ISSN 2249-4421

Previously UGC Approved Journal No. 42016

ALSD STUDENT JOURNAL

VOLUME X

December 2021

STUDENT JOURNAL

A Journal of Amity Law School, Delhi
(A Peer Reviewed Journal)

VOLUME X

2021

AMITY LAW SCHOOL' DELHI

ISSN 2249-4421 Previously UGC Approved Journal No. 42016

ALSD Student Journal

A Journal of Amity Law School, Delhi

(A Peer Reviewed Journal)

Volume X 2021

Founder
Dr. Ashok K. Chauhan
Founder President, Ritnand Balved Education Foundation

Patron-in-Chief
Dr. Atul Chauhan
President RBEF and Chancellor, AUUP, India

Patron
Prof. (Dr.) Dilip K. Bandyopadhyay
Chairman, Amity Law School, Delhi

BOARD OF EDITORS

Faculty Supervisory Editor
Prof. (Dr.) Arvind P. Bhanu
Acting Director, Amity Law School, Delhi

Faculty Advisory Board
(Dr.) Santosh Kumar
Associate Professor, Amity Law School, Delhi

Editor-in-Chief
Ayesha Priyadarshini Mohanty

STUDENT EDITORS

Senior Editor

Ms. Sharona Mann

Editors

Aparna Gupta
Bhoomika Agarwal
Ragini Kanungo
Saloni Sharma
Sidhant Thukral Arora
Subha Chugh

Editorial Advisory Board

Ms. Neerja Gurnani
Associate at Quinn Emanuel
LLM, University of Oxford

Ms. Aashna Chawla
Associate at Chamber of Mr. Ciccu Mukhopadhaya
LLM (Proposed Class of 2023), Harvard Law School

Ms. Gunjan Mehta
PhD Candidate,
Symbiosis Law School, Pune

Ms. Beatrice Senese,
LLB, Luiss Guido Carli,
University of Rome

Ms. Sabiha Goksu Tezer
LLB, Istanbul University

Mr. Apar Gupta
Executive Director, Internet Freedom Foundation
LLM, Columbia Law School

Mr. Manaved Nambiar
MALD, The Fletcher School at Tufts University

Mr. Hardeep Singh Chawla
Associate (Direct tax),
Khaitan & Co.
LLM, NYU School of Law

Mr. Raghav Sabharwal
Former (Asst.) Advocate General, Govt. of Haryana,
Supreme Court of India

Mr. Kyle Skelton,
LLM, University of Law, England
Barrister, Hon'ble Society of Middle Temple

Published and Distributed by
ALSD Student Journal

ALSD Student Journal is published annually.

ISSN: 2249-4421
©2022 ALSD Student Journal All rights reserved.

Disclaimer:
Views expressed in the ALSD Student Journal are those of the contributors. The Editors and ALSD do not necessarily subscribe to the views expressed by the contributors. The Editors and ALSD disclaim all liability and responsibility for any error or omission in this publication. In the case of binding defect, misprint, missing pages etc., the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the journal should be addressed to:
Editor,
ALSD Student Journal
(An Institution of the Ritnand Balved Educational Foundation) *(Affiliated to Guru Gobind Singh Indraprastha University, New Delhi)* F-1 Block, Sector 125, ALSD Student Journal University Campus Noida-201313 (U.P.) Tel: 0120-4392681
E-mail: alsdelhi@amity.edu Website: www.amity.edu/als

Electronically Published at:
https://www.amity.edu/als
(Amity Law School Delhi website)
F-1 Block, Amity University Campus
Sector -123, Noida – 201301

MESSAGE FROM THE CHAIRMAN

Research forms the foundation of legal profession. Amity Law School, Delhi has always encouraged its students to develop research oriented legal acumen. In furtherance of the said objective, the Student Journal Editorial Board of ALSD publishes a theme specific annual journal, which has been aiming to be platform of generation of ideas, creating pathways for innovations and discourses on contemporary issues from across the country. It is overwhelming to see young minds contributing towards effective legal narrations in the form of research papers, notes and case comments based on analysis. The journal has been successful in ensuring exchange of academic and legal knowledge amongst students of ALSD with other students of Indian law colleges and universities.

I congratulate all the student authors who have contributed in this volume of this journal, and the members of the Student Journal Editorial Board

who have worked intelligently and diligently over the past few months to publish the journal. Wish everyone all the best for their future endeavours to make India the best country of the world.

Prof. (Dr.) Dilip Kumar Bandyopadhyay
Patron, ALSD Student Journal
Chairman, Amity Law Schools

MESSAGE FROM THE ACTING DIRECTOR

It gives me immense pleasure to state that ALSD Student Journal has completed the 10th year of its publication. Building on the legacy, the journal has strived to bring together students across India and the world to contribute towards contemporary legal discourses. The themes of the journal have been such that it accommodates the socio-legal issues of that particular year. The ALSD Student Journal has always provided a platform to the student researchers in law to bring forth their strength of generating ideas and research-based views on theme specific issues. No doubt, the ALSD Student Journal Editorial Board have gone an extra mile during the current pandemic to accomplish their task of e-publication of their journal.

This year the journal celebrates a decade long readership focusing on theme '*Contemporary Legal Issues and Intersectionality with Public Policy*.' The EB received a record number of innovative contributions since its publication, the best of which have made it to the final content of the journal. It is indeed gratifying to see the students, the future leaders of legal field, engage in fruitful research and articulate the same in the form of research papers, short notes and case comments. The ALSD Student Journal Editorial Board has been at the forefront of the process of publishing the journal and has efficiently worked reviewing, editing the papers and interacting with authors to make the journal paramount amongst its contemporaries.

I am sure the journal would be a delightful read among students, academicians and professionals alike, initiating a healthy debate and discussion on the future of litigation and public policy. Congratulations to all the student authors and the ALSD Student Journal Editorial Board.

Prof. (Dr.) Arvind P. Bhanu
Faculty Supervisory Editor,
ALSD Student Journal
Acting Director, ALSD

MESSAGE FROM THE EDITOR IN CHIEF

The Amity Law School, Delhi Student Journal, is proud to present this special edition issue commemorating the 10th anniversary of its publication. Contemporary societies are undergoing rapid transformation. With pressing challenges emerging in technological, environmental, social, economic, and political landscapes, the core of justice lies in ensuring the protection and full realisation of the rights of the people. Such actions are continuously manifested in judicial pragmatism and prowess. Yet, as our authors point out there is much more work to do.

The journal explores the development of the modern administrative state through the theme "*Contemporary Legal Issues and Intersectionality with Public Policy*". The exploration of wide range of disciplines that impact the creation of new rights and explore the archaic power structures are navigated. Growing in the shadows of a humanitarian crisis that implored the antecedents of policymaking on the lives of people, the legal

scholarship of authors is a wonderful reminder of the confluence of litigation, policy, and public discourse.

Extending my heartfelt gratitude to our alumnus, teaching staff and administration for their earnest efforts, we have continued with the editorial philosophy of celebrating the original contribution of authors. I am particularly grateful to my team, the Student Journal Editorial Board members, Sharona, Aparna, Bhoomika, Ragini, Saloni, Sidhant and Subha, who have consistently poured hours of hard work and toil, despite personal circumstances for this journal to see the light of the day. Thank you for the incredible opportunity to learn from each of you.

To Professor (Dr.) Arvind P. Bhanu, Acting Director, Amity Law School, Delhi, I extend my deep appreciation and reverence for his consistent encouragement and entrusting us wholeheartedly in this endeavour. I also express my gratitude to our Faculty and Editorial Advisory Board members for their guidance. Lastly, to our readers, without your support this journal would not exist. I hope this journal stands the testament of times and leaves behind a legacy for the future. It has been an honour to serve as the Editor-in-Chief of the Amity Law School' Delhi Student Journal.

Sincerely,

Ayesha Priyadarshini Mohanty
Editor- in- Chief
Vol. 10

MESSAGE FROM THE SENIOR EDITOR

The Amity Law School Delhi Student Journal is scripting history by entering into the publication of its 10th anniversary edition. Staying true to its tradition, this Volume has upheld its high standards in terms of quality and content of the papers published. I am pleased to share that after rigorous review of the numerous articles and notes submitted for publication, this Volume embraces the novel take of authors on *Contemporary Legal Issues and Intersectionality with Public Policy*.

Despite the raging pandemic, the authors were able to bring forth the rigors of juristic thought by expressing their opinions on diverse topics ranging from pre-pack insolvency to third party funding in arbitration. I truly hope that this edition of the journal serves as a steadfast reminder that one must not be disheartened by the testing times but continue to explore the limits of their ideas through the mighty power of words.

In the end, I congratulate all the authors for their hard work and extend my heartfelt appreciation to the entire editorial team, working under the able guidance of our esteemed faculty members, in bringing about a successful fruition of this Anniversary edition.

Sharona Mann
Senior Editor
Vol. 10

ALSD STUDENT JOURNAL **ISSN 2249-4421**

A Journal of Amity Law School Delhi **Volume X**
(A Peer – Reviewed Journal) 2021

INDEX

SHORT NOTE

ABOUT THE THEME OF THE JOURNAL

Volume X of the ALSD Student Journal seeks to augment the discussion on ***Contemporary Legal Issues and Intersectionality with Public Policy.***

The dynamicity and complexities in the legal arena provide pathways to explore and contribute to its transformation. In a modern administrative state, there is a strong need to balance the art of policymaking with the judicial processes that promote and sustain democratic values. This allows us to appreciate the interpretations of law from a holistic lens, cross cutting across the various disciplines of international issues, technological challenges, regulatory policies and promote analytic rigour to our national context.

Combined with the intersectional theories of economics, political sciences and social issues, the journal bridges the divide between policy and legal diaspora. The Journal invited contributions not limited to, the following sub-themes –

- Restructuring rights in constitutional democracies with judicial prowess
- Future of healthcare regulations for promoting access to equitable treatment for all
- Probe into the gendered divide under Populist-Nationalist regimes

- Convergence of private and public international laws vis-à-vis human rights laws and dispute resolution process
- Cross-border foreign disputes emerging under environmental and energy agreements
- Challenges to procedural enforcement under Intellectual Property Laws
- Future of cyber regulations impacting national security
- Changing narratives in antitrust laws and regulations vis-à-vis technology, innovation, and economy
- Mapping the progress in insolvency and bankruptcy laws
- Analysis of the underlying issues in investment arbitration and international law
- AI rethinking internet regulation and impacting accountability, transparency, and ethical fairness

RIGHT TO DISSENT: A JURISPRUDENTIAL ANALYSIS IN LIGHT OF THE PLATONIC AND MILL'S CONCEPTION OF LAW

*Indrasish Majumder and Kirti Malik**[1]

ABSTRACT

The Citizenship (Amendment) Act, 2019 attracted mass criticism across the nation through peaceful demonstrations. These demonstrations however became violent in certain parts of India. Delhi has been the epicentre of publicity due to police attacks on protesting students, prolonged mob activity in and around Jafrabad and other such incidents. This flagrant abuse of human rights and abuse of state power has been criticised globally. Recent events on similar lines such as the Bhima Koregaon incident and censorship of the media in Kashmir (post-Art. 370 revocations) indicate a general trend to track down the core fundamental freedoms entitled by the Indian Constitution.

In his book "Crito" Plato sees opposition as counterproductive to society since a person must uphold democratic order, rather than to undermine it by disobeying the law. Mill, however, claims that the best platform for criticism is the democratic system since politics is the collaboration of individual ideas.

*[1] Authors are *4th Year B. A L.L.B [Hons.] students at National Law University Odisha, Cuttack*

With these radically similar concepts of dissension applied in completely different ways, the dilemma between political and personal responsibilities is exposed in the writings of Plato and Mill. Although dissension is a healthy type of personal speech, there are limits to the degree to which it can be beneficially followed. The paper would make a comparative study of the repression of dissension in ancient Athens and the contemporary Indian scenario considering the Platonic and Mill's conception of law.

Keywords: Dissent, Freedom of Speech, Plato, J.S. Mill, Harm Principle

I. INTRODUCTION

Since ancient times, the issue of liberty has been discussed by philosophers and scholars from around the world. The subject became more complicated and intricate with the creation of first cities and with the formulation of the notion of a nation-state, redefining freedom within the confines of the four walls of a legal framework became essential.

A pioneer among philosophers, Plato's entire life was dedicated to the deliberation of diverse philosophical questions. *Dialogues, one* of Plato's most famous works deliberates on the multiple aspects of human life which scrutinises the question of individual liberty. The Dialogue and Republic discuss the concept of freedom and liberty in the chassis of such a social structure.The other philosopher from Britain interested in the study of liberty was the economist and politician John Stuart Mill. The liberalism theory has been much enhanced by his views featuring the

concept of absolute liberalism. The notion of liberty and the relationship between an individual, the nation-state, society and freedom has been primarily dealt with by Mill in his book ``On Liberty".

The theories propounded by Mill might showcase some similarity to the works of ancient philosophers such as Plato, Aristotle and Socrates. However, despite the certain elements of commonality between Mill's philosophy on liberty and that of ancient greek philosophers, Mill focused more on an individual's complete independence from the state authorities and social forces. Plato much in contrast was in favour of the idea of absolute control of the political and private life of citizens. Indeed, the examination of the principle of freedom remains relevant at every time because such principles are often seen as part of modern democratic values and contemporary liberal political systems. This paper investigates the distinctions between two theoretical frameworks of freedom as described by Mill and Plato, and also the similarities of their theories concerning the notion of liberty. It attempts to distinguish between contemporary perception of liberty and the insights of previous philosophers on the same issue.

The paper disperses light on the current manner in which preventive detention laws are used, as exemplified by the Bhima Koregaon incident and justified how Plato would have perceived the constitutionality of the laws, from his book the Republic. The authors have attempted to correlate Plato's conceptions on dissent to the current Preventive detention laws.

Secondly, the paper analyses why Plato believes dissent and the freedom of speech should be constrained. The section also discusses the Bhima Koregaon incident and the curbing of Press Freedom in Jammu and

Kashmir, wherein the Detention laws were upheld and the police were bestowed the power to carry out arbitrary arrests. The incidents and Plato's reasoning, when studied in togetherness, will reveal certain commonalities, which the authors have attempted to glean.

Thirdly, the paper deliberates on a different aspect of Plato's teachings on the "Political obligations" of Athenian citizens. In this chapter of the Republic, Plato expounds the circumstances under which revolution against the ruling class is justified. Considering his teachings, the authors attempt to analyse how the arbitrary manner in which the laws were used in Kashmir, after the abrogation of Article 370 violates the Fundamental rights of citizens and the principle of "Audi Alteram Partem". To substantiate the authors argument reference to certain case laws have been made wherein the Supreme Court refused to ratify Preventive Detention laws, as it infringes the fundamental rights of citizens. The authors co-relate the Fundamental rights of this era to Plato's definition of Traditional laws and attempts to manifest how Plato would have supported the demonstrations and protests against the arbitrary and abusive manner in which the laws are ratified by the police.

II. DISSENT AND PREVENTIVE DETENTION WITHOUT TRIAL PER PLATO'S THEORY OF LAW

Considerable contemporary attention is being received by the issue of political obligations. Under the twin stimulus of arbitrary arrest and suppression of dissent, some scholars and citizens are raising voices and their questions have significantly reignited the political philosophy debates. In any society, dissent is rarely welcome and mostly sneered upon by the government as an unwelcome diversion. Sufficient examples of

suppression of political dissent has been showcased not only by political dictatorships, but also in democracies at times. Actions against dissent need to be sugar-coated to portray the repressive actions as a security measure to safeguard communal harmony and national security.[2]

Countries such as India with its supercilious democratic values are not so different. The emergency of 1975 may be regarded as the worst such incident in that line, but there were a plethora of unofficial competitors for the same. Serious questions have been raised by the recent arrest of certain social activists under the draconian UAPA (Unlawful Activities Prevention Act) by the NIA (National Investigation Agency). Several activists namely writer and poet Varavara Rao, lawyer Sudha Bhardwaj, academic Vernon Gonsalves, human rights activists Arun Ferreira and Gautam Navlakha alleged of having Maoist links were arrested on August 28, 2019, under the UAPA. The violence according to the police was incited upon the proclamation of certain inflammatory speeches, by the above-named persons. After their arrest, five eminent luminaries including the renowned Historian Romila Thapar moved to the Supreme Court and filed a Writ Petition in Public Interest under Article 32[3], claiming an infringement of the Fundamental Rights of the arrested under article 19, 21[4]. The petitioners contended, not only did the arbitrary arrest of the five activists constitute an infringement of their Fundamental Rights, but had a chilling effect on the entire citizenry, who fearing a similar backlash would be disinclined towards exercising their rightful

[2]Arun Simon, Suppressing Dissent at : https://medium.com/illumination-curated/suppressing-dissent-63a449d86f9a (last visited on 20 January, 2021).
[3]The Constitution of India , art. 32.
[4]Constitution of India , art. 19.

entitlements (especially those fundamental rights dealing with life, liberty and freedom). A unique bail condition under "Section 43(D)5 of the UAPA"[5] allows an accused to be denied bail if the court has reasonable grounds for believing the accusations against the accused are "prima facie true" under which the activists are still incarcerated.

The accused in the immediate case was detained under the UAPA without a proper trial. "Human Rights Watch" has asked the Indian government to drop charges under the Act against the two detainees Anand Teltumbade and Gautam Navalka for allegedly inciting caste-based violence. The Indian government has been urged to safeguard the rights of freedom of expression, peaceful assembly, and association by repealing the draconian UAPA by Human Rights Watch and other Human Rights groups.

Undoubtedly the above-mentioned legislation paves the path for a totalitarian regime characterised by the suppression of dissent by the preventive detention of those who speak out against the ruling party. The controversy over the debate - democratic or totalitarian?[6] relates to Plato's teaching on contemporary problems. Distinguishing two questions in this regard will be useful whether 1) dissent and 2) the disobedience of law should be justified? The questions even though related are distinguishable and concretely concerns Plato.

[5]Unlawful Activities Prevention Act, 1967, s 43(D)(5).
[6]Hanna Pikin, 'Obligation and Consent-I' 59 American Political Science Review 991 (1965).

Plato supports the suppression of dissent in his books "the Republic", "Statesman" and "The Laws".[7] A form of censorship has been mentioned in the Republic limiting the independent voicing of opinions by citizens and ancillary attitudes critiquing the regime. Plato in his book *The Statesman* prohibits an individual from questioning the law and does not recognise "right to free speech" because most men according to him are incapable of knowing the justice.[8] Plato opines if the ordinary human being is allowed to seek truth by way of trading of ideas with their fellow humans, self-interest would end up being adopted as the rule of conduct and justice would be relative.[9] He is apprehensive of allowing individuals to define justice as per their convenience believing that such a levy would bring no good and would corrupt those few who are actually capable of understanding and delivering justice. It would only bring in foray a baffling number of conceptions and an amateurish enquiry into the nature of justice.[10] This will not only be futile, but also a harmful exercise threatening the very superstructure of the nation.

III. PLATO'S THEORY ON POLITICAL OBLIGATION: WHO ARE CITIZENS OBLIGATED TO OBEY AND WHY?

It is surprising that the members of the constituent assembly who bore innumerable sufferings because of Preventive Detention laws during their fight for independence, approbated constitutional sanctity to such laws under the very Constitution that they drafted. The validation of these laws

[7]Karl R Popper, *The Open Society and Its Enemies* 53-86 (Harper, New York, 4thedn. 1962).
[8]Plato, *Republic II* 377c-380d, 605a – 608b.
[9]Plato, *Republic VIII* 537e-540d.
[10]Plato, *Republic V* 573ce.

derives from Part III of the Constitution dealing with Fundamental Rights. Part III guarantees fundamental rights, however certain parts of Part III; certain parts of Article 22 for instance are perhaps fundamental dangers and not rights. They pose danger to the very citizenry for the benefit of whom the constitution was enacted. On 26th February 1950, under the first act of Preventive Detention, common dissenters and disturbers of the law and order were not put behind bars but a leader of A.K Gopalan's reputation was. It was exemplified by this very first arrest under the act, the legislation was aimed to curb political dissent, and ever since until the very recent Bhima Koregaon incident or the crackdown on media in Kashmir, the legacy has followed. Plato, as has been explained above, favoured a system of check and balances on the freedom of speech, expression and association.

There are two assumptions to Plato's theory on the suppression of freedom of speech. Plato enumerates proper ways of conduct that can be deduced by investigation of man as a creature who chooses from multiple courses of actions and ultimately rules on the basis of the most appropriate choice. Plato contends that justness and reasonableness is inherent in human nature: "the righteousness of the excellence of men". In the *Republic* he argues "reason" is the ability to distinguish between the right rules of conduct and knowing justice is dispensable only by philosophers. Therefore, most men, Plato argues, rely on other men for the right rules of conduct, to ensure justice, and only when such rules are provided for and adhered to they can be just.[11] Consequently, to ensure justice and stability

[11]Plato, *RepublicIX* 590ae.

Plato argues unquestioned adherence to the higher authorities (philosophers in ancient Athenian society) is essential.

Plato distinguishes the unsocialised man living outside the state from the socialised man one who lives in the state.[12] He comments the unsocialised man recognises no constraints on his behaviour and that in such a man appetite rules. The socialised man, on the other hand, being governed by reason observes restrictions on his behaviour and has temperance to consider certain things; e.g. the unrestricted exercise of freedom of speech and expression or dissenting against nation-state, ought not to be done merely out of fear of punishment but because they render negative impacts on the welfare of the citizenry in general.The philosopher believes the unrestrained imposition of restrictions by the state on the individual is preferable than an interference followed by the enforcement of juster restrictions.

