constitution horizontally, he does not seem to argue how the institutional approach can apply to a scenario like India where the Constitution specifically recognizes horizontality of a few fundamental rights, and not others. It is not tough to argue horizontality of Article 23, because Article 23 is horizontal by itself. It is pertinent to mention that Bhatia does acknowledge the limitations of his approach and says that it is not to supplant private law, but to supplement it.[73] He observes that several

[68] *Bhatia* (n 2) 127, 128.
[69] *Van der Walt* (n 19) 7.
[70] *Bhatia* (n 2) 128, 129.
[71] Bhatia relies on Thomas and also Fredman's insight to make this argument.
[72] *Krishnaswamy* (n 52); M P Singh, 'Fundamental Rights, State Action and Cricket in India' (2005) 13(2) Asia Pacific Law Review 203; David Bilchitz and Surya Deva, 'The Horizontal Application of Fundamental Rights in India: "Kishor" (Baby) Steps in the Right Direction?' ((*IACL-AIDC Blog*, 25 April 2023) <https://blog-iacl-aidc.org/2023-posts/2023/4/25/the-horizontal-application-of-fundamental-rights-in-india-kishor-baby-steps-in-the-right-direction> accessed 28 April 2024.

Constitutions are now either generally or specifically adopting some form of bounded horizontality. Therefore, in a jurisdiction like South Africa and Kenya, where there is a general provision providing for horizontality of fundamental rights and the courts have not developed a consistent theory to apply horizontality, his institutional approach can aid in deciding the scope of bounded direct horizontality.[74]

V. Further Reflection

Bhatia's book is an excellent exposition on how to address the issues of non-State entities violating fundamental rights of individuals. He proposes an approach that moves away from default verticality. However, from an Indian perspective, I could not find arguments for how a provision that is expressly or impliedly vertical can be applied horizontally, using institutional approach, to directly bind non-State entities. Another peculiarity about the book is the absence of reference to *Kaushal Kishor v. State of UP*[75] in which the Supreme Court of India held that Article 19 and 21 can be enforced against private persons. Interestingly, Bhatia does engage with *Kaushal Kishor* on his blog and makes scathing remarks on the majority's decision.[76] He says that future courts will find *Kaushal Kishor* "simply incapable of application".[77] This is the point I was attempting highlight at the beginning of the paragraph. How a bounded horizontality model, such as institutional approach, is going to apply in instances where the fundamental rights are explicitly or impliedly vertical. In such situations, moving away from the

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[73] *Bhatia* (n 2) 170, 199.
[74] *Bhatia* (n 2) 214.
[75] (2023) 4 SCC 1.
[76] Gautam Bhatia, 'Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors' (*Constitutional Law and Philosophy*, 27 January 2023) <https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/> accessed on 06 May 2024.
[77] ibid.

assumptions of default verticality might not be constitutionally permissible. Perhaps that is why Krishnaswamy suggests the need for a new metric to interpret Article 12, to expand the scope of enforcement of fundamental rights.[78]

Institutional approach proposed in this book provides for a concrete theoretical framework to apply direct bounded horizontality within a robust theoretical framework where the Constitution implicitly or explicitly, or generally or specifically, recognizes (permits) the scope for horizontality.[79]

[78] *Krishnaswamy* (n 49) 72.

[79] Despite laying down a theoretical framework that will enable the courts across jurisdiction to apply horizontality with theoretical consistently, he modestly ends the book as the beginning of a conversation.

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