However, his belief is not to be confused to mean that a transition in the traditional order will be initiated by the unsocialised men of "irrational mass". Plato strictly argues against philosophers and common citizens participating in the daily political affairs of the state and asks them to eschew politics believing they cannot be successful revolutionary leaders. How does then, Plato ensure Justice, while alienating philosophers and common citizens from the political sphere.

[12]Leo Strauss and Joseph Cropsey (ed), *History of Political Philosophy* 38 (University of Chicago Press, 1st edn. 1963).

Justice according to Plato is ensured in each part of the state and soul doing its respective duties. The lower, that is appetite ought to be governed by the higher, that is, reason. The constraints imposed by the nation-state through laws and regulations, over time, become internalized. The recognition and observance of these laws and rules ensure cooperation among individuals. Therefore, a man should respect and observe these constraints constituting the creation of the state, for him/her to realize the virtue he/she is capable of. The state's purpose is making men good..Therefore, man imbibes an ethical sense while adapting himself to the state and develops a sense of what ought and ought not to be done for the preservation of harmony and public interest.[13]

IV. PREVENTIVE DETENTION WITHOUT TRIAL: THE SUPPRESSION OF DISSENT AND THEIR CONFLICT WITH FUNDAMENTAL RIGHTS AND TRADITIONAL LAWS

The usage of strict national security laws against political dissenters, in the lack of any violence, is accursed in all cases. Revocation of Article 370 from Jammu & Kashmir was followed by extensive detentions and arrests under the former State's Public Safety Act, 1978 thereby allowing two years of detention, that too without trial.[14] Such preemptive measures can seem appealing on the lines of age-old adage of prevention over cure, but the stark truth is that such measures only facilitate a shortcut to merely suppress the problem for the time being and can never eradicate it. If

[13]Plato, *Republic VI* 500d-501d; MB Foster, *The Political Philosophies of Plato and Hegel* ch 1 (Russell and Russell,New York, 1965).

[14]Abhinav Sekhri, Not fair, just or reasonable at: https://www.thehindu.com/opinion/op-ed/not-fair-just-or-reasonable/article30905962.ece (last visited on 25 January, 2021).

anything, such laws give extraordinary powers to state authorities and provide them an easy route to discharge their function. This shortcut is indeed a trap and security minded officers are often tantalised to use these exceptional laws even under general circumstances. This brings down such laws from their exceptional status thereby resulting in normalisation of practices like preventive detention.[15] This is accompanied by gross avoidance of procedure and comes down harshly upon liberties and human rights of people.

The number of arrests and detention made under preventive detention laws is on a consistent rise.[16] Exceptional measures are justified under exceptional situations, but as exemplified by the Bhima Koregaon incident and the curbing of press freedom in Jammu & Kashmir, these laws operate as a threat to personal liberty and natural justice in their present form and are in sheer disregard of Art. 21.

However certain safeguards under the constitution are provided to prevent the reckless usage of Preventive Detention laws. These safeguards, also recognised by the Supreme Court essentially ensures the fundamental and natural rights of citizens are not infringed in the process of penalising individuals under preventive detention laws.[17]

[15]ibid.
[16]Law Commission of India, 177th Report on Law Relating to Arrest (December, 2001).
[17]Rudrasin, Preventive Detention and Constitution of India-Effect on Human Rights at http://www.legalservicesindia.com/article/1891/Preventive-Detention-and-Constitution-of-India---Effect-on-Human-Rights.html (last visited on 10 February, 2021).

In "*Kharak Singh v. The State of U.P*"[18]The defendant was charged with dacoity and consequently imprisoned. However, because of the lack of sufficient evidence he was released. The police even after his release kept surveillance on his whereabouts for an entire day. The court upholding the sanctity and absoluteness of Fundamental Rights propounded this action to be violative of Art. 21.

The Supreme Court in the case of *Rekha v. State of Tamil Nadu*[19] ruled that:

"*Preventive detention ran counter to the fundamental right to liberty of a citizen and authorities can resort to the extreme measure only in exceptional cases after citing relevant reasons...prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law...No such law exists in the USA and England (except during wartime)...since article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles*."

Court has always been of the view that detention without trial, even for a very short time period, is outrightly against the very tenets of the democratic establishment of our nation. Anti social behaviour or activity can never be a ground to violate an individual's liberty. Strict adherence

[18]*Kharak Singh v. State of Uttar Pradesh* 1964 SCR (1) 332.
[19]*Rekha v. State of Tamil Nadu* (2011) 5 SCC 244.

to law and procedure can never be done away with and is a sine qua non under all circumstances. Same can be alluded to Plato's theory on the predominance of traditional laws over the arbitrary command of philosophical rulers in curbing dissent and free speech. Plato, despite his arguments concerning the suppression of freedom of speech and personal liberty for the welfare of the nation-state and his insistence for obedience towards the state governed by philosophers can never mean to extend to blind obedience even if there is lawlessness in the State. Even though Plato never suggests an obligation or right to disobedience, neither does Plato opine the obligation to obey the laws that suppress one's freedom. Plato enumerates certain exceptions to the suppression of dissent and limiting personal liberty.

Plato argues even though only a few men are aware of the concept of justice, most men are acquainted with the traditional laws of their nation-state and absolute obedience is owed to the traditional law.[20] When the rulers enact measures in deviation of these traditional laws, Plato asserts in "*the Republic*" that the obligation to respect and obey the rulers is terminated and the ruled are entitled to restore traditional law by attempting to overthrow the rulers. According to Plato in "*the Laws*" where the ruling class ratifies laws in its own interest deviating from the traditional laws, they are not states but parties battling for gains achievable by the possession of political power. Plato expresses his disdain for arbitrary rule i.e. rule in deviance of traditional law or rule by non-philosophers.

[20]Plato, *Statesman* 298-99.

Therefore, according to Plato states where the rule is arbitrary should be discredited and can be challenged through dissent. The principles of "fair, just and reasonableness" under Article 21[21]might as well be considered "traditional laws" which all citizens are aware of and entitled to in light of Plato's teachings. Therefore, Preventive Detention Laws when perceived in light of arguments from"*Republic"* or "*Laws*" should be scrapped if the laws are being used arbitrarily and infringing an individual's fundamental right. The principle of "Audi alteram partem" is also violated by Preventive Detention laws which legalise the arrest of people without trial. Individuals whose duties and rights are questioned and infringed must be accorded a reasonable opportunity to defend themselves.

V. J.S Mill and Liberty

In a democratic setup, balancing freedom of an individual vis-a-vis the national security has been one of the most contentious issues of all times. The line between reasonable restriction and arbitrary curtailment of expressive liberty is very thin. This critical aspect of freedom of expression can be deciphered in the light of the philosophy of John Stuart Mill who was one of the greatest proponents of freedom. Liberty for Mill was of utmost importance and the core for progress and development of individuals and the society.

Mill was of the view that subsequently in a representative democracy; the voice of the majority would become a threat to the minority voice.[22] The

[21]Constitution of India, art. 21.
[22]JS Mill, *On Liberty* ch III (Longman, Roberts and Green, London , 3rd edn.1864).

imminent threat to freedom of speech and expression in a democratic nation like today's India (wherein the ruling party enjoys full-fledged majority) is not from the ruler, it is perhaps from the ruled itself. The majority voice in such a system is the biggest threat to the unpopular voice of the minority. In the past few years, significant upsurge in the attacks on minorities has been witnessed by the nation. For instance, a marked rise since 2015, in cases of mob lynching primarily for religious and political beliefs has been observed.[23] Exercising the right to dissent in such an environment is indeed precarious. The majority populace in no time take the form of an intolerant unruly mob ready to wreak havoc on anyone opposing their ideology.[24] This extremism not only hinders the individual liberty, but also hampers the work of administration and the government. This is indeed a demonstration of Mill's fears of democracy taking the form of suppression of minority's liberty.[25]

VI. The Conundrum of Hate Speech in Modern India in the Light of Mill's Harm Principle

Freedom is the constitutionally guaranteed fundamental right. It is highly valued and is the essence of democratic setup of India. Right to Dissent is an indispensable aspect of liberty (of freedom of speech and expression) and its suppression creates an insurmountable roadblock in the holistic

[23]RohitParakh, 84% Dead In Cow-Related Violence Since 2010 Are Muslim; 97% Attacks After 2014 at https://www.indiaspend.com/86-dead-in-cow-related-violence-since-2010-are-muslim-97-attacks-after-2014-2014 (last visited on 20 January, 2021).
[24]RupaSubramanya, Has India become "Lynchistan"? at https://www.orfonline.org/expert-speak/has-india-become-lynchistan/ (last visited on 20 January, 2021).
[25]Supra note 21 at ch II.

progress of the nation and the society. It is owing to this high value attached to freedom that abuse or curtailment of this fundamental right[26] can never be justified by some abstract moral explanations of greater good or merely because the majority at a particular time deems it fit.

However, the constitutionally guaranteed freedoms are not absolute. Right to freedom as much as it talks about entitling freedom, it equally provides for the curtailment of individual freedom for exclusionary reasons[27] like national security, public order, morality and health among others in order to achieve the welfare of maximum. This puzzle of striking the right balance can be resolved with the aid of Mill's harm principle[28]. Harm is the touchstone of restricting liberty as it would enable a balanced exercise of one's freedom. According to Mill, there should be no restraint upon liberty and everyone must have the freedom to dissent unless the exercise of individual liberty could bring harm to others.[29]

In other words, the harm principle is the justification for imposing reasonable restrictions on liberty. Mill in his book "*On Liberty*" imposed two determiners on freedom of speech and expression: (i) speech that is investigative in nature; (ii) public conduct that is indecent.[30] This is very much in congruity with the reasonable restrictions under article 19(2)[31] of

[26]Constitution of India, art 21.
[27]Joseph Raz, *Practical Reason and Norms* 114-117 (OUP Oxford, 2nd edn. 1999).
[28]Supra note 21 at ch III.
[29]Irene M Ten Cate, Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses 22(1) YJLH (2010) at https://digitalcommons.law.yale.edu/yjlh/vol22/iss1/2 (last visited 10 February, 2021.
[30]Raphael Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* 3-23 (Palgrave Macmillan, UK, 1st edn. 2001).
[31]Constitution of India , art 19(2).

the Constitution and various other penal laws[32] that have been enacted to curb the menaces like those of hate speech.

Hate speech, which has become an easy way to attract public attention nowadays, poses grave complexities and threatens the fundamental right to freedom of speech and expression.[33]

"Hate speech lays the ground-work for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."[34]

Hate speech is a primary reason for harm and can under no circumstances be protected in the name of liberty or promoting dissent. It is in fact against the very mandate of freedom of speech and expression. The mandate of freedom is to reveal and highlight the truth and self-fulfilment and facilitate active participation of all factions in the functioning of the democracy. Even the most avid proponent of free speech, Mill acknowledged that the immunity of speech is lost as soon as it results in harm and the essence of his philosophy is strictly against giving any freedom or protection to hate speech.

[32]The Indian Penal Code, 1860, ss 153(A) and 295(A).

[33]MK Bhandari and MN Bhatt , Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=22819 (last visited on 6th February, 2021).

[34]*Pravasi Bhalai Sangathan v. Union of India,* (2014) 11 SCC 477.

The very basis of hate speech lies in lack of freedom of will and it is therefore antithetical to liberty. Free will is not merely the freedom to do anything and everything that a person desires. Free choice is the ability to make rational decisions without getting swayed by human emotions, passions and desires.[35] True freedom can be exercised only by a rational man whose actions and speech are guided by reason alone and are not tainted with biases. Curtailment of vices like hate speech and mob lynching brewing in the name of liberty is indispensable. Such restrictions classify as reasonable restrictions and are quintessential for attaining true Liberty as was envisioned by Mill.

VII. Conclusion

Upon close analysis of Plato's and Mill's philosophies on freedom and liberty, it can be concluded that despite the apparent differences in their views, both the philosophers were amongst the greatest proponents of freedom in its true sense. True freedom is not merely the freedom to do anything and everything that a person desires. It is about the freedom of will from all biases and prejudices. It is about being guided by reason and truth alone.

Plato argued in favour of suppression of the right to dissent for the collective good of the nation-state. Nevertheless, he never advocated for blind obedience in an arbitrary lawless state. Plato's allegiance was to reason alone. Dissent could be suppressed only if it was against a fair, just

[35]Free Will, *Stanford Encyclopedia of Philosophy* (2018) at https://plato.stanford.edu/entries/freewill/ (last visited on 1 January ,2021).

and reasonable law. Plato's philosophy is indeed the ancient version of reasonable restrictions on freedom, similar to the contemporary restrictions present in our Constitution. Dissent must be based on reason and truth and not something brewing out of one's selfish interests and biases.

The authors observe a fundamental weakness is revealed by the national security laws in general and in the Indian scenario. Human Right regimes have been incapable of articulating principles capable of balancing the structural tensions between the archetype of an International Legal order and the requirements of efficient governance. The analysis of controversial practices because of this lack of accommodation transmits into either unsubstantiated assumption of sovereignty by the nation-state or bare assertions of the importance of International Law by lawyers and International organisations. Condensed comparative legal work accounting for both the proposed ideals for state practises and the loopholes of international standards is required to find a "third way".

The need of the hour is a collective initiative by people of diverging philosophies to identify and fill the loopholes in the national security laws and ensure they do not operate as a tool for the police and army to arbitrarily curb dissent. The key purpose of protection laws is to maintain public safety, law enforcement, peace and stability. However, the states have been unable to restrict the scope of such laws even by confining their aim. For instance, the primary goal behind the NSA's passage was to prohibit persons from behaving against the nation's interests, including curbing actions that endanger the "protection of India" or the "security of

the state government" or are "prejudicial to the preservation of public order." These words, however, are not mentioned explicitly in either the NSA or any other legislation. So, now it has been impossible to bring under these heads any sort of action.

Therefore, unrestricted and unregulated powers for preserving public order and security in any volatile situation is granted to military officials. Thereby, culminating in several instances of violations and tortures. The protections approbated by CrPC on arbitrary arrest and preventive detention have been bypassed by these protection laws as they grant the law enforcement authorities the discretion to investigate anyone without any warrants and to arrest someone, indicating how these regulations have diminished the constitutional privileges of an offender under the CrPC. Many people argue that these rules have not only ignored, but even violated, their fundamental rights and freedoms.

There is no question that national security is of paramount significance to every regime, but it must maintain a dynamic equilibrium between the conflicting values of rights of people and national security. The government should not let either of these two priorities collapse. The most essential responsibility of the State is to maintain public order and in process of fulfilling this goal exceptional rules might be enumerated, but these regulations should not be ambiguous. It is necessary to create a community ruled by the law and not by the arbitrary rules of man. There are many security regulations, such as Armed Forces Special Powers Act, Public Safety Act, Unlawful Activities Prevention Act and the National Security Act,which have been enforced in Jammu and Kashmir, and are

stringently opposed to by the citizens on the grounds of breaching human rights and conferring particular extraordinary powers in the hands of the army and police personnel. Maintaining stability and dignity in the state is the most essential responsibility of the nation, but the rights of its people should not be sacrificed to accomplish this aim. A reasonable compromise should be struck between the two, or the state and its netizens would suffer.

If two philosophers belonging from two completely different times and set of dogmas can converge on the line of argument that only under exceptional circumstances can the right to dissent be curbed. It is disheartening to see in the twenty –first century people and the political superstructure is immune towards converging ideologies and achieving true freedom. The need of the hour is for people from competing castes, class, faiths to convene and suggest a system of checks and balances on the national security laws. For the time being discussions on the abusive nature of these laws as discussed above is limited to people belonging to the same faith, mindset and ideology. The government needs to create an environment which is conducive to discourse, and people can freely speak out without fearing any personal attack on their religious or political affiliations. The only pathway towards resolving the issues that are eclipsing the freedom of speech and dissent is a discussion among citizens irrespective of their social positioning.

PEOPLE'S APPROACH AND THE INHERENT RIGHT OF KASHMIRI SELF DETERMINATION- ANALYSIS UNDER INTERNATIONAL FRAMEWORK

*Asmita Misra & Prantak Yadav**[1]

ABSTRACT

The right to self-determination covers all situations wherein people are oppressed by others, whether via slavery, dominance, or exploitation. It extends to all peoples and all places alike. The focus of legal approaches to the right to self-determination has so far been on the "peoples" and "territory" involved. The right to self-determination is a human right, but not an absolute right and the methods to discover and analyse limits on the right depends on comprehensive legal norms developed under the international framework. There has been a demand for self-determination in Kashmir. The situation continues to be a cause of anxiety for everyone around the world, especially between Pakistan and India, after India had revoked the special status of State of Jammu and Kashmir in 2019. However, the constitutionality of revocation of special status is suspected, henceforth there must be a people centric policy to satisfy the basic interests of people of Kashmir. The purpose of this study is to examine the principle of self-determination within international framework and

*[1] *Authors are 4th and 5th Year LL.B. (Hons.) students at Faculty of Law, University of Lucknow.*

contemporary state practice in order to answer the question of people's autonomy.

***Keywords*:** Self-determination, International Law, rights of peoples

I. BACKGROUND

"Self-determination has never simply meant independence. It has meant the free choice of people.
-Rosalyn Higgins"

Throughout history, there have always been aggressive and powerful centres of authority that set their own laws and used violence to uphold their supposed "values." Cultural beliefs, philosophies, and ideologies were created as a result, with disastrous consequences for humanity. The First and Second World Wars were tragic climaxes of these grave violations of human rights, at the end of which international governments realised the need to agree on a universal value system that was accepted by all and guaranteed a peaceful life with a standard rate of individual liberty to all human beings. Thus, on the 10th of December 1948, at the Palais de Chaillot in Paris, the United Nations General Assembly declared and authorised the Universal Declaration of Human Rights ("All human beings are born free and equal in dignity and rights.") as a direct response to World War II and its disregard and disrespect for human rights, which led to acts of barbarism.

It was declared by the United Nations that the Right of Self-determination is an inherent right of Kashmiri people and to fulfil that right a plan was established for resolving the political and military issues between India and Pakistan. The right to self-determination of Kashmir has not been achieved as the plan was not executed. Multiple wars and numerous military clashes have resulted between India and Pakistan over Kashmir. The situation in Kashmir continues to be a cause of anxiety for people all around the world, especially and now both Pakistan and India have nuclear arms.

Fresh international recognition and commitment towards the achievement of the Kashmiri people's right to self-determination is required to address the situation in Kashmir. Then, and only then, can a peace plan with a chance of success be implemented[2].

II. SELF DETERMINATION

President Wilson, a political scientist and former President of the United States, enunciated the theory of self-determination, which was absurd at the time but largely recognised as a reasonable idea. It seems logical on the ground: let the public decide. It was absurd since the people have no say until someone decides who the people are. [3]

[2] UN Security Council Resolution S/RES/80(1950) ; *See also* Shimla Agreement of 1972 where India and Pakistan have agreed to consider Kashmir as a bilateral issue and resolved to settle their differences by peaceful means.

[3] James Crawford, The Creation of States in International Law 124 (Oxford: Oxford University Press, 2nd edn., 2006).

People have the right to "freely decide their political status and pursue their economic, social, and cultural development,"[4]. Self-determination is linked to "permanent sovereignty over natural wealth and resources" as per Article 1(2) of the Human Rights Covenants[5].

The Enlightenment era is the inception of right to self-determination and this period has already been well covered by a number of authors. It's enough to remember that the concepts established at the time had a significant effect on the concept of self-determination. In reality, Locke and Rousseau's notions of "representative government" and "popular sovereignty" are at the core of self-determination as it emerged in Western Europe and the United States.[6] Central and Eastern Europe follows Hobbesean classical model of Self-Determination[7]. After the First World War and the Bolshevik Revolution, Lenin and Wilson energetically promoted self-determination as an international idea. Self-determination offered a chance for Lenin to forward his political goal. Self-determination was utilised to support communist goals rather than being a notion for the good of people as a whole. Wilson, on the other hand, understood the notion of self-determination from a completely different perspective.

[4] OHCHR, United Nations Resolution 1514 (XV) of Dec. 15, 1960.
[5] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966 993 U.N.T.S. 3; the International Covenant on Civil and Political Rights Dec. 16, 1966 999 U.N.T.S. 171.
[6] Thomas D. Musgrave, Self-Determination and National Minorities 2-4 (Oxford University Press, New York, 1997); *See also* S. Smis, A Western Approach to the International Law of Self-Determination: Theory and Practice, Unpublished PhD Thesis, Brussels: Vrije Universiteit Brussel 2001, p. 15.
[7] M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" 43(2) Int. & Comp. L. Quarterly 249 (1997).

Western democratic governance concepts has inspired his version of self-determination.

The mandate system was based on Article 22 of the League Covenant, providing that:

"[t]o those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant".[8]

The entire system was overseen by an international organisation, the Permanent Mandate Commission, which served as an advisory body to the League's Council. Self-determination was influencing the mandate system, which was designed to oversee the territories of old colonies as a trust while invigorating self-government until the populations of these territories were able to become independent, however, Article 22 did not mention it specifically.[9]

The Aland Islands Case was dispute between Sweden and Finland over the Aland Islands gives a balanced view on legal position of self-determination in the 1920s. Finland rejected the principle of Self Determination used by the local Islanders to support their proposal and the

[8] The Covenant of the League of Nations, available at: https://avalon.law.yale.edu/20th_century/leagcov.asp#art22 (last visited on Oct. 08, 2021).
[9] H. Hannum, "Rethinking Self-Determination" 34 Virginia J. of Int. L. 1 (1993).

matter was taken to the League of Nations Council. The League's Council convened a Jurists' Commission to assess whether the disagreement was an international issue that fell under the League's jurisdiction, or a matter out of League's jurisdiction. The Commission of Rapporteurs' report reiterated the Committee of Jurists' conclusion that self-determination is not a rule of positive international law, and recommended that the Aland Islands remain part of Finland, which would be required to create special autonomy arrangements for the Islanders to ensure the preservation of their culture. Aland Islands Case puts emphasis on two points. First, the Committee of Jurists expressed an intriguing viewpoint on "the connection between self-determination and minority protection. According to the Committee, "both have the same aim - to ensure that some national group's social, ethnical, or religious features are maintained and allowed to grow." The Committee further expressed that 'geographical, economic, and other comparable circumstances' prevent people from exercising their right to self-determination, minorities' protection might provide a 'compromise option.' Second, it's worth noting that both the Committee of Jurists and the Commission of Rapporteurs examined the prospect of a minority being discriminated against indefinitely. A case like this, according to the Committee of Jurists, would come under the League's authority.[10]

III. SELF DETERMINATION UNDER INTERNATIONAL LAW

[10]League of Nations Official Journal, Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the Legal Aspect of the Aaland Island Question, Special Supplement No. 3 (Oct. 1920), p. 5.

A. The United Nations Charter

Self-determination's Right is a norm of jus cogens.[11] On a national and international scale, the Second World War had far-reaching and long-lasting repercussions. This War and its aftermath had a significant impact on the world legal system as we know it today. Major changes were made in the principle of self-determination during this time. The United Nations Conference on International Organization was held in San Francisco in April 1945, during which the United Nations Charter was drafted. The debates were based on the Four Powers' Dumbarton Oaks recommendations from the previous year, but because they did not address self-determination, the principle was not explored at first.[12] Nonetheless, the inclusion of self-determination in Article 1 of the Charter was obtained thanks to a Soviet proposal backed by the Four Powers[13] Although some States supported the new provision, others expressed concern, or even outright criticism. Most of the concern and criticism focused on the issue of secession, as many States were afraid that self-determination would be interpreted as including a right of secession.

[11] Ian Brownlie, Principles of Public International Law 83 (3rd edn., 1979), argues that combatants fighting for realization of self-determination should be granted a higher status under armed conflict law due to application of jus cogens to the principle of self-determination.

[12] J. Summers, Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations 146 (Leiden: Martinus Nijhoff Publishers, 2007)

[13] Amendments Proposed by the Governments of the United States, the United Kingdom, the Soviet Union, and China: "Chapter I…2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace", Documents of the United Nations Conference on International Organization, San Francisco, 1945 UNX.341.13 U51, Doc. 2 G/29, UNCIO , Vol. III, at p. 622.

While some states endorsed the new clause, others expressed reservations or open opposition. The majority of the worry and criticism centred on the subject of secession, as many countries feared that self-determination would be construed to include the right to secede.

While concluding the San Francisco Conference, United Nations Charter in two places incorporated the principle of self-determination: Chapter I, Article 1(2), which contains the Organization's purposes, and Article 55, Chapter IX, which deals with international economic and social cooperation. One of the United Nations' purposes, according to Article 1(2), is:

“to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”.

Respect for the principle of equal rights and self-determination of peoples are two necessary conditions for stability and well-being which are necessary for peaceful and friendly relations among nations, thus the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

It is described as a means to develop friendly relations among nations in order to strengthen peaceful coexistence during first appearance, and as a list of actions that the United Nations (UN) should promote in the second appearance to ensure 'peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' in the second appearance.

Concept of self-determination is the result when we analyse the context of the statement, as well as the intent and purpose of the UN Charter, as stated in Article 1(2), was intended to convey one of the UN's goals. Self-determination was thought to aid the establishment of amicable ties between states and enhance world peace.[14] As a result, the Charter's declaration of self-determination was seen as a guiding legal concept rather than a legally obligatory right under international law.[15]

The definition of the term "peoples" is also unclear, as no definition is given in the Charter, and the travaux do not address this problem. Years later, the United Nations General Assembly would declare that "the Charter [...] included no elaboration or explanation of the notion of a 'people,' and that "there was no text or definition to define what 'people' was.[16] As will be demonstrated later, this uncertainty will continue to

[14] Article 31 (1) of the Vienna Convention on the Law of Treaties 1969, available at http://untreaty.un.org.; Yehuda Z. Blum, "Reflections on the Changing Concept of Self Determination" 10 Israel L. Rev. 511 (1975) notes that '[c]learly then, self determination, […] was not originally perceived as an operative principle of the Charter. It was regarded as a goal to be attained at some indeterminate date in the future; it was one of the desiderata of the Charter rather than a legal right that could be invoked as such'.

[15] H. Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights 33 (University of Pennsylvania Press, Philadelphia, 1990)

[16] UN Doc. A/6799 (1967)

obstruct the exercise of the right to self-determination, because the ‘peoples' who have the right have yet to be recognised.

Despite the fact that the words "self-determination" is absent from Article 73 of Chapter XI of the Charter on non-self-governing territories and Article 76 of Chapter XII of the Charter on the international trusteeship system, it has been claimed that "the drafters of the Charter regarded Chapters XI and XII as particular purposes of the principle of self-determination." Members of the United Nations overseeing non-self-governing territories were required, according to Article 73, to

"develop self-government, to take due account of the peoples' political aspirations, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples, and their varying stages of a democratic process."[17]

The parties argued the phrases "self-government" and "independence" extensively, but because they couldn't agree whether "self-government" should or should not include "independence," the word "independence" was not included in Article 73. The lack of any explicit or implied mention of self-determination in the Article makes it seem doubtful that the drafters intended this to be a "particular application" of the concept.

The League of Nations' mission system was replaced by the international trusteeship system which was governed by Chapters XII and XII of the Charter “[t]he essential objectives of the trusteeship system, in line with

[17] Charter of the United Nations, 1945, art. 73(b).

the United Nations Purposes put forth in Article 1 of the present Charter," according to Article 76 of the Charter. This statement indirectly refers to the concept of self-determination by alluding to Article 1 of the Charter. Furthermore, one of the trusteeship system's goals was:

"to promote the residents of the trust territories' political, economic, social, and educational advancement, as well as their progressive development toward self-government or independence, as appropriate to the particular circumstances of each territory and its peoples, as well as the freely expressed wishes of the peoples concerned, and as provided by the terms of each trusteeship agreement"[18]

According to these policies, it can be argued that under the trusteeship system, by exercising their right to self-determination, the residents of the trusteeship area found independence possible. The Right to self-determination was merely a guiding legal principle and not a legal right during drafting of the charter, and its content needs to be clarified. However, it is important to include the principle of self-determination in the Charter of the United Nations, a multilateral treaty that establishes international organizations. Since then, self-determination is no longer a political principle and has taken the first step in the field of international law.

B. The International Bill of Rights

Several articles of the United Nations Charter alluded to "human rights and basic freedoms," but the substance of these provisions needed to be

[18] *Id.* at art. 76 (b).

clarified. Following the Charter's ratification, the international community set out to draught the "International Bill of Human Rights." The Universal Declaration of Human Rights, which was adopted on December 10, 1948, and the two International Human Rights Covenants, which were adopted on December 16, 1966, would eventually be included in this Bill of Rights. Despite the Soviet Union's efforts, self-determination was not included in the Universal Declaration of Human Rights. First, the preamble said that human rights must be protected "if man is not to be forced to turn, as a last resort, to revolt against tyranny and oppression." Second, as stated in Article 21 (3),

"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

The concept of "popular sovereignty" which has always been at the heart of self-determination, was stated in this article. The Covenant would be split into two parts, each of which would include a clause on self-determination. The UN General Assembly adopted the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in 1966, after a nearly two-decade writing process that began in 1947 and ended in 1966.[19] Common Article 1 of the two Human Rights Covenants reads as follows:

[19] Both Covenants entered into force in 1976. On 5 April 2009 164 out of 192 UN Member States had ratified the ICCPR and 160 had ratified the ICESCR.

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

It could no longer be disputed that the political concept had matured into a positive norm of international law with the inclusion of a clause on self-determination in two Human Rights Covenants.

IV. THE 'PEOPLES' APPROACH TO THE RIGHT OF SELF-DETERMINATION

"Who are the 'peoples' who are entitled to the right?" Since the earliest discussions on the right to self-determination, this has been a recurring topic[20], because "there is nothing within the boundaries of the self-

[20] A. Whelan, "Wilsonian Self-Determination and the Versailles Settlement" 431 G.L. Quarterly 99, 103 (1994).

determination formula on its own to offer advice on the definition and concretization of the self." [21]

Shared historical heritage, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial link, common economic existence, and being a specific number are some of these criteria.[22] Another "peoples" concept has sought to minimize the peoples who are subject to the right to simply "the peoples of a State in its totality," ignoring any other potential elements.

The component of a group's self-identification as a "people" was identified as a "fundamental criterion" of the interpretation of "peoples" in the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989) [23], and it is the primary reason why no perpetual and universal objective definition of "peoples" can be observed. Indeed, the framers of Article 1 of the two Human Rights Law Covenants used the collective phrase "peoples" instead of "nations" because "peoples" was seen to be a more inclusive term: "Peoples in all countries and territories, whether autonomous, trust, or non-self-governing, were referred to as "peoples"... It was considered... that the term "peoples" should be regarded in its broadest sense, with no need for explanation."[24]

[21] M. Pomerance, "The United States and Self-Determination: Perspectives on the Wilsonian Conception" 70 AJ.I.L 1,22 (1976).
[22] *See* the description of "peoples" given by the UNESCO Meeting of Experts on Further Study of the Rights of Peoples (UNESCO, Paris, 1990) and also R. Kiwanuka, "The Meaning of 'People' in the African Charter of Human and Peoples' Rights" (1988) 82 AJ.I.L. 80
[23] Art.l(2), reproduced in (1989) 28 I.L.M. 1382
[24] M. Bossuyt, Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights 32-35 (1987).

The Right of self-determination has been used in circumstances where the "peoples" involved are only a small part of a state's population, for example the Palestinians and Kashmiris, or the Czech Republic and Slovakia who have not been recognized as state before[25]; or are distinguished by race or colour; or where the right is exercised by international means, such as the Palestinians and Kashmiris.

State conduct in this area is not definitive since recognising a people as a "people" is ultimately a political decision that may or may not be consistent with the law relating, and individuals entitled to the preservation of a right wouldn't be at the mercy of states. After all, because even some States admit, the right to self-determination belongs to peoples, not governments, and as the Charter and the two International Covenants clearly proclaim, [it is] a right of peoples, as the Charter and the two International Covenants expressly state. States are not included. Countries aren't included. Governments, not so much. But, Peoples.[26]

The strict definitions of "peoples" approach to the right to self-determination become a limiting element in any attempt to establish uniform universal legal norms respecting the right. A limitation on the concept of "peoples" to only include all residents of a State, for example, would tend to legitimise a repressive government functioning inside illegitimate State borders, causing more disturbance and conflict in the international community. This approach also maintains a State's

[25] Robert Mccorquodale, "Self-Determination: A Human Rights Approach" 4 Int. & Comp. L. Quarterly 857 (1994).
[26] Statement by the UK representative to the UN Commission on Human Rights (Mr H. Steel), 9 Feb. 1988, (1988) 59 BY.I.L 441. It is clear that "the peoples in whom [the] right is vested are not inherently or necessarily represented by States or by governments of States"

inexhaustible authority at the expense of citizens' rights, which runs counter to the growth of self-determination under international law in general.

V. Self-Determination within the Human Rights Framework

The right to self-determination, among the major international humanitarian treaties, is specifically safeguarded by the ICCPR and 1966—ICESCR[27]. However, since the Optional Protocol to the ICCPR exclusively enables "individuals" to make assertions, the Human Rights Committee has been restricted in its capacity to hear claims brought by persons alleging abuses of their right to self-determination.[28] Article 1 of the ICCPR specifies that all peoples enjoy the right to self-determination, and the committee has concluded that under the Optional Protocol to the ICCPR, the question of Lubicon Lake Band constituting “people” is not for the Committee to consider.[29] However under the reporting procedure the committee can and does consider this right.[30] Despite this, No question pertaining to violation of the right to self-determination has been raised before any major international human rights courts. Furthermore, prime focus on Civil, Political and individual rights has primarily led to evolution of legislation for international human rights.

Despite these limitations, the right to self-determination can be regarded within this human rights framework because of its aim and connection

[27] *Supra* note 4
[28] Optional Protocol of the ICCPR, art. 1.
[29] Ominayak and the Lubicon Lake Band v. Canada H.R.C. Report Doc. A/45/40, Vol.11, Annex IX, p.l at p.27 (para.32.1). This stance ignores the reality that individuals can suffer due to a breach of the right of self-determination of a peoples of whom they are a member
[30] D. McGoldrick, The Human Rights Committee 249-254 (1991).

with the protection of individual rights. The ultimate aim of the right is to protect and strengthen communities or groups against persecution. Likewise, the international human rights legal framework intended to safeguard individuals from persecution while also safeguarding the communities or organisations to which they belong. After all, "culture is transmitted from one generation to the next by groups and communities, not by isolated people," and "cultural and social distinctions in society are embodied and given by groups and communities, not by isolated individuals.".[31]

The international human rights legal framework provides guidance for establishing general legal rules for the consideration of economic, social and cultural rights[32], including the right to protect groups such as employees and families. It has been proven to be possible. In addition, the Yugoslav Arbitration Commission (Badinter Commission), established by the countries of the EC, examined the question of whether the Serbian minorities of Croatia, Bosnia and Herzegovina have the right to self-determination within the framework of human rights[33]. Therefore, given the nature and interplay of individual rights underpinned by the flexibility of the framework of international human rights law, self-determination can be considered within this framework.

[31] H. Steiner, "Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities" 64 Notre Dame L. Rev. 1539, 1541 (1991).
[32] David Harris, "The System of Supervision of the European Social Charter", in L. Betten (Ed.), The Future of European Social Policy 3 (1989).
[33] David Feldman, “European Human Rights and Constitution-building in a Post-conflict Society: the Case of Bosnia and Herzegovina”, Cambridge Yearbook of European L. Studies 101 (2005)

This is something that both the "peoples" and "territorial" approaches—as well as many of those who claim the right—tend to overlook. Of course, certain human rights are unconditional, such as the right to be free from torture and other cruel, inhuman, or humiliating punishment of the crime, as well as the prohibition of genocide[34], both of which preserve an individual's or a group's personal or physical integrity. Most human rights, however, have certain constraints on their exercise; for example, the right to freedom of expression is restricted (or "restricted") where it is essential to safeguard the rights or identities of others, or to preserve national security, law and order, public health, or morality.[35]

These restrictions reflect the fact that people do not exist in a vacuum, but rather as members of a larger society as well as numerous smaller societies, such as families, groups, organisations, and communities. It is in the public interest of all communities to have a somewhat stable social and legal framework, so that members of the community may conduct their activities with confidence. A State must behave in accordance with its domestic law and international responsibilities, including its human rights duties, within the international human rights law framework[36], but its constitutional order is taken into consideration. The combination of these legal rules leads to the conclusion that most human rights are subject to limitations in order to protect other rights and the general interests of society, but these limitations are narrowly interpreted, considering the

[34] Convention on the Prevention and Punishment of Genocide, Dec 9 1948 78 U.N.T.S. 277.
[35] International Covenant on Civil and Political Rights, art. 19(3); European Convention on Human Rights, 1953, art. 19(2); American Convention on Human Rights, art. 13(2); African Commission on Human and People's Rights, art. 27(2).
[36] Sunday Times v. UK 30 ECLHR (A) ¶59 (1979).

context of the society affected by the right as well as current international standards.

VI. Limitations on Self- Determination

The right to self-determination is today applied by the international community to every scenario, both internal and foreign, in which peoples are oppressed by subjection, dominance, and oppression. The right to self-determination would not be an unrestricted absolute right. Its intent is not to directly safeguard the personal or physical integrity of individuals or groups, as absolute rights do, and, unlike universal rights, the exercise of this right can require complex systemic changes in a State and must affect, often considerably, the majority of individuals and groups in that State and even beyond. For instance the right of self-determination of the Kurds has impacts on Iraq, Turkey, Iran and Syria. As a result, the nature of the right necessitates the imposition of some restrictions on its exercise. A human rights approach may effectively deal with these restrictions on the right to self-determination, which are meant to safeguard the rights of everyone (including those not seeking self-determination) and the general interests of the international community.

A. Protection of Other Rights

Considering the absence of express restrictions on the right to self-determination in common Article 1 of the ICCPR and ICESCR, common Article 5(1) of those Covenants states that "nothing in the present Covenant shall be construed as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein." This

provision, which is also contained in the European and American Conventions[37], suggests that the right to self-determination is limited to the degree that exercising it does not lead to the demise (or damage) of any of the other rights guaranteed. In cases of external self-determination, state practise currently appears to emphasise the necessity for the new state to preserve all of the territory's people' rights, generally through constitutional guarantees.

The human rights approach, which use the international human rights law framework to resolve these opposing rights, strives to safeguard all rights, not only the right to self-determination. After that, rights may be balanced, and a solution can be developed that preserves both rights as much as feasible in the given situation.

Instead of secession being the only option, peoples would be able to exercise their right to self-determination through methods such as federation formation, political power guarantees to defend or promote group interests, special assurances (as with minority rights), granting a group a specific recognised status, or "consociational democracy." For example, granting Serbian citizenship to a Serbian citizen of Bosnia and Herzegovina.

Most of all, there would be fewer claims of violation of the right to self-determination if there were enforceable national and international human rights assurances that safeguarded and judicially implemented equal rights of every individual and group in each State. As a result, any government

[37] European Convention on Human Rights, 1953, art. 17; American Convention on Human Rights, art. 29(a).

shall represent "the whole population belonging to the area without difference as to race, creed, or colour, [38] or any other kind of discrimination, ensuring that the right to self-determination is not violated. The essence of the right to self-determination, as well as contemporary State practise, places restrictions on its exercise in order to preserve the rights of others as much as feasible. This is because, in the spirit of self-determination, both individual and collective rights must be protected from repressive activities.

B. Protection of General Interests of Society

Article 1(3) of the ICCPR and ICESCR both imply a limitation on the right to self-determination, since it asserts that state governments must respect the right "in accordance with the provisions of the United Nations Charter." The Declaration on Principles of International Law, which set forth seven principles of international law, defined the applicable duties of States under the terms of the UN Charter. These principles included prohibitions on the use of force, involvement in a State's domestic authority, the duty to settle conflicts by peaceful methods, the need to cooperate with other States, sovereign equality of States, and the requirement for States to fulfil obligations in good faith. The Declaration clearly says that the aforementioned principles are linked in their interpretation and implementation, and each rule should be interpreted in respect of others.[39] In other words, there is a requirement to take into

[38] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annex to G.A.Res.2625(XXV). adopted without vote on 24 Oct. 1970.
[39] *Supra* note 46, Declaration 2.

account these other principles when construing the right of self-determination.

C. Territorial integrity

The particular constraint of territorial integrity is part of the broader limitation on the right to self-determination. The right to self-determination is not to be understood as sanctioning or promoting any action that would dismember or harm the geographical integrity or political unity of sovereign and independent States, in whole or in part, according to the Declaration on Principles of International Law. This restriction stems from most civilizations' aim to have a somewhat stable social and legal order. The territorial integrity limitation, on the other hand, cannot be applied in all circumstances. Only "States undertaking themselves in conformity with the provisions of equal rights and self-determination of peoples... and thus wielded of a government representing the entire people who belong to the territory without differentiation as to race, creed, or colour" can rely on this limitation, according to the Declaration on Principles of International Law.

D. Uti possidetis juris

The concept of uti possidetis may apply if the rights such as the right to self-determination is to become independent from a colonial power or to separate from an independent State. The goal of this idea is to create territorial stability by keeping a state's colonial boundaries. Despite the fact that the concept of uti possidetis is not universally applied, it is a principle that must be viewed as a constraint on the right to self-determination. It is only applicable in the rare cases where the alleged

exercise of the right is for secession and the secession has an impact on a colonial boundary.

E. Other aspects of international peace and security interests

While there are broad restrictions on the use of force and intervention as part of international society's overall interest in peace and security, there has been recognition of the necessity to relax such prohibitions in order to safeguard individuals whose right to self-determination is being violated. It is self-evident that people denied the right to self-determination can seek forceful international support to defend their rights, and that no State can employ force against such organisations. It's even possible that groups wanting to exercise their rights may resort to armed force if it's their sole option for resisting coercive action. The right to self-determination is limited in order to preserve the general interests of international society, as well as the welfare of stakeholders within the State as a whole, in order to keep peace and security. The right is limited in this region by the concept of uti possidetis, which is used to safeguard a state's territorial sovereignty and to uphold colonial boundaries. However, each of these restrictions applies to a limited number of means of exercising the right to self-determination, and even then, they may not be suitable in the specific circumstances of a claim.

VII. CONCLUSION

The right to self-determination covers all situations wherein people are oppressed by others, whether via slavery, dominance, or exploitation. It extends to all peoples and all places, colonial and non-colonial alike. The

focus of legal approaches to the right to self-determination has so far been on the "peoples" and "territory" involved.

The right to self-determination is a human right, however as per the human rights conception, it is not an unconditional human right. The technique to discover and analyse limits on the right depends on comprehensive legal norms developed under the international human rights law framework. Unlike the limiting "territorial" framework, which restricts the right's exercise to secession or independence, interpreting the right in light of current State practise and international norms allows for full deliberation of the right's transformation and its wide variety of additional norms of exercises.

Wide and flexible rules regarding who is a "victim" competent brings a statement for violation of a human right to give a dynamic definition of "peoples" to counter the desolation and rigidity of the "peoples" approach. The technique produces a coherent and consistent set of general legal concepts by relying on the framework of international human rights law. This framework is used to identify and analyse the limitations on the right. The right to self-determination is subject to certain limitations, both to protect people' rights and to defend society's general interests, such as the need to preserve territorial sovereignty and international peace in some situations. While the human rights-based approach doesn't really enable us to declare in the absolute which peoples have the right to self-determination and the extent of any use of that right,[40] it still does establish

[40] Patrick Macklem, The Law and Politics of International Cultural Rights: E. Stamatopoulou, Cultural Rights in International Law; F. Francioni and M. Scheinin (eds.), Cultural Human Rights.International Journal on Minority and Group Rights 16(3):481-501

a framework through which all pertinent rights and liberties may be weighed and assessed. This balance recognises and tackles the geopolitical context of the right being claimed—specific historical circumstances—as well as the State's constitutional and international society's present rules.

It is evident from international framework and historical circumstances that the right to self-determination has many limitations and in reference to Kashmir, there cannot be an absolute inherent right of the people to exercise self-determination. Under the framework of international society and constitutional order, there's a liability to maintain balance between the people's rights, territorial sovereignty and interest of overall society.

A more dynamic 'peoples' approach and the limitations on self-determinations can help to dissolve the Palestinian and Kashmiri issues. The core of self-determination encompasses protection of both individual and collective right, this puts a bar on absolute exercise of Self Determination. The solution is something like that of the case of Bosnia and Herzegovina.[41] Therefore, it is recommended that "Autonomous Status" be granted in a 'constitutional democracy' to protect the interests of 'all' including the people of Kashmir.

[41] Cvete Koneska, "On Peace Negotiations and Institutional Design in Macedonia: Social Learning and Lessons learned from Bosnia and Herzegovina" 1 Peacebuilding 36 (2016).

EXTENDING THE RIGHT TO SPEEDY TRIAL OF CRIMINAL ADJUDICATION INTO CIVIL ADJUDICATION WITHIN THE INDIAN LEGAL FRAMEWORK

Chetan R[*1]

ABSTRACT

The right to speedy trial is one of the fundamental rights available to the parties involved in any case. Similar to countries like the US and the UK, the Indian Supreme Court also incorporated the right to speedy trial into the Indian constitution through the *Hussainara Khatoon v. Home Secretary, State of Bihar* case. The same can also be located under different provisions of the Code of Civil Procedure 1908 and the Code of Criminal Procedure 1973, which are primarily aimed at faster and more efficient proceeding of the case. In view of this, the author has attempted to locate neutral principles in the Indian Supreme Court's jurisprudence on the right to speedy trial, by reading it *vis-à-vis*, the principle of the Balancing Test, laid down in the American case of *Barker v. Wingo*. Since most of the cases on the right to speedy trial fall in the criminal law realm, the author identifies a clear dearth of the existence of this right in civil law adjudication and addresses the same through different theoretical and practical routes.

*[1] *Author is a 3rd Year B.A. L.L.B [Hons.] student from National Law School of India University, Bangalore*

Keywords: Speedy Trial, Civil Law, Criminal Law, Supreme Court, Justice

I. INTRODUCTION

"*To no-one will we sell, to no one we will deny or delay, or deny of delay right or justice*."[2]

The above phrase, from the Magna Carta of 1215, marks one of the first references to the right of speedy trial in modern judicial systems. Following this, there have been numerous renditions of this right being made by numerous stalwarts – like for instance, William Gladstone's quote, "justice delayed is justice denied" – and legal documents – like the Sixth Amendment to the US Constitution and Article 6 of the European Convention on Human Rights. Even in India, speedy trials were considered to be of high esteem by the ancient Hindu kings and the Islamic Mughal rulers.[3]

This right becomes all the more important and relevant in the current day and age, particularly in a country like India, where over 4.4 crore cases are pending before the courts.[4] The recognition and the effective

[2] Magna Carta 1215, cl. 29.

[3] Jayanth K. Krishnan & C. Raj Kumar, "Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective" 42 Georget. J. Int. Law 747 (2011).

[4] Pradeep Thakur, Pending cases in India cross 4.4 crore, up 19% since last year available at https://timesofindia.indiatimes.com/india/pending-cases-in-india-cross-4-4-crore-up-19-since-last-year/articleshow/82088407.cms#:~:text=The%20total%20cases%20pending%20as,4.4%20crore%20as%20on%20Thursday (last visited July 29, 2021).

legitimation of the right to speedy trial, through various measures in the judicial system, could very well address the delay in adjudication. These delays have mainly been linked to detrimental human right violations on parties involved in criminal cases, like prolonged incarceration, before trial and during the trial, police torture, mental exhaustion, etc. However, there isn't much expansion on its effects in civil cases.[5] Due to this reason, there is a dearth of literature and cases addressing the availability of the right to speedy trial in civil law adjudication, while there is much about this right in criminal law adjudication.

In this article, the author seeks to address these different issues by dividing the article in three sections. *Firstly*, the author will delve into the conceptualisation, invocation and scope of the right to speedy trial in the Indian judicial system. *Secondly*, the author will proceed with analysing the application of this right in the realm of criminal law adjudication in India through a comparative study with its American counterpart, in order to identify the neutral principles behind the invocation of this right. *Lastly*, the author will address the lack of an active right to speedy trial in civil law adjudication in India and discuss solutions which can bring about the principle of speedy trials in this realm of the law.

II. CONCEPTUALISATION OF THE RIGHT TO SPEEDY TRIAL IN THE INDIAN LEGAL SYSTEM

[5] Vandana Ajay Kumar, "Judicial Delays in India: Causes & Remedies" 4 J. Law Policy Glob. 16 (2012).

The right to speedy trial, in the Indian context, can be conceptualised within two frameworks: Constitutional framework and Statutory framework.

A. Right To Speedy Trial in The Constitutional Framework

Unlike the US constitution, India does not have an explicit mention of the right to speedy trial in its constitution. This means that our framers, in 1947, did not envision such a right for the country's legal system, in spite of it already being present in the US constitution, a document which had a major influence on our drafters. However, since India follows the practice of transformative constitutionalism,[6] with the judiciary playing a significant role, various provisions have been interpreted in an expansive manner to include rights which our drafters didn't originally include in the document. One such provision is Article 21 of the Constitution of India 1950, which the Supreme Court, in *Maneka Gandhi v. Union of India* ('*Maneka Gandhi*'),[7] expanded to include various positive rights, under the ambit of life and liberty, that could only be deprived by procedure which was reasonable, fair and just. This was followed by numerous Supreme Court judgements which incorporated different forms of amorphous rights within this article.

[6] Indira Jaising, 'For me, it now means personal liberty': Indira Jaising explains Transformative Constitutionalism available at https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism (last visited July 28, 2021).
[7] (1978) 1 S.C.C. 248.

In this process, came about the case, *Hussainara Khatoon v. Home Secretary, State of Bihar, Patna* ('*Hussainara Khatoon*'),[8] which brought in the right to speedy trial as an essential ingredient of the "reasonable, fair and just" procedure prescribed in Article 21. Any delay in the adjudication, would fall foul of the article because it would no longer be "reasonable, fair or just".

In addition to Article 21, the duty-based aspect of the right to speedy trial can also be seen in the Directive Principles of State Policy, because quick deliverance of justice would also be a part of maintaining social order in the society.[9] Since legal justice also entails the timely delivery of justice,[10] the right to speedy trial can also be located in Article 38 of the Constitution of India 1950.

B. Right To Speedy Trial In The Statutory Framework

Although India does not have an exclusive statute, like the Speedy Trial Act, 1974 in the US, various provisions in the Code of Criminal Procedure, 1973 ('CrPC') and the Code of Civil Procedure, 1908 ('CPC'), have embodied this right. Many provisions in these statutes can be purposefully interpreted to locate the right to speedy trial in their workings. Certain provisions, like:

[8] (1980) 1 S.C.C. 98, 5.
[9] The Constitution of India, 1950, art. 38.
[10] National Mission for Delivery of Justice and Legal Reform, Towards Timely Delivery of Justice to All: A Blueprint for Judicial Reforms available at http://www.wbja.nic.in/wbja_adm/files/Towards%20Timely%20Delivery%20of%20Justice%20to%20All.pdf (last visited July 29, 2021).

i. s.157(1) of the CrPC – Every police officer shall investigate the facts and circumstances of a case and take measures for the discovery and arrest of the accused.
ii. s.173(1) of the CrPC – Every investigation shall be completed without unnecessary delay.
iii. s.309(1) of the CrPC – Every inquiry/trial shall continue from day to day until every witness has been examined.
iv. s.27 of the CPC – Summons need to be issued before thirty days from the suit institution.
v. Rule 2, Order VI of the CPC – Pleadings must be concise and only deal with material facts.
vi. Rule 1, Order VIII of the CPC – Written statements shall be presented by the Defence within thirty days from the date of summons.
vii. Rule 1, Order XVII of the CPC – Adjournments may be given only when sufficient cause is presented, and only for a maximum for three times.
viii. Rule 1, Order XX of the CPC – The court shall pronounce the judgement after the case hearing, as soon as practically possible, or fix the day for such pronouncement.

These provisions direct the state functionaries to efficiently decide cases within reasonable time. There are also provisions like, s.167(2)(a), s.173(1A) of the Code of Criminal Procedure 1973, etc., which mention the actual time limit within which certain sensitive cases should be decided.

However, irrespective of the source, the right to speedy trial, unlike many other rights envisaged under Article 21, is quite peculiar in character.

Firstly, it is not something which can be positively enforced against the state. This means that one cannot go to court, and at the first instance, claim this right under the constitution or statute and ask the court to decide their case then and there.[11] It merely places a constitutional duty on the state and judiciary to ensure the case is decided at the earliest. *Secondly*, due to the above reason, a specific invocation of this right has only been done when it has actually been breached, i.e., when the case has been pending before a court and has gone on for an unreasonable amount of time.[12] In such cases, the court either fast-tracks the cases, or quashes them, depending on the circumstances of the delay. *Thirdly*, this right may benefit one party and disadvantage the other depending on the context of the case. For instance, the right to speedy trial would benefit the accused if he is innocent, however, the right would disadvantage the accused if he is guilty. In the latter example, the right would actually benefit the state, as less resources of the state would be used for fighting the case.[13] These characteristics essentially make this right quite amorphous, unpredictable and difficult to vindicate.

III. THE RIGHT TO SPEEDY TRIAL IN CRIMINAL LAW ADJUDICATION

While *Hussainara Khatoon* did locate the right to speedy trial in Article 21 as a fundamental right, it did not flesh out the scope for the application and determination of violation of this right. It just introduced the principle into the Indian legal system, which was later expounded upon by several subsequent criminal law cases, to the extent that every stage of the

[11] Kamal Kumar Arya, "Right to Speedy Trial and Mercy Petitions in India" BLR 168 (2016).
[12] Sheela Barse v. Union of India, (1986) 2 S.C.C. 632, 3.
[13] S.N. Sharma, "Fundamental Right to Speedy Trial: Judicial Experimentation" 38(2) JILI 236 (1996).

administration of criminal justice, is subject to the right to speedy trial under Article 21. The post-*Hussainara Khatoon* Supreme Court judgements have, however, laid down principles using which the violation of this right can be detected and remedied by the court. These principles are analogous to the constituents of the Balancing Test, as laid down in *Barker v. Wingo* ('*Barker*').[14] While this test has been, in theory, adopted into the Indian legal system, through the case, *Abdul Rehman Antulay v. R.S. Nayak* ('*A. R. Antulay*'),[15] this section aims to analyse the Indian jurisprudence on speedy trials under the purview of the four factors of this test.[16]

A. The Length of Delay

This part of the test has been an issue of contention in the Indian Supreme Court in the past. The main concern was at what stage would the time taken for a criminal case constitute unreasonable delay. In the 1980s and 1990s, the Supreme Court began prescribing strict time limits for deciding certain types of criminal cases. For instance, in cases like *Sheela Barse v. Union of India* ('*Sheela Barse*'), *Raj Deo Sharma v. The State of Bihar*,[17] and *Common Cause "A Registered Society" v. Union of India*,[18] the court set strict time limits for different types of cases, based on its discretion, which when not abided by, would lead to the quashing of their respective proceedings.

[14] 407 U.S. 514 (1972).
[15] (1992) 1 S.C.C. 225.
[16] Richard D. Avil Jr., "Constitutional Law-Sixth Amendment-Right to a Speedy Trial-A Balancing Test" 58(2) Cornell L. Rev. 399 (1973).
[17] (1998) 7 S.C.C. 507.
[18] (1996) 4 S.C.C. 33.

However, in 2002, a 7-judge bench of the Supreme Court in *P. Ramachandra Rao v. State of Karnataka* ('*Ramachandra Rao*'),[19] in line with the original American case, *Barker*, overruled these previous judgements. It conclusively held that it is neither feasible, advisable, nor judicially permissible to prescribe or draw a judge-opined uniform limit on the time for concluding criminal proceedings. Legislators have made laws, in the form of CrPC, whose provisions provide for speedy trials, and courts should rely on these existing powers to effectuate the right, instead of setting discretionary-based limits. In addition to the above, speedy trials cannot be squarely equated to fair trials because there are qualitative differences between the two.[20] There are certain cases, depending on the nature and complexity of the offence, which require an extended trial time for the court to properly apply its mind to all the facts and evidence, and decide the matter. This requires the right to speedy trial to be seen in the relative, i.e., these different factors have to be weighed vis-à-vis the extent of the right to speedy trial.[21] Therefore, it is only when the delay is inordinately lengthy to become unwarranted and oppressive in that particular context, that the right to speedy trial will be violated. A necessary delay for the proper administration of justice would still fall within the fair trial and procedure under Article 21.[22]

Since then, the judge's discretion has primarily relied upon in deciding whether the length of the delay in any case has been unreasonable and

[19] (2002) 4 S.C.C. 578, 28.
[20] K.N. Chandrasekharan Pillai, "Speedy Trial — The Rise and Fall of a Right" 10 SCC J. 39 (2012).
[21] Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 9 S.C.C. 408.
[22] *Supra* note 19.

excessive. And this discretion should be based on the subjective circumstances and requirements of each case.

B. The Reason for The Delay

As per American jurisprudence and literature, broadly, there can be three reasons for delay in adjudication. *First*, delay caused by the accused's actions. *Second*, delay caused by the prosecution. *Third*, delay caused by "neutral reasons" like court congestions, judge transfers, official negligence, etc.[23] All these three reasons are equally applicable in the Indian scenario as well, with each having different responses from the court. In cases falling under the first subclass, such as, *State of Maharashtra v. Champalal Punjaji* ('*Champalal Punjaji*'),[24] and *Ranjan Dwivedi v. C.B.I., Through the Director General*,[25] the Supreme Court has held that in spite of there being considerable delay in adjudication of the case, there is no violation of the right to speedy trial because this delay has been caused by the accused as a defence tactic. The defence, with a weak case and/or evidence, usually employ this tactic to make the evidence and witnesses obsolete and unreliable, so that the beyond reasonable doubt standard is not met and the accused is acquitted.[26]

In cases falling under the second subclass, such as, *Hussainara Khatoon* and *Mantoo Majumdar v. State of Bihar*,[27] the Supreme Court has often recognised the infringement of the right to speedy trial and actively issued directions to the lower courts and state functionaries to give relief to the

[23] *Supra* note 15.
[24] (1981) 3 S.C.C. 610, 6.
[25] (2012) 8 S.C.C. 495.
[26] *Supra* note 10.
[27] (1980) 2 S.C.C. 406.

prisoners, either through release on bail or expedite the proceedings. This also happens frequently in a number of cases involving special laws, like the Unlawful Activities (Prevention) Act, 1967 ('UAPA'),[28] the Narcotic Drug and Psychotropic Substances Act, 1985 ('NDPS Act'),[29] etc., where the state misuses the rigorous bail conditions to keep the accused imprisoned for long periods of times, not only during the trial but also during investigation.

However, in cases falling under the third subclass, which forms the majority of the delayed cases in India, the courts do not actively engage with the subject in the case, and thus, results in the accused shouldering the burden for the delays caused due to "neutral reasons".[30] In fact, the Supreme Court[31] has held that it will not quash cases when no party has actively contributed to the delay. This actually shows the harshness of the principle which is prevalent in the Indian judicial system, where the accused can only get active relief from the courts for the infringement of the right when the delay has been caused by the purposeful, oppressive and unwarranted acts of the prosecution.

[28] The Wire Staff, If Right to Speedy Trial Is Violated, Bail Can Be Granted in UAPA Cases: Supreme Court available at https://thewire.in/law/if-right-to-speedy-trial-is-violated-bail-can-be-granted-in-uapa-cases-supreme-court (last visited July 29, 2021).

[29] Akshita Saxena, 'Infringement of Right to Speedy Trial': Madras High Court Directs Prosecution to Pay Rs. 1 Lakh Compensation available at https://www.livelaw.in/news-updates/madras-high-court-fundamental-right-speedy-trial-compensation-ndps-169982 (last visited July 29, 2021).

[30] Upendra Baxi, "Right to Speedy Trial: Geese, Gander and Judicial Sauce (State Of Maharashtra v. Champalal)" 25(1) JILI 90 (1983).

[31] Champalal Punjaji, 3 S.C.C. 610, 2.

C. The Defendant's Assertion of The Right

This factor is also called the "Demand Rule" in the American context. This essentially means that for the accused to claim the infringement of the right to speedy trial, they should have previously made a demand for the speedy trial. Any delay caused before this demand would not be accounted for by the court while addressing this claim.[32] While this rule may have relevance in the American judicial system, the Supreme Court of India, in *A. R. Antulay*,[33] has explicitly denied its application in the Indian system.

D. Prejudice To the Accused

Similar to the American standard of prejudice, the Indian courts have also accepted a broad scope of what constitutes prejudice to the accused. Different cases have incorporated different hardships which an accused might face during the trial, under the ambit of prejudice. In *Champalal Punjaji*, the court has held that prejudice would include detaining an accused without trial and denying them fair trial.[34] It also extended the scope to any difficulties faced during the preparation and conduct of the defence of the accused.

In *A. R. Antulay*, the court, by relying on *U.S. v. Ewell*,[35] further broadened the scope of prejudice by including inordinately prolonged delays and incarcerations as presumptive proofs of prejudice to the accused.[36] In

[32] *Supra* note 15.
[33] A. R. Antulay, 1 S.C.C. 225, 84.
[34] Champalal Punjaji, 3 S.C.C. 610, 1.
[35] 383 U.S. 116 (1966).
[36] A. R. Antulay, 1 S.C.C. 225, 86.

Pankaj Kumar v. State of Maharashtra & Ors. ('*Pankaj Kumar*'),[37] the court also included "mental stress and strain of prolonged investigation" by the authorities to also qualify as prejudice. Therefore, similar to the US standard, prejudice is used with a wide scope in India.

IV. LOCATING THE RIGHT TO SPEEDY TRIAL IN THE CIVIL LAW ADJUDICATION

A common factor visible in all the cases discussed above is that they all belong to the realm of criminal law. While it is accepted that prolonged trials could have dire human right violation to the accused parties in criminal cases, it doesn't mean that parties involved in long drawn-out civil cases do not face any hardship. This aspect of the right to speedy trial in the civil law realm has largely been missing in Indian jurisprudence and literature. This section aims to address this dearth and show how the right to speedy trial, as a principle, can even be invoked in civil law adjudication as well.

A. Need for Speedy Trials in Civil Law Adjudication

Prolonged delays in deciding civil matters can actually have deep consequences on the parties involved. Since almost 66% of all civil suits pertain to land and property disputes, long battles with frequent injunctions preventing the parties from building on or selling the land, can actually affect the development and living of the parties particularly when

[37] (2008) 16 SCC 117, 26.

that land/property is their source of income or place of residence.[38] Moreover, since civil suits in general, tend to go on for much longer than criminal suits, a huge chunk of the parties' income goes into legal fees,[39] which may affect their livelihood as well, particularly those belonging to the middle or lower-middle class. Therefore, long delays in civil adjudication can also have adverse impacts on other aspects of "life and liberty" under Article 21 (like property, residence, livelihood, and the quality of life.

B. A New Conception of The Right To Speedy Trial For Civil Cases

In 2016, the Supreme Court, in *Anita Kushwaha v. Pushap Sudan* ('*Anita Kushawa*'),[40] recognised a more neutral form of right to speedy trial, in the sense that it isn't just confined to criminal cases. It has conceptualised the right to speedy trial, as a component of "access to justice". This "access to justice" is a constitutional value given to the people by the court.[41] However, if the process for attaining this justice becomes too laborious, time-consuming and frustrating for the parties (which is especially true in civil matters), then, this would not only result in the denial of access to justice, but the denial of justice itself. This form of a right to speedy trial, located in "access to justice", can qualitatively and jurisprudentially be considered the same for civil, criminal and other matters as well. Therefore, justice will only be accessible if there is a

[38] Namita Wahi, Understanding Land Conflict in India and Suggestions for Reform available at https://cprindia.org/news/7922 https://cprindia.org/news/7922 (last visited July 30, 2021).
[39] Pending case in judiciary: 82% of delays due to lawyers, much less the judges, says study available at https://www.financialexpress.com/india-news/pending-case-in-judiciary-82-of-delays-due-to-lawyers-much-less-the-judges-says-study/612552/ (last visited July 30, 2021).
[40] (2016) 8 S.C.C. 509, 36.
[41] The Constitution of India, 1950, preamble, art. 39A.

speedy trial of the case enforced and upheld by the courts, irrespective of the nature of the proceeding. And since justice, through the Constitution, is sought in all forms of adjudication, the Supreme Court has essentially opened the doors for the right to speedy trial to permeate into all forms of adjudication in the country.

Now, in order to determine the scope of application of this right, we can also extend the three relevant constituents of the "Balancing Test", as discussed in the previous section, to the civil law realm as well. Firstly, the length of delay. The *Ramachandra Rao* holding that unreasonable delay is to be ascertained on a case-to-case basis, without setting a definite time limit for different types of cases, can be applied to the civil cases as well. The judge's discretion can be relied upon for deciding when a particular civil matter has gone on for beyond reasonable time.

Secondly, the reason for delay. Unlike criminal cases, the reasons for delay in civil cases are more on the lines of the aforementioned, "neutral reasons". These neutral reasons are more of institutional deficiencies in the Indian judicial system. They include, shortage of judges, inadequate number of courts, transfer of judges while suits are pending, etc. There are also a few reasons which faults the parties as well, like the non-appearance of the parties, large number of appeals, non-awareness of alternate dispute resolution mechanisms, etc., but none of which can be compared to the graver forms of delay as in criminal trials.

Thirdly, the prejudice test. Since *A. R. Antulay* and *Pankaj Kumar* have already broadened the scope of what falls within prejudice in this test, the same parameters can be used in delayed civil suits as well. And as previously discussed, civil cases can also have adverse impacts on an

individual's life, which cause great prejudice to him, which might not be the case for the other party who might have instituted a false civil case against him.

C. Additional Routes of Securing the Right To Speedy Trial In Civil Law

In addition to these theoretical reasons for the extension of the right to speedy trial by the judiciary, there are other routes as well which fasten case proceedings and uphold the right to speedy trial.

Firstly, the existence of the Commercial Courts Act, 2015 ('CC Act'). This legislation provided for the constitution of commercial courts to adjudicate over commercial disputes valuing at over Rs.3 lakh. This amount was actually reduced from Rs.1 crore, by a 2018 amendment, and this actually brought in a lot more cases into the jurisdiction of the commercial courts, where they can be dealt with expeditiously. Since these courts provide for special courts with modified procedures, cases tend to be tried and decided much faster than ordinary civil courts. These modified procedures include:

i. A requirement for filing all documents and evidence relevant to the dispute at the time of filing the suit itself, or at the time of filing the defence. This prevents frequent introduction and arguments over new documents and evidence throughout the trial process, which greatly delays its adjudication.[42]

[42] The Commercial Courts Act, 2015, Schedule para 4(E).

ii. Certain deadlines for both the filing of defence (120 days) and for pronouncing judgements (90 days) in order to prevent lethargy and ensure efficiency on the part of the parties and the judge.[43]

iii. Providing summary judgements without trials, particularly aimed at frivolous and baseless claims, wherein the court either dismisses/decrees a suit or accepts/rejects a particular claim or defence, on the basis of prima facie perusal. This prevents claims or defences with no real prospect of succeeding from being brought into the court.[44]

iv. If it appears to the judge that the particular case has a possibility of succeeding but this success is highly improbable, it may ask the party, whose case is improbable of succeeding, to deposit a certain sum of money or provide surety for restitution of costs, or security, etc, before proceeding with the trial.[45]

Along with the introduction of special courts and judges, this Act also amended the CPC to introduce new provisions which greatly facilitate the faster disposal of cases. They include, Rule 2(3A) of Order XVIII, which necessitate the parties to submit concise written arguments of their case within four weeks of the commencement of oral arguments, so that there is no delay and the court gets acquainted with the arguments of the parties

Secondly, the Indian courts should move towards a more "managerial judging" approach as is prevalent in the US.[46] This essentially refers to judges who take part in the active management of their courtrooms and

[43] The Commercial Courts Act, 2015, Schedule para 4(A).
[44] The Commercial Courts Act, 2015, Schedule para 5.
[45] The Commercial Courts Act, 2015, Schedule para 5.
[46] Judith Resnik, "Managerial Judges" 96 Harv. L. Rev. 374 (1982).

the cases being adjudicated upon. This does away with the more traditional and passive form of judging whereby the court takes more control over the case right from the pre-trial stage.[47] The CC Act introduced this concept into the Indian judicial system through Order XVA, which essentially deals with case management by the court, allowing the court to make timelines and fix definite dates for hearing. It also puts a bar on giving adjournments which further enhances the speed of the trial. Moreover, there is already a limit of three adjournments which can be given to a party to a suit under the proviso to Rule 1 of Order XVII. This must be strictly followed by the courts to ensure less time is delayed by the parties.

Thirdly, another crucial aspect of "managerial judging" is looking for and suggesting the parties to go for mediations and settlements as much as possible. This can be achieved in the Indian context through s.89 of the CPC and s.12A of the CC Act, which provide for pre-institution mediation and settlement of the disputes outside the court. As managers, the judges can learn more about the case than they are doing right now, which enables them to make such helpful suggestions to the parties. To enable a greater awareness of the case, the recommendations of the 77th Law Commission Report that judges should read all the pleadings of the parties in advance and in detail for better use of Order X, can be adopted.

Fourthly, the involvement of virtual courts and technology in civil adjudication. The COVID-19 pandemic has forced our courts to adopt a virtual existence. This has turned out to be a boon for the right to speedy trial in India because virtual courts have proven to be cheaper and faster

[47] Ibid.

in proceedings as compared to physical courts.[48] Everything can be done much efficiently online. There is no need for a physical presence, physical filing and other complex procedures to be followed. Geographical distances and absences from courts can be minimised. The arguments and verdicts can be transcribed real-time using technology which would reduce the mistakes in summarising the judgements. All documents will be a click away for the parties and the judges. This greatly reduces the chance of court absences and time for adjudication.[49] The Parliamentary Standing Committee on Law and Justice also recommended the continuation of virtual courts in the post-COVID agencies to remedy the delay and safeguard the right to speedy trial.[50]

Therefore, these measures and many more, such as the introduction of the Legal Services Authorities Act, 1987, which established Lok Adalats and gave statutory backing to their judgements, directions and awards, etc., when applied rigorously along with precedents, would clearly effectuate the right to speedy in most cases.

[48] Express Web Desk, Virtual courts cheaper, faster: Parliamentary panel bats for 'digital justice' available at https://indianexpress.com/article/india/parliamentary-panel-virtual-courts-digital-justice-report-6591764/ (last visited August 01, 2021)..

[49] Charlie Harrel, Virtual courts and COVID-19: the future is now, Thomson Reuters Practical Law available at https://uk.practicallaw.thomsonreuters.com/w-028-4693?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited July 30, 2021).

[50] Continue virtual courts in post-Covid period as digital justice is faster, cheaper: Parliamentary panel available at https://timesofindia.indiatimes.com/india/continue-virtual-courts-in-post-covid-period-as-digital-justice-is-faster-cheaper-parliamentary-panel/articleshow/78054273.cms (last visited July 30, 2021).

V. CONCLUSION

With the amount of population in India, it is no wonder that almost 4.4 crore cases are pending for the courts. Cases are filed every day and there is very little disposal of cases by the courts. Two types of factors contribute to this delay: party-based factors, such as wanting the evidence to become unreliable, punish the undertrial prisoner, etc., and institutional factors, such as shortage of judges and courts, complex procedures, dis-involvement of judges, etc. These factors lead to the infringement of a crucial right of the parties, i.e., the right to speedy trial. The Supreme Court having become cognizant of the impact which the violation of this right has on the parties, has inculcated this right, in its true form, into the Constitution and has repeatedly worked towards securing and expounding on this right in numerous criminal law cases.

In recent times, the court has also acknowledged the lack of this right in the civil law realm and in cases like *Anita Kushawa*, has even attempted to fill this void by actively upholding this right for civil law adjudication as well. This combined with various other steps taken by the state for ensuring fast disposal of cases of both criminal and civil in nature, along with an active application of the provisions of the CrPC and CPC which enable faster disposal, would not only ensure proper protection of the right to speedy trial in all forms of adjudication in the country, but also reinforce the legitimacy and build more confidence and trust in the courts.

ARTIFICIAL INTELLIGENCE: INVENTORSHIP AND OWNERSHIP IN PATENT LAW

Vareesha Irfan[*1]

ABSTRACT

The curious case of DABUS, an Artificial Intelligence (AI) machine to invent something on its own, has drawn everyone's attention towards the need to devise appropriate provisions to accommodate the acts and creations of the upcoming AI regime. The paper discusses the said case and analyses the judgments delivered in the courts of the U.S.A and Australia. While the District Court in the U.S.A upheld the USPTO Director's decision of denying the application of Stephen Thaler, who named his AI machine DABUS as an inventor, the Australian Federal Court granted the inventorship to DABUS and the ownership to Stephen Thaler. The position of the laws in the European Union and India is also more or less the same as that of the U.S.A., as there are no provisions in place to grant inventorship to an AI. The paper further critically examines the challenges before the lawmakers for amending or adding the provisions that could take into purview the inventions made by AI in the patent law and proposes certain solutions to overcome these challenges.

*[1] *Author is a 4th Year student of B.A. L.L.B [Hons] Faculty of Law at Jamia Millia Islamia University, New Delhi*

Keywords: Artificial intelligence, DABUS, Patent laws, PCT

I. INTRODUCTION

The introduction of Artificial Intelligence in the realm of Intellectual Property has been making news for quite a while now. Most recently, in *Stephen Thaler v. Andrew Hirshfeld*,[2] a case decided by the District Court for Eastern District of Virginia made it explicitly clear that although AI inventions can be granted patent protection, the developer of the AI cannot claim that protection in the name of the AI. The bench interpreted the language of U.S. Patent Law when it defines or mentions "an inventor" and reached the said conclusion. Though this case reaffirms the accuracy of the statute governing the patent laws in the U.S., it also opens doors to certain probing questions on why can't an AI be accommodated for in the law itself. The Australian Federal court has tried to resolve some of these questions in its earlier judgment with respect to granting the patent for an AI invention while the South African Patent Office has agreed to grant the inventorship to the AI DABUS, no questions asked;[3] however, there is still no law in force for the regulation of AI patents. Whenever a new technology emerges, its use has to be regulated, and actions are accounted for, so why not do the same for an AI? Are we reserving the concept of intelligence and intellect for our kind and refusing to acknowledge the same for something unnatural and man-made? Is it the right approach?

[2] Thaler v. Hirshfeld, 1:20-cv-903(LMB/TCB).

[3] Meshandren Naidoo, In a world first, South Africa grants a patent to an artificial intelligence system, available at: https://qz.com/africa/2044477/south-africa-grants-patent-to-an-ai-system-known-as-dabus/ (last visited on Oct 23, 2021).

This paper discusses some of these probing questions and attempts to provide some viable solutions for the same, in the light of the above-mentioned case and keeping in mind the laws of different jurisdictions.

II. AN AI CANNOT BE AN INVENTOR

On July 29, 2019, the plaintiff, Stephen Thaler, filed for a Patent in the United States Patent Office (USPTO) for the invention of "Neural Flame," a light beacon that flashes in a new and inventive manner to attract attention and "Fractal Container," a beverage container based on fractal geometry by DABUS, an Artificial Intelligence (AI) machine.[4] The USPTO issued a notice to the plaintiff to make amends in the application as it was inconsistent with the U.S. Patent Law, which recognises only an individual as an inventor and not an AI.[5] However, the plaintiff refused to alter the application and consequently, the USPTO dismissed the patent application. The plaintiff then filed a petition before USPTO's Director for reconsideration,[6] but to no avail.

The plaintiff then filed a Civil Action in the District Court of Virginia to review USPTO's refusal of his patent application.[7] The court deliberated that plaintiff could have issued a "Substitute Statement" under S. 115d (3) of 35 U.S. Code owing to the legal incapacity of DABUS and could have become the inventor of the patents officially. The court focused on the dictionary meaning of the term "individual," as a human being, used by the U.S. Congress in the Statute while defining an inventor, and applied

[4] Thaler n(1) 786.
[5] 35 U.S. Code, ss. 100(f) (2006).
[6] CFR: Title 37. Patents, Trademarks, and Copyrights, CFR § 1.181.
[7] Thaler n(1).

the doctrine of *noscitur a sociis* (a word is known by the company it keeps) with reference to the statutory language "himself/herself" used for an inventor. The court concluded that an inventor could only be a natural person, reiterating the Federal Circuit Court's decisions in the case of *University of Utah v. Max-Planck-Gesellschaft*[8] that neither a sovereign nor a corporation can claim inventorship for not being a natural person. The plaintiff also claimed "policy considerations," emphasising the advantages of commercialisation and disclosure of information to society at large and encouragement for other inventors because of the same. However, his arguments were disregarded by the court for want of any cogent evidence to suggest preference of policies over statutory interpretation on the given subject when in fact, the precedents suggested to the contrary that courts must not decide on policy.[9]

Therefore, the court, in its decision on September 2, 2021, rejected the plaintiff's petition. Nevertheless, it's been a pressing question for quite a while now whether the inventions created by AI can be offered legal protection? If yes, then what would be the hurdles in the way of devising laws in support of the same, and how would the lawmakers overcome those hurdles?

III. CHALLENGES IN GRANTING INVENTORSHIP TO AI

Reading and understanding the judgments delivered on AI's patentability, it becomes clear that an AI cannot become an inventor because it doesn't fit within the statutory language used to describe an inventor. However, if

[8] 734 F.3d at 323, Beech Aircraft, 990 F.2d at 1248.

[9] Sandoz Inc. v. Amgen Inc. 137 S. Ct. 1664 (2017).

one were to consider the essence and spirit of the Patent Law and the policy behind developing it, which is providing protection after the disclosure of an invention so that other inventors can be inspired and work towards developing something new or revealing their own inventions, then awarding the patent to an AI makes complete sense and seems the right way forward. So, why are lawmakers not ready to amend the Patent Laws and include AI in the category of an inventor? Following are some of the prime concerns in this regard.

1. **No Legal Personality:** The Courts have ruled against the inventorship of Corporations & Sovereigns time and again because of the fictional nature of their existence due to which the patent rights cannot be enforced by them, but is it also the case with AI? AI comprises of computerised programs to perform certain tasks on its own, which can only be done by a human mind.[10] It doesn't reside in just a computer or machine or a set of computers & machines as these are mere resources for an AI to deliver the required output. Thus, it can be said that generally, AI doesn't exist physically and going by the current statutory interpretations, it is rightly excluded from being an Inventor even it was considered a Legal Personality. If one were to argue that legal persons are not eligible for inventorship in patent law because they comprise of human agencies whereas an AI doesn't, it would be pertinent to point out that if the lawmakers and courts ever decided to grant inventorship to fictional personalities, they would most likely

[10] Alex Owen Hill, What's the Difference between Robotics and Artificial Intelligence, available at: https://blog.robotiq.com/whats-the-difference-between-robotics-and-artificial-intelligence (last visited on Sept 15, 2021).

begin by granting it to Corporations & Sovereigns as humans can be easily subjected to rights and liabilities.

2. **Liability:** Learning and creating a novel output by using resources and applying that learning is usually the character traits of a person. This means that the person who created a particular invention can be bestowed with all the glory for their achievements and can also be held accountable for the destruction or disruption it causes. Furthermore, since the inventor is the one claiming the rights, they will be liable for all the acts that follow. At the present technological stage, although AI might be making the decisions in developing its invention, it is not possible to impose legal liability on it. In such a case, the resort would be to hold the owner of the AI accountable to balance the scales of justice. For instance, if the invention proves to be fatal to the life of a user who then claims compensation for the injuries, in this case, the inventor AI cannot actually pay the compensation amount, it is the owner who will do so, probably from the money they made out of monetising on the invention, but it will be their loss, and not the AI's because it is not a part of the economic ecosystem as such. All in all, the execution of a patent can only be accomplished by a human being and not a machine since AI cannot be subjected to legal liability in the present time.

3. **Authenticity:** Let's consider for a moment that an AI can be granted inventorship of a patent. It is a fact that an AI is operated and supervised by a person, at least presently, and it is the owner/developer only who will apply for the patent of an invention. The test of

patentability is that the invention should be new, inventive and capable of industrial application.[11] There is no test as to the authenticity of the patent unless there is an objection by some other person. In the case of an AI made invention, if it does fulfil all the requirements of a patent, there is no known way to determine whether the invention was made entirely by the AI itself or with human intervention. A patent application only consists of the details of the invention and not of how the invention was arrived at.[12] Further, to establish such authenticity, a separate procedure would have to be provided and then a measure as to how much human intervention defeats the AI's claim over the inventorship, which could be the case where an AI generates multiple solutions to a problem and the owner analyses all the outputs to chose the most appropriate one and apply that. In this case, the AI merely acts as a tool and can't be called an authentic inventor.

4. **Little Advancement:** It is often a question of whether an AI is actually capable of inventing something by itself from scratch or does it need human interference.[13] While human input and supervision are required in most cases, this cannot be a fair reason not to accommodate such AI systems that can and have produced the invention all by themselves. The advancement needs to be from both ends to attribute more substance to the argument of consideration of AI in the laws, in general. For instance, the filing of the patent requires the submission

[11] Article 27.1, TRIPS.

[12] Should an AI system be credited as a patent inventor?, available at: https://www.williamspowell.com/ip-and-ai/should-an-ai-system-be-credited-as-a-patent-inventor (last visited on Sept 19, 2021).

[13] Id.

of such a description of the invention, which would enable a person of normal skill in the field of the invention to carry it out. If somehow, the applicant managed to describe the performance, who is supposed to be able to carry that out and give the requisite result, is it going to be an AI specialist, or is it going to be an AI? Therefore, in order to accommodate an AI as an inventor, an entirely new procedure will have to be formulated to test the worthiness of the application.

IV. POTENTIAL SOLUTIONS TO OVERCOME THE CHALLENGES

After a close analysis of the problems posed in granting inventorship to an AI, the following suggestions could give a solution for the same:

1. **Adapt –** A while ago, the lawmakers were posed with the issue of patentability of a computer program, and eventually, the global treaties and national patent laws were amended to give patent protection to inventions made in and with the help of computer programming. That is to say that the nature of the law has been dynamic to keep with the pace of the development of science and technology. This has also been the case for all other kinds of Intellectual Property, such as unconventional trademarks (motion marks, sound marks, etc.) and copyright (computer codes, sound recordings, broadcasting, etc.). Although there hasn't been any advancement towards granting the proprietorship to technology, the possibility of considering an AI as an inventor cannot be said to be a very slim one. In fact, the idea should be welcomed and worked on to give a policy incentive to the AI developers by giving due credit to their creation and lay stones to futuristic technology.

2. **Substitute Statement –** The USPTO in the DABUS case offered a viable solution to sort out the concern with respect to the AI's liability which is to issue a Substitute Statement, but the Appellant denied to do so. However, the provision for the same can be amended to consider granting inventorship to the AI after a proper analysis of its intelligence and testing whether the AI can fulfil the obligations for exercising its patent claim, the burden to prove which would be on its creator. This could be somewhat compared to the situation with that of a child who is legally incapable of filing for a patent; however, once they reach the age of majority, they become competent to enforce and claim their rights. The said provision will not only satisfy the Patent Offices' concerns regarding the technological advancement of the AI but also provide a huge incentive to the AI developers to improve their technology and people to invest in their development.

3. **Joint Inventorship –** This would be the most promising solution, for now, wherein all entities apart from natural persons could be made joint inventors with the natural person who has the complete legal capacity to file, claim and defend the patent rights on behalf of the joint inventors of any invention. However, the condition in this particular case would be that the natural person must also have made some contribution to the invention proposed to be patented. This would help in overcoming the major problems of legal personality, legal liability as well as authenticity and would require the least amount of changes, efforts and time, to be implemented. Moreover, it would also empower the developers and encourage the companies that invest in AI technology to finally have an opportunity to claim their rights in the invention. Therefore, by awarding joint inventorship, the

Patent System could take a leap forward while considering the present limitations of the legal system.

V. AUSTRALIAN POSITION

Stephen Thaler also filed a patent application under Patent Co-operation Treaty (PCT) in Australia; however, the Deputy Commissioner of Patents didn't accept the name of an AI as an inventor.[14] The decision was appealed in the Federal Court of Australia on July 30, 2021, wherein the court delivered the verdict in favour of Stephen Thaler. The bench identified DABUS as a manifestation of the human brain function that not only organises the data and gives possible solutions to a problem but also creates novel information patterns and independently adjusts the results in different situations. The court drew upon the fact that the word "inventor" as described under the Australian Patents Act didn't exclude an AI and relied on the definition given under the Statute of Monopolies Act, 1624,[15] i.e., "any manner of new manufacture the subject of letters patent and grant of privilege." The court also drew a distinction between the concept of ownership and inventorship wherein it attributed the former to a natural/legal person and the latter to anything, and concluded that Stephen Thaler owned the inventions made by DABUS, who is actually the inventor. Nonetheless, the court made it explicitly clear that AI need not be a patentee, not presently anyway. [16]

VI. POSITION IN EU

[14] Thaler v. Commissioner of Patents [2021] FCA 879.
[15] Statute of Monopolies Act, 1624, s. 6.
[16] Thaler n(13).

The European Patent Convention, 1973 regulates Granting of Patents in 38 contracting states. Article 52 of the Convention excludes computer programs, as such, from patent protection; however, it does protect any inventive solution given to a technical problem using a computer program. So, as far as AI inventions are concerned, they are patentable under the European Patent Law.[17] Article 58 of the European Patent Convention provides that a patent application can be filed by any natural or "legal person", which means that if AI were to be given the status of a legal person in future, it would certainly be entitled to inventorship. Nevertheless, the European Parliament is firm in its view that the present law applies only to the AI-assisted human creations and not AI-generated creations as it would certainly raise the question of ownership, liability, rights, etc., and the term "intellectual" being associated with natural persons only.[18] Thus, European Law only sees AI as a tool used by humans for creating an invention and not as an inventor or a potential inventor in the near future.

VII. INDIAN POSITION

In India, the Patents Act, 1970 governs the regulation of Patents. The relevant provisions pertaining to AI inventions are Section 3(k) of the Act and Guidelines for Examination of Computer Related Inventions which determine the patentability of the invention. The provision is very restrictive with respect to computer programs and excludes algorithms and computer programs *per se*. Thus, the scope is limited and restricted in this

[17] Report on Intellectual Property Rights for the Development of Artificial Intelligence Technologies, available at: https://www.europarl.europa.eu/doceo/document/A-9-2020-0176_EN.html#title7 (last visited Sept 19, 2021)
[18] Id.

regard; however, this does not mean that inventions created by AI cannot be patented. In fact, six per cent of the patents filings in the emerging technology are related to AI in recent times in India, some of which have also been granted protection.[19] These patents include 'NIRAMAI,' an AI technology to detect breast cancer in early stages by analysing thermal images without exposing the patient to any harmful radiation, and 'GRAHAA SPACE,' a technology that helps in streaming high-quality videos from low earth orbit.[20] The Indian Government has taken many initiatives to encourage AI technology, such as RAISE 2020, an effort to use AI for economic and social development; INDIAai, the national AI portal and; PARAM SIDDHI AI, India's fastest and largest supercomputer.[21] However, as far as the concept of inventorship in the Indian patent law is concerned, it is restricted only to "persons."[22]

VIII. CONCLUSION

After analysing both the cases decided by the courts of the U.S. and Australia, the prevalent position of AI in the arena of Patent law becomes apparent. According to Australian law, which has a broader interpretation of the term inventor, and the South African Patent Office, an AI can only be an inventor. Whereas in other jurisdictions, it is still a mere tool operated by and under the supervision of a person. There are good reasons behind both the views, namely; (i) In the U.S., legal persons are not

[19] AI Patents: Driving Emergence of India as an AI Innovation Hub, available at: https://indiaai.gov.in/research-reports/ai-patents-driving-emergence-of-india-as-an-ai-innovation-hub (last visited on November 25, 2021).
[20] Id.
[21] How MeitY spearheaded India's AI ambitions in 2020, available at: https://indiaai.gov.in/article/how-meity-spearheaded-india-s-ai-ambitions-in-2020 (last visited on November 25, 2021).
[22] Patents Act, 1970, s. 6.

considered inventors for the purpose of patents, while in other jurisdictions like U.K. and Australia, where legal persons can file for a patent, AI doesn't have the status of a legal person in any jurisdiction yet; (ii) There is no law in place yet, that can determine the liability of an AI as far as patent law is concerned; (iii) There is no procedure in place that could establish the authenticity of the invention that it was in fact made solely by the AI and; (iv) Except DABUS, there still hasn't been such huge development in the technology that can create something from scratch. However, there are ways to overcome these hurdles like, to award joint inventorship for such patent applications where one natural person could represent the AI throughout the process and exercise the patent rights; to issue a statement while filing to take complete possession of the invention and to begin working on laws that help regulate the entire procedure of granting and executing patent rights. Hence, it would be in the interest of society to expand the scope of the law to this dimension.

THIRD-PARTY FUNDING IN ARBITRATION: AN UNDER-EXPLORED MARKET THAT CAN EFFECTIVELY DEPLOY CAPITAL

Jasmine Madaan[*1]

ABSTRACT

"Third-Party Funding (TPF) is the future", a saying that has captured the entire legal market. It is a well-established practice in developed countries in arbitration, however, for India, its use in arbitration is comparatively new and is rapidly increasing. The author has followed the doctrinal method and bifurcated the paper into five parts. The first part introduces the topic with a brief description of the concept. The second part highlights the advantages that TPF offers. After acknowledging the advantages, it analyses different issues that arise related to TPF in international arbitration in the third part. The fourth part briefly maps the evolution of TPF dating back to the doctrine of maintenance and champerty and is further divided into two sub-parts. The first sub-part analyses India's stance on TPF in dispute resolution. While tracing the development of the law via judicial pronouncements in India, the paper highlights the lacuna in strict and separate laws pertaining to TPF in arbitration and the dire need to implement one. The second sub-part offers a succinct analysis of the legal stance of countries namely Singapore and Hong Kong on TPF

*[1] *Author is a 4th Year B.A. L.L.B [[Hons.] student at Vivekananda Institute of Professional Studies, GGSIPU*

in arbitration. The fifth part of the paper concludes with some suggestions that can be incorporated in Indian legislation to statutorily regularize TPF in Indian seated arbitration, based on the analysis drawn by studying different jurisdictions' approaches.

Keywords: Third party funding, international law, arbitration, doctrine of maintenance

I. INTRODUCTION

"Third-party funding", the worldwide legal industry's rising buzzword, has occupied markets' headlines for its foreseeable prominence, especially in the post-COVID era. Third-party funding is an alternative method of financing which is a lesser-explored market than its potential and is often referred to as a non-party's provision of economic support to a participant. In absence of a universally accepted definition, based on various definitions put forward by institutions and authors, it could be understood as non-recourse financing available to parties wherein the cost of legal proceedings, partly or fully, of a party is covered by a third person i.e. the outside funder in exchange for a predetermined or post-determined share in the settlement amount or the monetary award of the proceedings, if successful. It could be any dispute resolution mechanism including but not limited to arbitration, mediation and litigation. It is believed to serve equality between the parties by bringing the financially weaker party at par with the other party by leveraging capital. The increase in the promotion of the use of TPF in arbitration is self-evident and in consonance with the increasing globalization.

A 2016 press note of the Government of India revealed that the then capital tied up in infrastructural arbitration was Rs. 70,000 crores.[2] This example helps to build a case that despite a continuous advertisement of arbitration as a cost-effective mechanism over litigation, an enhanced requirement of outside financing in arbitration cases is discernible.

Beginning with offering lending hands to the companies to pursue claims, it has now become a regular practice in certain jurisdictions' litigations. The assumed finality of awards, high-value claims and enforcement regime under the New York Convention has led to an increase in its use in international arbitration. However, the question of whether its regularization in arbitration by domestic laws would assist in its proliferation by inculcating the trust of the stakeholders still remains. This process faces many issues including the question on procedural and ethical grounds in case of arbitration due to the discretion offered to the parties to appoint arbitrators of their choice. However, no one would be incredulous that if rightly implemented it can increase access to justice and boost business efficiency.

II. REASONS FOR ITS GROWING DEMAND

Significant advantages of third-party funding or the reasons for its rampant use in arbitration are listed as follows:

A. Easier access to justice

[2] Cabinet Committee on Economic Affairs, Cabinet approves Initiatives to revive the Construction Sector, (Aug. 31, 2016), Available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=194729#:~:text=Cabinet%20approves%20initiatives%20to%20revive%20the%20Construction%20Sector&text=The%20Cabinet%20Committee%20on%20Economic,to%20revive%20the%20Construction%20Sector' (last visited on Jan. 30, 2021).

The primary contention in favour of TPF is that it provides access to justice to financially weaker parties i.e. the ones who could not afford legal expenses otherwise. TPF has the function of "bargaining-power-equalizing" adhering to the statement *"Where bargaining imbalances threaten to skew settlement, the solution is more likely to be found in a market mechanism than in procedural reform"*.[3] TPF helps in the efficient use of resources and saves the cost of the parties. It further helps in more objective assessment and management of cases as the element of suppression of the under-resourced party is eliminated. The denial of access to justice may influence views of the fairness and legality of international arbitration as well.[4] The acknowledgement of third-party funders as adopted by judges in civil cases as those who help others to access justice[5] applies to arbitration as well.

B. Offer financial stability

Often the claimant withdraws from the arbitration proceedings due to the cash drain. Even the parties that are equipped with resources to fund the proceedings can utilize that capital to save other resources for alternate business purposes. Moreover, it helps in the partial transfer of monetary risk resulting in lesser uncertainty.

C. Advance assessment of merits of the claim

As a part of the TPF process, a fine advance assessment of the merits of the claim or commonly called due diligence is conducted by the funder

[3] M. Rodak, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", 155 Penn. L. Rev. 503 (2006).
[4] C. ROGERS, "Gamblers, Loan Sharks & Third-Party Funders" 41 Penn. L. Rev. 51 (2013).
[5] Yeheshkel Arkin v. Borchard Lines Ltd & Ors, [2005] EWCA Civ 655

before investing. Objective assessment and management of the case offer a substantial basis to both the claimant and funder to proceed based on the tentative success of the claim.[6]

D. Win-win situation

Had the party not been funded, it would not have been able to contest the matter, thus, even if a certain share of the award is handed over to the funder, the funded party would still be left with the remainder which otherwise would not have been possible. As compared to other forms of funding, for instance, in the case of equity funding, a certain percentage of equity i.e., ownership of the company is transferred to the equity funder who indirectly also claims a share in the award granted in legal battles. Whereas, in the case of TPF, the funder directly invests in the legal proceedings and indirectly in the award claimed and therefore in return receives ownership of the claim. As much as it acts as a safer source of funds to the claimant, it is also a better investment alternative for funders as it is less dependent on financial and unpredictable markets. Moreover, the perks of arbitration namely cost & time effectiveness, expert decision-makers, high enforceability of the award due to the likes of the New York Convention make it a favourable option[7].

[6] A. Endicott, N. et al., Third-party funding in arbitration: innovation and limits in self-regulation (part 1 of 2), available at: http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-inself-regulation-part-1-of-2/ (last visited on Jan. 30, 2021).

[7] Professor K.W. Patchett, The New York Convention on The Recognition And Enforcement Of Foreign Arbitral Awards Explanatory Documentation Prepared For Commonwealth Jurisdictions, The New York Convention on the Recognition and enforcement of Foreign Arbitral Awards, available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-Commonwealth.pdf (last visited on Feb. 16, 2021).

III. ISSUES ARISING OUT OF TPF

The advantages mentioned in the last part are overshadowed by the following issues that arise in TPF especially in the case of international arbitration:

A. Disclosure

Non-disclosure of funding arrangements is seen as a grave threat to the free and fair arbitral proceedings. As per the usual practice, it is not disclosed voluntarily unless made mandatory or ordered by the institutions or the country's law. Questions that arise herein are: who shall bear the burden of disclosure, under what conditions, and to whom it should be made. Moreover, funders not being parties to the proceedings cannot be compelled under the general rules to disclose their participation, so what should be the solution? The solution lies in a regulation that shall cater to answers to these questions as disclosure can prevent or curb conflicts of interest.

IBA Guidelines General Standard 7(a) provides, inter alia, that parties shall disclose any third-party funding arrangement to the tribunal and other parties involved, at the earliest opportunity[8]. However, the ICCA-QMTF report[9] which focused on identifying issues related to TPF in

[8] International Bar Association, *IBA Guidelines on Conflicts Of Interest In International Arbitration* (Issued on Oct. 23, 2014) (General Standard 7(b)).

[9] Stavros Brekoulakis, William W (Rusty) Park and Catherine A Rogers, Draft Report for Public Discussion Of IICCA-Queen Mary Task Force On Third-Party Funding In International Arbitration, available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (last visited on Feb. 18, 2021).

international arbitration, provided that the task force wasn't certain about what relationships needed to be disclosed under IBA General Standard 7.

In addition to ICCA-QMTF's finding, the author finds the disclosure requirement under the IBA Guidelines as an incomplete provision as firstly, its scope is only limited to arbitrator's relation with the funder ignoring relation with other stakeholders, for instance, the opposite counsel; secondly, it doesn't provide any reasonable time frame for disclosure leaving an open end of uncertainty. Most importantly, the guidelines aren't binding and don't have an overriding effect on national laws and arbitral rules chosen by the parties rendering it a weak piece unless adopted by arbitral institutions or states.

The 2015 survey report issued by Queen Mary states that the main point raised in all the interviews was that the regulations shall focus on disclosure of the third-party funding (76%) and identity of funders (63%).[10] Major Asian arbitration centres have brought in rules for disclosure which are discussed later in the paper. An instance of recognizing and handling the issue of disclosure in TPF was seen when the International Centre for Settlement of Investment Disputes (ICSID) tribunal in a case ordered the funded parties to disclose whether there was a third-party funding arrangement, if the answer was affirmative, then the names and details of the funders and lastly the terms of funding.[11] It was

[10] Queen Mary University of London and White & Case LLP, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, White & Case, available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (last visited on Feb. 18, 2021)

[11] Muhammet Çap & Sehil Inşaat Endustrive Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6)

a landmark step attracting the focus of authorities to the issues and their probable solutions in TPF in arbitration.

The aforementioned instances depict the regularisation of disclosure. However, different legislations provide for distinct time for disclosure, authority to order disclosure and nature of disclosure. On the contrary, disclosure is opposed with the contention that it can be used frivolously to create challenges for arbitrators, requests for the security of costs or drive up the cost unnecessarily.[12] These issues make it necessary to provide guidelines or regulate the functioning of TPF in arbitration by law.

B. Conflicts of interests and control of proceedings

The issue of conflict of interest can arise out of the funder's relation with the stakeholders including the arbitrator and the lawyer. It is an essential feature to maintain the impartiality and independence of arbitrators, and every arbitration institution has rules[13] for the same requiring disclosure of facts that could form grounds of disqualification.

The funder meddling in the attorney-client relation, strategic decision making of management and case strategy, is often an issue. The IBA Guidelines on Conflicts of Interest in International Arbitration propose a set of principles whose effectiveness rate is 60%[14] in practice despite not being binding. It also provides a list of situations that might create issues related to impartiality and independence. In countries where an attorney or the law firm is permitted to be a funder, conflict of interest might arise

[12] Supra note 9, at 86

[13] LCIA Rules, Art. 10 (1) and (3); ICC Rules 2012, Art. 14 (1); UNCITRAL Rules 2010, Art. 12; ICDR Rules, Art. 8 (1); SIAC Rules 2010, Art. 11 (1); HKIAC Rules, Art. 11 (4); CIETAC Rules 2012, Art. 29 (2)

[14] Supra note 8 at 36

if the funder has business connections with the law firm, threatening the legal profession. Some of the cases where the presence of a funder might lead to a conflict of interest are: when the arbitrator holds shares or some interest but not limited to work as a director in a funding company; where the funder has indirectly made appointments of the arbitrator in multiple arbitrations; the relationship between the funder and the arbitrator's firm etc. Conflict of interest poses a grave threat to the valid composition of the tribunal and the normal functioning of the arbitration proceedings therefore the author believes that the best time to reveal any conflict of interest would be within a specified duration of appointment of the arbitrators.

C. Confidentiality

Confidentiality of proceedings in the arbitration is an attractive feature that prevents the case details from being shared with outsiders.[15] In the case of TPF, prior to funding, thorough due diligence is conducted by the funder with its team. In order to review aspects related to the claim, the funders also analyse the details about arbitration, for instance, the applicable laws, jurisdiction and seat of arbitration, for which the funder requires information regarding the case.[16] Once the funding agreement is finalized, during the case monitoring phase, the funder is updated on the case's development.[17] Due to the reason that a funder isn't a signatory to the arbitration, as per the general rule, he/she cannot be bound by the

[15] Elza Reymond-Eniaeva, Towards a Uniform Approach to Confidentiality of International Commercial Arbitration (Springer, 1st edn. 2019)
[16] Georges Affaki, A Financing is a Financing is a Financing ICC Dossiers Volume X (Kluwer Law International, 2013).
[17] Jonas von Goeler, Third-Party Funding in International Arbitration and Its Impact on Procedure (Kluwer Law International, 83, 2016).

implied confidentiality. Thus, reach of confidentiality can be fatal to the non-funded party unless there exists a confidentiality agreement with the funder to the contrary.[18] For instance, in India, inter alia the Arbitration and Conciliation (Amendment) Act, 2019 states that the parties and the tribunal are obliged to keep the arbitration proceedings confidential except the award which is to be made public for its enforceability.[19]

TPF in arbitration raises a concern on behalf of the non-funded party that it leads to a breach of confidentiality on account of the involvement of a third party. The ICCA-QMTF report provides that the tribunal can be provided with the authority to restrict the use of the information obtained by the third-party funder.[20] The conclusion drawn in the report provides that sharing of documents with the third party doesn't amount to waiver.[21] Certain arbitration rules[22] confer arbitrators the discretion to apply rules of privilege. These rules highlight the role that national laws play to decide the evidentiary value and legal privilege attached to any evidence.[23] Thus, it is necessary for national laws to have a provision regarding the same.

In the author's opinion, the best solution is that the parties shall enter into a non-disclosure or confidentiality agreement with the funders to avoid its breach and this can be furnished as proof to the non-funded party of no breach of confidentiality. Furthermore, the tribunal could be provided the

[18] *id*. at 299
[19] The Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of 2019), § 43A (India)
[20] Supra note 8, at 117
[21] Supra note 8, at 123
[22] The UNCITRAL Model Law, art 19; LCIA Rules, art 22; The ICC Arbitration Rules, art 22
[23] Supra note 8, at 121

power to restrict the information obtained by the funder thereby inculcating trust in the non-funded party.

D. Liability and Security for costs

Disclosure of TPF in arbitration can prompt the party not receiving funding to file an application for security of costs. Thus, even if the parties receiving TPF are successful, they are still vulnerable to such security for cost application which increases the overall costs. In the case where it is assumed that the party likely would not pay the awarded costs, the cost of security is usually granted. Since the common practice of TPF involves impecunious parties, the tendency to grant security for costs where the party is being funded is high.[24] However, in the current scenario, not only impecunious parties but solvent parties also adopt TPF as an alternative to maintain liquidity and share risk. The ICCA-QMUL Taskforce on third-party funding also states that TPF shall not be the criteria to order security for costs per se and shall be determined on the basis of impecuniousness.[25] Rather the TPF agreement can be used to establish that such a party can meet the award in an adverse case. National laws play a crucial role in determining the discretion of the tribunal to order security of costs. Recovery of costs can be granted in two cases: first, when the funded party is defeated; second, when the funded party succeeds. In the former case, the view of Lord Philips[26] is worth to be noted, he stated that justice would be better served if the professional funder is made potentially liable for costs of the opposite party than not providing any costs to compensate if

[24] *Supra* note 8, at 132
[25] *Supra* note 8, at 142
[26] Supra note 4

the case is found to be without merit, however, such liability shall extend to the funding provided. *Essar Oilfield Services Ltd. v. Norscot Rig Management Pvt. Ltd.*[27] acts as a precedent for the latter case wherein the successful claimant was granted other costs while observing that costs of funding a legal proceeding may be recoverable in arbitration as well. The provision for security of costs is provided in the Indian Civil Procedure Code, however, it covers only the litigation aspect.

Thus, to conclude this part, it can be observed that these issues often supersede the advantages offered by TPF, the uncertainties created due to these issues can be curtailed only by regularizing TPF arrangements via national laws or arbitral institutions' rules.

IV. EVOLUTION OF TPF AS A CONCEPT

The place of origin of the concept of TPF is often debated, however, it is believed by few that the foundation of TPF was laid in Australia and now it's a part of its civil justice system.[28] With the elapse of time, the practice started spreading its roots in the UK's legal market.[29] The USA adopted

[27] (2016) EWHC (Comm) 2361 ("We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.")

[28] Jason Lyon, "Revolution in Process: Third-Party Funding of American Litigation", 58 UCLA L. Rev. 571 (2010).

[29] B. Cremades & A. Dimolista, Third-party funding in International Arbitration, ICC Publishing, available at: https://icckauppa.fi/wp-content/uploads/sites/26/2016/06/752-icc-third-party-funding-in-arbitration.pdf (last visited on Mar. 19, 2021); M. Destefano,

this practice at a slower pace. The present system of TPF recognizes two types of third-party funders: commercial and consumer. Commercial funders usually fund disputes between businesses, business and sovereign parties, whereas consumer funders invest in consumer disputes like personal injury cases, medical malpractice which involve claims of lesser amounts.[30]

A. Maintenance and Champerty

Maintenance and champerty is a common law doctrine that had imposed a barrier on the application of third-party funding in common law jurisdictions. Maintenance is referred to as assistance offered by someone to the litigant with no bonafide interest to prosecute or defend a lawsuit i.e. meddling in someone's litigation.[31] Whereas, champerty is an aggravated form of maintenance wherein the intermeddler facilitates the litigant to pursue the claim in return for a share in the judgment proceeds as a consideration.[32] Contingency fee agreements are an exception to the champerty, and different legal jurisdictions have different stances on it. The doctrine originated in the UK when TPF was being abused by English barons who bought weak claims by underwriting the costs, usurping claims to gain power backed success.[33] The earlier belief was that third-

"Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?" 80 Fordham L. Rev. 2822 (2012).

[30] University of Pennsylvania Carey Law School, Conflict of Interest in International Arbitration in the Context of Third-Party Funding, YouTube, available at: https://www.youtube.com/watch?v=fnAJB0ChJCo&t=1910s (last visited on Mar. 20, 2021).

[31] B.A. Garner, Black's Law Dictionary, Thomson West, 2007, 973; D. RICHMOND, "Other People's Money: the Ethics of the Litigation Funding" 56 Mercer L. Rev. 652-655 (2005)

[32] Alexander v. Unification Church, 634 F.2d 673, 677 (2d. Cir. 1980)

[33] Kshama Loya Modani, Vyapak Desai, Asia No Longer 'Third to Third Party Funding- Meets The Financing World of Arbitration, Nishithdesai, available at:

party funding is a glorified form of maintenance and champerty and dilutes the purity of justice. With the advancement of time and the concept of access to justice, the doctrine has been diluted or repealed in most legal jurisdictions.[34] However, at present, few countries including Ireland still consider maintenance and champerty a tort and a crime. In the opinion of this author, third-party funding should not be considered opposed to public policy and rather, it shall be seen as a concept that advances public policy by providing access to justice to the ones who can't afford it. Germany, a civil law jurisdiction, believes that the non-existence of traditional doctrine of champerty and maintenance in civil law countries has helped in the growth of a balanced market.[35] The author partly agrees with the belief of Germany that following the traditional doctrine in the present scenario would be detrimental for the growth of a country, especially stopping people from getting access to TPF. To conclude, the rule of reason shall be applied as opposed to the rule of per se to decide the question of whether a TPF agreement is in violation of public policy.

B. India's Saga of non-regularization of TPF in arbitration continues

To dismiss the cloud of uncertainty regarding third-party funding in India, it is important to highlight that the Indian statutes neither expressly allow nor bar third party funding in arbitration or even in litigation thereby

https://nishithdesai.com/_A_Asia-No-Longer-Third-To-Third-Party-Funding.pdf (last visited on Mar. 21, 2021)

[34] Iain C McKenny, Evolution of the Third-Party Funder, Lexology, available at: https://www.lexology.com/United%20Kingdom,of%20law%20began%20to%20develop (last visited on Jan. 5, 2021)

[35] George R. Barker, Third-Party Litigation Funding in Australia and Europe, 8 J.L. ECON & POL'Y 451, 522 (2012).

making it legal in India. However, the concept of third-party funding in India has been shaped by judicial pronouncements listed below

1. 1876 (Privy Council)

The Privy Council in an early case of *Ram Coomar Coondoo v Chunder Canto Mookerjee*[36] was faced with the question of whether TPF violates public policy or not. Even prior to independence when common law and Indian law went hand in hand, the Privy Council held that when there is a fair agreement to provide funds to continue the suit in consideration of a share in the disputant property, if recovered successfully, ought not to be opposed to public policy. The Council stated that the concept of maintenance and champerty in English law has not been adopted in its original form and entirety in Indian law. The council also provided that in cases where the consideration for funding exceeds a reasonable limit of return and if found unconscionable and extortionate shall not be effectuated. Moreover, cases involving no bonafide object to assist a claim shall be watched carefully and shouldn't be effectuated, provided this shall be decided on a case-to-case basis. The author views this decision of the Privy Council as a milestone which paved the way for the entrance of third-party funding in India.

2. 1908-2018

During this period, some Indian states, namely Gujarat, Maharashtra, Uttar Pradesh, Madhya Pradesh, Andhra Pradesh, Tamil Nadu and Orissa amended the Civil Procedure Code, 1908 especially Order XXV Rule 1

[36] 1876 SCC OnLine PC 19

granting power to the Court in cases of financed suits, to order such financier to become a plaintiff to the suit if he consents and may fix a time to submit security for payment of all costs incurred or likely to be incurred by the defendant, failure of which might lead to dismissal of the suit. The provision safeguards the interest of the defendant by depositing security of costs which can be furnished in case the plaintiff's claim is found to be unmeritorious. The said provision acknowledges the existence of third-party funders proving that it's not an alien concept to Indian jurisprudence. Despite the lacuna of an express provision for TPF, the only evolution of the concept in the Indian context has been via judicial pronouncements. For instance, an agreement wherein 50% of the claimed amount be provided to the funder[37] or an agreement providing 75% of the claimed amount to the funder was held to be a non-reasonable bargain[38] and opposed to public policy. The author wants to draw attention that even till date; no such amendment has been made to the central Code leading to a negative lacuna of an express provision related to TPF in litigation as well.

The Arbitration and Conciliation Act, 1996 makes no express mention of third-party funding. The presence of the TPF clause in state amended CPC doesn't adduce the legality of a similar clause in arbitration. However, Fifth Schedule, Para 19 of the Arbitration and Conciliation Act, 1996 which provides for justifiable doubt as to independence or impartiality of an arbitrator on the ground of arbitrator or his/her close family member's close relationship with a third-party that may be liable to recourse on the part of the party in case of an unsuccessful claim, hints at the recognition

[37] Babit Ram v. Ram Charon Lal, AIR 1934 All. 1023
[38] Nuthaki Venkataswami v. Kalia Nagi Reddy, AIR 1962 AP 457

of TPF in arbitration. The High-Level Committee's report of 2017 to review the scope of Institutionalisation of Arbitration Mechanism in India mentioned that enactment of legislation for third-party funding in different jurisdictions, namely Singapore and Hong Kong, has helped in making them an arbitration hub.[39] However, to the surprise, there was no provision in the Bill proposed later, yet again leaving the concept of TPF unregulated in India seated arbitration. The author discusses later that similar legislation can be helpful for India to achieve its goal of becoming an international arbitration hub.

An important case to be noted here is the case of *G, A Senior Advocates*[40] wherein the Hon'ble Supreme Court inter alia ruled that the rigid English law's concept of champerty and maintenance isn't applicable to India. A contract based on consideration of share in the success of the case isn't illegal per se. However, it ruled that an advocate can't stipulate for, or receive a proportion of the results or claim, and doing so would be considered as offending the rules of his profession[41]. Moreover, India's Standards of Professional Conduct and Etiquette bar any advocate to enter into a contingency fee agreement or agreement to share the proceeds of the case.[42]

Another judgment to be noted is that of the Hon'ble Kerala High Court in the case of *Damodar Kilikar & Others v. Oosman Abdul Gani & Another*[43]

[39] *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India,* Department of Legal Affairs (Jul. 30, 2017), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (last visited Jan 15, 2021)
[40] 1955 1 SCR 490
[41] Bar Council of India Rules, 1975
[42] *id.* at 2
[43] Appeal Suits No. 171 Of 1956, 176 Of 1956 (E) | 09-01-1961

wherein the Court reiterated that unless there is an involvement of an advocate in the agreement to share the legal proceeds, it can't be declared illegal prima facie.

In a recent case of *Bar Council of India v. AK Balaji*[44], the Supreme Court stated that there "appears" to be no bar on third-party funding in India. A conjoint reading of *Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim),* and lastly *Rule 22 (participating in bids in execution, etc.)* of BCI Rules strongly suggests that there is merely a bar on any advocate to fund litigation of their client. The author believes that the Court ensured that the ethics of funding are complied with. However, the word "appears" leads to ambiguity and glimpses the uncertainty in the judiciary regarding the concept of TPF. This judgment can only work as a thread to control the scattered thought of validity of TPF let alone its regularization by the Indian legislature, even in litigation.

This remains the current standpoint of the Indian judiciary on third-party funding in litigation. It is to be noted that these precedents read with the aforementioned provisions lay down the rule that contingent fee agreements are not permitted in India, continuing to maintain a silent stance on the regularization of TPF. It can be implied from the tone of the Indian judiciary that to determine the validity of funding agreements rule of reason is used rather than the rule of per se i.e. facts of every case determine the validity of the agreement. This is in line with the author's views as mentioned earlier.

[44] AIR 2018 SC 1382

3. 2020 onwards

In the recent case of *Jayaswal Ashoka Infrastructures Pvt. Ltd. v. Pansare Lawad Sallagar, Thr.*[45], one of the parties entered into a contingency fee agreement with his counsel who wasn't an advocate and was a CA but had represented the party in a construction arbitration. The final award was granted in favour of the same party but it denied paying the counsel his fee. On approaching the Court, the party contended that the contingency fee agreement is barred by the public policy under the Indian Contract Act[46]. The Bombay High Court held the contingency fee agreement, in this case, isn't hit by public policy exception as the counsel with whom the agreement was entered into was not an advocate leading to the non-applicability of the BCI Rules. However, an appeal against the High Court's judgment is pending before the Hon'ble Supreme Court wherein the Court will decide whether BCI Rules regarding contingency fee agreement are applicable to non-lawyers. It would be interesting to note the Apex Court's view on this point as it might lead to further shaping of the concept of TPF in Indian seated arbitration by discussing the concept of contingency agreements involving a non-lawyer counsel in the light of public policy.

In the case of *Norscot Rig Management Pvt. v. Essar Oilfields Services*[47], a London seated international arbitration, the costs for arbitration were awarded against a party that was funded by a third party. It is pending

[45] 2019 SCC OnLine Bom 578
[46] Indian Contract Act, 1872, § 23
[47] 2019 SCC OnLine Bom 9153

before the Bombay High Court wherein respondents have tried to challenge the enforceability of a foreign award by Sir Philip Otton under the ICC Rules. The contention raised is that the TPF arrangement is contrary to public policy. In the author's opinion, this could be a landmark decision as the court is expected to delve into, inter alia, the question of public policy restriction in third-party funding in international arbitration and the enforceability of third-party funded arbitrations, especially international arbitration, in the country.

To mention some recent TPF activities in the country, major infrastructure companies namely Patel Engineering and Hindustan Construction have secured third-party funding for their pending arbitration claims.[48] This makes it evident that TPF is emerging as a preferred route to tackle and share the burden of costs by debt-laden construction and engineering companies. Looking at such examples, it becomes even more important for India to clear its stance in the case of third-party funding in arbitration, especially international arbitration. Issues discussed in part III need to be resolved under domestic laws, for instance, due to lacuna in the legislation, an objection can be merely raised against the appointment of an arbitrator only in link with conflict of interest with the parties[49] and since the funder is not a party, the general rule doesn't include it creating a loophole that can be exploited.

[48] Amritha Pillay, Infrastructure companies eye litigation funding to settle claims, available at: https://www.business-standard.com/article/companies/infrastructure-companies-eye-litigation-funding-to-settle-claims-119021800035_1.html (last visited on Mar 25, 2021).

[49] Supra note 18

C. Other jurisdictions' take on TPF's regularisation in arbitration

International Bar Association was the first entity to issue guidelines regarding third-party funding in 2014[50] which were followed by various institutions thereafter. A major move by ICC is the insertion of Article 11(7) in the ICC Rules 2021 that imposes a duty on the parties to immediately disclose any third-party funding and identity of the funder, facilitating the claimant or the defendant, having a vested economic interest in the result. The move was taken with due consideration of various issues that arise in absence of regulation for TPF in arbitration, as discussed earlier.

1. Singapore

Singapore made a significant mark by passing the Civil Law (Amendment) Act, 2017 which abolished the common law tort of maintenance and champerty[51]. It clarifies that TPF isn't contrary to public policy or illegal, provided the regulations passed are complied with. The Civil Law (Third-Party Funding) Regulations 2017 restricts the extent of applicability of TPF only to matters of international arbitration; court litigation and mediation arising out of the same. Singapore has recently permitted TPF for domestic arbitration and related court and mediation proceedings in the Singapore International Commercial Court (SICC)[52] which is yet another step towards making Singapore a more arbitration

[50] Supra note 8

[51] Civil Law (Amendment) Act, 2017 § 5A (1) (Sing.)

[52] Ministry of Law, Singapore,Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore, available at: https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore (last visited on Oct. 20, 2021).

friendly jurisdiction. The requirement to qualify as a third-party funder under the abovementioned law is that the funder shall carry on professional principle business of funding, in Singapore or elsewhere, with a paid-up share capital or managed assets of not less than S$ 5 million.[53] In case of failure to meet the qualification of the third party funder, such a person can't enforce its rights under a funder agreement.[54]

The aforementioned amendments led to an amendment in the Legal Profession Act and Legal Profession (Professional Conduct) Rules 2015. The amendment imposes a mandate on the legal practitioner representing the party seeking funding to disclose to the court or tribunal and every party to the proceeding about any funding arrangement along with the identity and the address of the funder.[55] The lawyer is permitted to introduce funders to the clients, provided that he/she shall not gain any direct financial benefit from it.[56] Furthermore, it provides that the disclosure shall be made either on the date proceedings commence or as soon as practicable if funding is obtained later.

[53] Civil Law (Third Party Funding) Regulations, 2017, Reg. 4(1)(b).
[54] Supra note 50, § 5B(4).
[55] Singapore Legal Profession (Professional Conduct) Rules 2015, § 49A(1)(a)
[56] Supra note 51, §49A and 49B; Singapore Ministry of Law, Legislative Changes to Enhance Singapore as an International Hub for Commercial Dispute Resolution, Press Release Nov. 7 2016, para. 7(iv), available at: https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/legislative-changes-to-enhance-singapore-as–an-international-hu.html (last visited on Mar. 21, 2021)

Post amendments inter alia two institutions' guidelines are highly significant: SIArb and SIAC. SIAC released a Practice Note[57] which provides that an arbitrator:

- shall disclose any direct or indirect relationship with external funder;
- has the discretion to conduct enquiries and order disclosure of external funding arrangements and/or identity of the funder, and/or details and adverse cost liability of the funder, on a case to case basis; and
- has the power to take into account funding arrangements when apportioning costs of arbitration and order reimbursement of legal or other costs.

The aforementioned laws specify the extent of its applicability; define characteristics of a third-party funder and the time for disclosure. However, it excludes non-commercial funders, especially pro bono funders. The wordings of the laws are narrow enough to offer escape routes. Firstly, the Professional Conduct Rules apply to Singapore legal practitioners creating a loophole by not binding legal practitioners outside Singapore. This can lead to inequality in the application of ethical rules, even in Singapore-seated arbitrations. Secondly, the provision regarding disclosure isn't clear on the aspect of whether or not the parties shall necessarily disclose if arbitration takes place outside Singapore. Thirdly, the term "as soon as practicable" leaves space for uncertainty and can be abused by parties to escape accountability.

Despite the loopholes, the step taken to make the disclosure in case of international arbitration statutory is an appropriate step to foster the

[57] SIAC, Administered cases under the Arbitration Rules of the Singapore International Arbitration Centre on arbitrator conduct in cases involving external funding, available at: https://www.mlaw.gov.sg/files/ThirdPartyFundingPracticeNote31March2017.pdf/ (last visited on Apr. 20, 2021).

arbitration culture. Moreover, given the powers granted to the tribunal or institutions, in practice, they can use their powers to ensure equality. It was a well-thought step to reinforce and hold its position as Asia Pacific's leading destination for international dispute resolution.

2. Hong Kong

Hong Kong abolished the doctrine of champerty and maintenance for arbitration subsequent to the release of two major documents: the consultation paper by the Third-Party Funding for Arbitration Sub-Committee of Hong Kong's Law Reform Commission (LRC) in 2015 and 2016's Law Commission report which recommended permitting TPF in Hong Kong seated arbitration along with service provided in Hong Kong where the seat of arbitration isn't Hong Kong. The *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2017, Part 10A (ss.98E – 98W) and Section 7A* were added to *the Arbitration Ordinance (Cap. 609),* and *the Mediation Ordinance (Cap. 620)* respectively.[58] Hong Kong has a unique stance, unlike India, lawyers and law firms can be the funder only when they aren't representing any party to the proceeding.[59] The major difference between Hong Kong's law and Singapore's law is that the definition of 'third-party funders' in Hong Kong is broader and includes not only professional funders but any person who is a party to the funding agreement and doesn't have any vested interest other than the economic interest under the funding agreement.[60]

[58] HSF, Hong Kong allows third party funding for arbitration and mediation, HSF ARBITRATION NOTES, available at: https://hsfnotes.com/arbitration/2017/06/14/hong-kong-allows-third-party-funding-for-arbitration-and-mediation/ (last visited on Apr. 21, 2021)
[59] *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2017* § 98NA (HKSAR)
[60] Id.§ 98J

On December 7, 2018, a Code of Practice (hereinafter, HK Code) was released to provide guidelines regarding third-party funding. The HK Code is similar to the English Code of Conduct; however, unlike the English Code which provides for a self-regulation model, the HK Code is monitored and reviewed by an advisory body that is to be appointed by the Secretary for Justice. The HK Code is even more detailed regarding conflict of interest and complaints of funded parties. It places onus on the funder to observe the confidentiality and privilege of information obtained related to the arbitration, to the extent permitted by Hong Kong law, or other applicable law. It provides for a solution to the issue of costs and security of costs by providing that the funder shall mention in the funding agreement whether he is liable to meet any liability for adverse costs and security for costs, if the answer is in affirmative then the extent shall be mentioned too. Lastly, unlike SIAC Rules, in Hong Kong, it is mandatory for the funded parties to disclose third-party funding if availed. Another major distinction between Singapore and Hong Kong's law is the timing for disclosure. The Hong Kong law clearly provides that the disclosure shall be made within 15 days of finalization of funding agreement whereas the Singapore Legal Profession Rules state "as soon as practicable after the third-party funding contract is entered into" leaving it highly uncertain.[61] Lastly, the HK Code also contains provisions of grounds for termination for funders as well as the funded party.

[61] Supra note 51, §49A(2)(b)

V. CONCLUSION

A silent stance on an issue of high importance in the current scenario can prove to be lethal for the judicial system and economy of the country. Non-fulfilment of the lacuna in the legislation regarding TPF in international and domestic arbitration is problematic as it renders the rights of the parties unprotected, leaves questions related to issues of disclosure, confidentiality, conflict of interest etc. unanswered. After analyzing the judicial pronouncements in the paper, in the absence of the contrary, it can be concluded that India has no bar on TPF, except in the case of advocates. As listed earlier amendments in the current laws are needed and statutory regulation of TPF in arbitration is the need of the hour. It is to be noted that the Singapore legislation clearly defines the person who needs to disclose third-party funding arrangements, to which the disclosure is to be made and the nature of the disclosure. Hong Kong's law is considered to be better in the aspect that an obligation on the parties itself to disclose makes it easier for the tribunal to enforce any order for disclosure.

Thus, in the author's opinion, by learning from these jurisdictions, India needs to pass some regulations or a law to provide a structure and statutory regularize TPF in the country, in international and national arbitration. The author recommends the following provisions to be included in such law:

- It could combine provisions of Hong Kong and Singapore law making it mandatory for both the lawyer and the funded party to disclose the funding arrangement. The provision shall cover and be binding on all legal practitioners and not merely Indians, to avoid the creation of a

loophole similar to Singapore's law. The Bar Council of India could be delegated the role to insert ethical duties of legal practitioners pertaining to TPF in existing laws especially related to disclosure and conflict of interest.

- It shall specify a particular time period for disclosure about the funding arrangement, for instance, 15 days as in the case of Hong Kong, and shall not opt for Singapore's approach stating "as soon as practicable" to avoid uncertainty. The time period shall be short to stick to the purpose of arbitration, i.e. speedy and effective decision making.
- It shall include a provision making it compulsory that the disclosure shall be made to both the tribunal and involved parties. The need for disclosure of funding arrangement and details about the funder cannot be overlooked as it prevents conflicts of interest, confidentiality breach and provides greater transparency.
- Similar to the HK Code, a provision regarding express mention in the funding agreement of whether or not the funder agrees to be liable for any adverse cost, if yes, to what extent, could be included. Similarly, a provision for an express mention in the funding agreement of whether or not the funder is liable to meet the security of costs, if yes, to what extent, could be included. The law shall protect the interest of the funded party and prevent its exploitation by the funders, upholding the rule of just and equitable access to justice.
- It shall provide discretion to the tribunal to decide grants for the security of costs by not merely relying on the criteria of the presence of a funding arrangement.
- To protect the funded party, a provision could be included ensuring that arbitrators don't deny cost recovery due to the presence of a third-

party funder. The objective is to understand that the cost recovery is an important part of the net recovery and the basic fact that it is not the funder being compensated rather it is the party receiving the compensation.

- The piece of legislation could list the rights of the funders to interfere, penalty provisions, termination of funding agreements, confidentiality, breach of privilege, conflict of interest etc. Similar to the HK Code, the onus to maintain confidentiality in accordance with the extent of Indian or other applicable laws shall lie on the funder.
- At present FEMA doesn't explicitly classify TPF as a current account or capital account transaction, therefore, making special provisions for third party funding arrangements in arbitration in FEMA or classifying it into some category can further instill confidence in the foreign funders, claimants and other players.
- In consonance with the 2019 Amendment, the Arbitration Council of India may form rules or issue guidelines regarding the functioning of third-party funding in arbitration. This step could help bring uniformity and clear the grey clouds surrounding the same at present, at least in the institutional arbitration. It could help clear the extent of applicability of TPF, define major terms and the qualification of funders, agreements that may amount to be violative of public policy etc.

TPF being the arrow can hit two targets at once i.e. attract foreign investment and foster the dream of making India the international hub of arbitration. Despite the mention by the Law Commission in its report on Institutionalization of Arbitration in India about TPF arrangements in

arbitration space and bringing into effect laws catering to the same by Singapore and Hong Kong, no such laws were put forth by the Indian legislature. The author firmly believes that the legislature shall not hold a blind eye to the opportunity of exploiting third-party funding in Indian arbitration space. The same can be done effectively only by bringing in laws or regulations that cater answers to the dilemmas faced by the international arbitration practices in different countries, some of which have been highlighted in the paper.

Not just India, other countries shall also promote TPF as a part of pro-arbitration and pro-business economic strategy. Regulatory safeguards shall be placed to curb the loss in case of downsides to its use. Importantly, it shall always be borne in mind that the regulatory regime for third party funding in the arbitration shall be designed keeping in mind the two pillars of arbitration: flexibility and party autonomy. Lastly, it is evident that TPF is the future thereby the regulatory part shall be extended to both domestic as well as international arbitration.

PRE-PACK INSOLVENCY IN INDIA: A CRITICAL ANALYSIS OF THE EXISTING LEGAL POSITION AND THE WAY FORWARD

Tejas Sateesha Hinder & Amritya Singh[*1]*

ABSTRACT

Pre-packaged insolvency (hereinafter "pre-packs") refers to a process involving the conclusion of an agreement between the distressed corporate (debtor) and creditor, prior to the debtor moving towards the process of insolvency. Pre-packs continue to be used to keep the debtor's company running while preserving its enterprise value.

While pre-packs have been effectively legally governed and implemented across multiple jurisdictions, prominently including the United States of America (hereinafter "US"), United Kingdom (hereinafter "UK") and Singapore, it is still in its nascent stages in India with the Insolvency and Bankruptcy Code (Amendment) Bill, 2021 (hereinafter "the 2021 Bill") enacted in earlier this year in April. It is hence quintessential to assess the potential prospects that it brings and the legislative shortcomings in the Bill and related Regulations, which may result in practical hindrances.

*[*1] Authors are Fourth Year B.A. L.L.B [Hons.] students at National Law Institute University, Bhopal*

This paper attempts to identify the potential practical prospects that it would bring about and identify unchecked legal shortcomings that could bring about difficulties in the implementation of pre-packs. Employing a reform-oriented approach, the paper makes suggestions to combat the identified shortcomings by placing reliance on the legal position of the US and the UK on pre-packs, hence bringing out a way forward.

Keywords : Pre-pack insolvency, Insolvency and Bankruptcy Code, MSME

I. INTRODUCTION

Pre-packaged insolvency can be understood as an arrangement wherein the resolution of the distressed corporate debtor is negotiated between the debtor and its creditors before the initiation of statutory proceedings.[2] This resolution plan is then ultimately sanctioned under the statute by the AA.[3]

The pre-pack process is an amalgamation of the formal Court proceedings and the informal, out-of-Court debt restructuring mechanism. Its purpose is to find a middle-ground between flexibility, cost-effectiveness and speed, along with, the binding nature of the insolvency resolution process. This innovative corporate rescue practice was first developed in the US after the enactment of the Bankruptcy Reform Act of 1978, which soon

[2] Jose M. Garrido, Out-of-Court Debt Restructuring (World Bank Study 2012) paras 97-99 accessed 19 February 2020
[3] *Id.*

garnered significance in the United Kingdom, Singapore and Canada, among other countries.

Pre-pack in the US refers to a delinquent company's reorganisation agreement that is negotiated, distributed to creditors, and agreed on by creditors prior to the declaration of the bankruptcy, but the plan must be accepted by the court. However, in some circumstances, the agreement is negotiated and distributed to creditors for consideration, but voting takes place only until the bankruptcy is filed under Chapter 11 of the United States Bankruptcy Code.

In the United Kingdom, a pre-pack entails the disposal of any or part of a company's properties and business before an administrator is named (equivalent to a Resolution Professional). The assets are sold either directly or shortly after the administrator is appointed.

The advent of the COVID-19 pandemic and the consequent economic disruption has brought its own set of challenges to the economy. The Corporate Insolvency Resolution Process (hereinafter "CIRP") is dependent on a resolution applicant to rescue a corporate debtor through a resolution plan. However, with economies all over the globe at the brink of collapse, there seems to be a scarcity of resolution applicants willing to rescue corporate debtors. This would result in stressed corporates ultimately being pushed into liquidation thereby going against the basic premise of the IBC. In order to protect corporate debtors from a slew of insolvencies due to COVID-19 induced defaults, the Government suspended the initiation of CIRP under the IBC for a period of one year. Albeit the suspension gave respite to the corporate debtors, the need of the hour is a long-term solution to the predicament.

Pre-packs can prove to be a viable alternative to the CIRP. At the time of its inception, the IBC had anticipated the need for speedier resolution of insolvencies. The Bankruptcy Law Reforms Committee Report[4] had contemplated the court supervised pre-packs as an efficient method of insolvency resolution which must be operationalized at appropriate stage after wider consultation with the stakeholders involved.

Acknowledging the advantages that pre-packs bring with it and the surmounting commercial difficulties that the COVID-19 pandemic has brought with it, the 2021 Bill was enacted, and marks a significant attempt to bring in pre-packs into India. While the Bill has a number of merits to appreciate, it does have shortcomings that may bring in potential practical difficulties in the effective implementation of pre-packs in India. These shortcomings can be done away with by understanding the legal position of pre-packs in the US and UK, and taking lessons from the same.

II. OVERVIEW OF THE INDIAN LEGAL POSITION: THE PROCEDURE BROUGHT ABOUT BY THE 2021 BILL

The BLRC, while contemplating the evolution of the Indian insolvency landscape, had also observed that pre-packs would not be viable in the Indian context as the market was not developed enough to enable out-of-court restructuring, without court intervention.

However, thereafter, in a bid to develop the niche area of pre-packs in India, the Government constituted a sub-committee called the Insolvency Law Committee in 2019. It proposed recommendations after analysing the

[4] The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (November, 2015), available at: https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

design framework for pre-packs in other jurisdictions while also taking into consideration the core objectives of the IBC.[5] The sub-committee was of the opinion that the Pre-Packaged Insolvency Resolution Process (hereinafter "PPIPRP") framework so proposed, must be extended to all corporate debtors, but in a phased manner.

In the backdrop of the COVID-19 economic crisis and a paradigm shift towards pre-packaged insolvency across various jurisdictions for efficient, speedy and cost effective debt restructuring; India has taken a pivotal step towards adopting PPIRP, founded on the recommendations of the ILC sub-committee. The President promulgated the 2021 Bill to bring into force the PPIRP particularly for MSMEs, considering their vital contribution to the GDP of the Indian economy, and also that they were affected the most by the ramifications of the pandemic.

The Bill along with the supporting rules and regulations provides MSMEs with a resolution of its stressed assets through a blend of "debtor-in-possession" and "creditor-in-control" model. The minimum default threshold for triggering PPIRP under the Bill is ten lakhs as opposed to the one crore threshold for traditional CIRPs under the IBC. It stipulates a 120-day timeline for completion of the PPIRP, which can be categorised into three stages-

1. *Application Stage*: Prior to filing an application for initiation of PPIRP, the MSME must fulfil certain pre-conditions.[6] Firstly, the corporate debtor mustn't have undergone a CIRP or PPIRP in the

[5] Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process (October, 2020), available at: https://ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf.
[6] Insolvency and Bankruptcy (Amendment) Ordinance, 2021 §54A(2).

preceding three years. Secondly, no liquidation orders must have been passed against the corporate debtor. Thirdly, the corporate debtor must be an eligible resolution applicant under Section 29A of the IBC. Upon fulfilling these pre-conditions, the corporate debtor must seek approval from the shareholders of the MSME by passing a special resolution, and further prepare a Resolution Plan for its restructuring. It must then obtain approval from the financial creditors (unrelated parties), representing at least 66% of the total financial debt. Once the requisite approvals have been sought, the financial creditors must then propose and approve a RP for overseeing the resolution process. Subsequently, the corporate debtor may file an application before the AA for initiation of the PPIRP. The AA may either approve or reject the application within 14 days of filling of the same.

2. *Resolution Plan Stage*: The approval of the PPIRP application and appointment of the RP by the AA marks the commencement of the PPIRP and the consequent moratorium. Within two days of its commencement, a public announcement is made and the base resolution plan is submitted by the corporate debtor to the RP. Since the PPIRP has a debtor-in-possession approach, the Board of Directors will continue to manage the affairs of the corporate debtor throughout this process. The role of the RP is to scrutinise the list of claim and preliminary information memorandum submitted by the corporate debtor and, accordingly form the CoC comprising of the unrelated financial creditors. The CoC must then consider the base resolution plan submitted by the corporate debtor. If the base resolution plan is not approved by the CoC by a 66% vote or if it impairs the rights of

the operational creditors, a Swiss Challenge method would be undertaken. Under the Swiss Challenge method, the RP would invite prospective resolution applicants to submit resolution plans. The competing resolution plans would have to be 'significantly better' than the base resolution plan to be considered by the CoC.[7] In case there are no competing plans received, the base resolution plan would be put to the CoC's vote. Otherwise, the resolution plans would be considered and evaluated by the CoC based on an evaluation matrix decided by them. The resolution plan which obtains a highest score is considered to be approved by the CoC. It is also pertinent to note here that the CoC can allow an opportunity to the submitters to the improve their resolution plans to ensure value maximisation of the corporate debtor. However, in a situation wherein the CoC fails to approve a resolution plan, the PPIRP would be terminated.[8]

3. *Approval Stage*: The CoC approved resolution plan must be submitted within 90 days of commencement of the PPIRP. A period of 30 days is reserved for the AA to either approve or reject the said resolution plan, within the four corners of Section 30(2) of the IBC.

III. ADVANTAGES

There has been apprehension surrounding the success of the PPIRP considering that the Indian insolvency and bankruptcy law is at a nascent stage. However, the process offers key advantages as well, which can be identified as follows:

[7] *Id.*, §54K(10).
[8] *Id.*, §54K(12).

First and foremost, it allows speedy and cost effective resolution of the corporate debtor. Pre-Packs can optimise benefit by combining the performance, pace, expense, and versatility of workouts with the binding impact and structure of structured insolvency proceedings.[9] The fast disposal of pre-packaged cases will also lower total costs, which prevents long-term insolvency costs, hence supporting small companies that may not be economically capable of bearing such long term costs.[10] Moreover, faster resolution helps in the maximisation of value assets of the corporate debtor as well, since a prolonged resolution period will lead to the value destruction of the already stressed corporate debtor.

Secondly, the control of the business after the resolution of assets of the corporate debtor remains with the existing management. The management of the corporate debtor has an important role to play during the process of pre-packs and also after its completion. Throughout the course of the PPIRP, the company's promoters and internal management retain possession of the corporate debtor and ensure that the corporate debtor remains a going concern. Moreover, since the corporate debtor is sold back to the existing management upon the completion of the PPIRP, the success rate of the corporate debtor's business will be higher since the existing management would be familiar with the workings of the business.

Thirdly, it is a confidential yet binding process. The settlement negotiations or out-of-Court proceedings of the PPIRP are conducted in a confidential settings. This prevents the loss of property/asset values as a

[9] Corporate Report, *Statement of Insolvency Practice* 16, GOV.UK (Apr. 7, 2014), available at: https://www.gov.uk/government/publications/statements-of-insolvency-practice-16-sip-16.
[10] Sandra Frisby, *A preliminary analysis of pre-packaged administrations*, INTERNATIONAL INSOLVENCY INSTITUTE (Aug. 2007), available at: https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf.

result of the declaration of insolvency and is likely one of the key advantages of pre-packs over structured litigation, as it may contribute to the preservation of the bankrupt company's going concern by preserving its goodwill in the market.[11] At the same time, the resolution plan approved by the Court is binding on all stakeholders involved, ensuring the investor confidence in the stressed corporate.

Finally, it lightens the burden on the National Company Law Tribunal (hereinafter "NCLT"). The NCLT's have been overburdened by cases since it is a specialised body to deal with cases not only related to IBC, but also Competition Act and Companies Act. Currently, more than 9,000 applications of CIRP are pending for admission before various NCLT benches, out of which 5,485 have been pending for more than 180 days. PPIRP would help in decongesting the overburdened NCLTs, as well as legal expenses and delays,[12] since the consenting financial creditors and corporate debtor would reach an informal understanding before seeking the approval of the NCLT. It would hence minimise the NCLT's role, and at the same time make the concluded agreement legally binding on the parties.

IV. PRE-PACK MODELS IN THE US AND UK: POSITIONS TO COMPARE AND ADOPT

[11] Teresa Graham, *Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP* (2014), available at: http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf.

[12] Ministry of Corporate Affairs, Government of India, *Monthly Newsletter* (Vol.13Z, Nov. 2018), available at: http://www.mca.gov.in/Ministry/pdf/NovemberMCANewsletter_19122019.pdf.

With significantly successful implementation of pre-packs and results in the US and UK, it becomes quintessential to examine the process in these jurisdictions, and draw a comparison with that of India, so as to do away with the shortcomings in the latter.

A. Pre-Pack model in UK

In the United Kingdom, a resolution is passed by the Company's Board of Directors stating that they have considered the company's current financial situation and believe it requires resolution/rescue through Pre-Packaged Insolvency. Appointing an Insolvency Professional to advise the corporation should be part of the settlement. The IP examines the financial situation and recommends one of the following options:

1. Carry on operation
2. Company Voluntary Arrangement
3. Administration (including a pre-pack sale), or Creditors Voluntary Winding-up. Where a pre-pack administration is considered necessary, the IP will attempt to locate customers.

B. Pre-Pack model in USA

Pre-packaged bankruptcy proceedings, pre-arranged bankruptcy proceedings, and pre-plan transactions are three types of hybrid proceedings recognised by the US Bankruptcy Code under Chapter 11. Below is a brief of the process:

It first starts with Pre-Acceptance Negotiations. The debtor usually negotiates with interested parties and finalises the reorganisation agreement before filing a lawsuit with the judge. Following the

completion of the plan, the debtor distributes the signed plan to claim holders and "interested parties" in order to obtain their approval. The proposal is followed by a transparency document, the goal of which is to allow someone who is involved in the plan to make an informed decision.

It then follows with a Call for Creditors to accept the plan. Any class of affected persons, whose interests are harmed by the Chapter 11 proposal, including pre-packaged and pre-arranged arrangements, must adopt the plan. A class of interested parties will be borrowers or owners with 'substantially identical' claims or rights, and each interested party in the same class could receive the same care under the reorganisation agreement.

After acceptance and finalization of the plan, there is a Court filing. The debtor may file a voluntary Chapter 11 appeal, along with applications for organisational continuation, after the plan is finalized—including the solicitation of votes and approval by disabled groups of interested parties in the case of pre-packaged fillings (such as post-petition financing, right to use existing bank accounts, cash management systems etc.)

The final step is Plan Confirmation. For any class of impaired interested persons has already approved the proposal, the Court will confirm it if it meets the conditions set out in Section 1129 (a), which include requirements that the plan and its sponsor comply with the following sections of the US Bankruptcy Code:

1. The plan being made in good faith and not being forbidden by law;
2. Acceptance by every class of impaired interested parties;

3. Every dissenting impaired interested party receiving or retaining an amount not less than what she would have received or retained under liquidation;
4. The confirmation of the plan not being likely to be followed by liquidation or further reorganization.

Section 363 of the United States Bankruptcy Code allows a company to sell all or almost all of its properties without the "constellation of requirements" that a sale under a standard Chapter 11 reorganisation agreement entails. As a result, a pre-plan sale is a lot easier, faster, and more assured option than a Chapter 11 filing. Any involved party must be notified in advance of a pre-plan sale so that they can object to the proposed deal. Interested parties should always be given at least 21 days' notice unless the bankruptcy court extends the time of notice due to the exigencies of the situation. In fairness, the bankruptcy court has the authority to approve a proposal without the participation of involved parties.

V. CHALLENGES BEFORE IMPLEMENTATION IN INDIA: LESSONS TO LEARN FROM THE US AND UK

While chartering the murky waters of implementing pre-packs in India, there are various challenges that are bound to arise, these must be met with constant evolution and amendment of the law. The challenges can be identified as follows:

A. Unsecured Creditors and the need for inclusivity

Under the IBC, creditors play a critical part in the CIRP. Any class of interested parties has the right to approve or refuse the pre-packaged and

pre-arrangement reorganisation agreement under Chapter 11 of the US Bankruptcy Code. Interested Parties are described as "creditors and stakeholders with common claims and interests."[13] Before selling any of the debtor's considerable collateral, the trustee has the option of seeking creditors' consent. Further in the US, the trustee cannot sell the debtor's company or properties without the secured creditor's permission to release their security interest in the debtor's assets.[14]

Since the transaction is private and their consent is not required, the pre-pack is more in favour of secured creditors. The rights of unsecured creditors are not administered.[15] As a result, there's a chance the value owed to unsecured creditors will be taken by other parties.[16]

The Operational Creditors' exclusion from the CoC leaves them unable to convey their concerns before the Operational Debtors and Financial Creditors, excluding them from contributing to the creation of an appropriate settlement that also takes their interests into account. In the middle of claims that this operation is manifestly arbitrarily, it is important to remember that it is inaccurate to conclude that only since financial stakeholders have the potential to determine a plan's effectiveness and

[13] Oithijya Sen, Shreya Prakash &Debanshu Mukherjee, *Designing a framework for Pre-Packaged Insolvency Resolution in India| Some Ideas for Reform*, VIDHI LEGAL (Feb. 2020), available at: https://vidhilegalpolicy.in/wp-content/uploads/2020/02/Report-on-Pre-Packaged-Insolvency-Resolution.pdf.

[14] *Id.*

[15] Teresa Graham, *Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP* (2014), http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf.

[16] Sandra Frisby, *A preliminary analysis of pre-packaged administrations*, INTERNATIONAL INSOLVENCY INSTITUTE (Aug. 2007), https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf.

efficacy, they will do so before determining whether to approve or refuse it on certain grounds.

It is critical to rely on the Supreme Court's decision in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others[17] to achieve this inclusivity. It necessitated CoC decisions to consider the IBC's goals, which, as previously stated, were to transition to a "creditor-driven model" and maximise the valuation of the debtor's assets while maintaining stakeholder balance (the latter including operational creditors). The separation of operational creditors from the CoC not only contradicts the IBC's goals but also fails to achieve a harmony between the rights of operational creditors and debtors due to the marginalization of operational creditors' financial needs, which creates a common financial disincentive and often delays the time-bound resolution of corporate insolvency in order to increase the valuation of certain individuals' properties. Furthermore, operational creditors continue to be excluded from voting on decisions relating to insolvency resolution procedures, such as approval of a restructuring agreement that could result in adjustments in debt payments, and this lack of participation and consent nullifies and violates the IBC's protection for operational creditors, i.e. the payment of at least the liquidation amount and the recovery preference over the financial creditors.

For an Indian Model to be in line with the aforementioned means, reliance could be placed on Chapter 11 of the US Bankruptcy Code, which provides for the formation of an unsecured creditors' committee during

[17] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others, (2020) 8 SCC 531.

the insolvency resolution process. During the procedure, this committee makes submissions to the operational debtors' committee, and in order to facilitate internal dialogue among the latter, they sit together and work for a successful settlement, ensuring the fulfillment of commercial and financial interests on both sides. In India, the latter committee may include Financial Creditors and Corporate Debtors working out an appropriate settlement in the presence of the Operational Creditors after a feasibility assessment of the representations made by the Operational Creditors.

Further, Operational Creditors being stakeholders alongside financial creditors in debt recovery should be given representation in the formulation of the Resolution Plan. For this purpose, reference may be drawn to Reorganisation Plans under the aforementioned Chapter of the US Bankruptcy Code, which include all the stakeholders in the recovery, including promoters, lenders and members of the distressed corporation. Bringing about such inclusivity in the US has brought about effective redressal of the majority of the financial concerns of the promoters and lenders.[18] Hence, implementation of this model in India would bring about the inclusivity of Operational Creditors in the formulation of the resolution plan and hence have their financial concerns addressed in such plan, not marginalizing their financial interests as in the status quo.

B. Pre-Pack Pools and Safeguards against Mismanagement

The 2021 Bill allows for the submission of a base resolution plan by the existing management of the Corporate Debtor for the purpose of its financial restructuring. The eligibility criteria for this management

[18] *Supra Note* 15

submitting the base resolution plan is restricted to Section 29A of the IBC. There exists no means to exclude the management, when insolvency occurs as a result of its mismanagement. Pre-Pack Pools, if implemented and legislatively governed in India, as in the UK, can serve as an effective safeguard and resolve this issue.

Pre-pack Pool in the UK comprises of the 'pool of seasoned business people'[19], introduced by Tesera Graham is a committee of independent business people who "review and evaluate the agreement submitted by the connected parties to see if it is viable and useful to the creditors and debtors."[20] The Insolvency Practitioner's tasks must be carried out in the best interests of borrowers and debtors.[21] Statement of Insolvency is a document that requires an insolvency practitioner to report all relevant and reasonable facts to a creditor in order for the creditor to conclude that the pre-pack deal was satisfactory and that the administrator acted in the creditors' best interests. Furthermore, the advice and rules of an independent authority will assist creditors in deciding whether or not to support the promoter's resolution scheme.

C. The Court's Obligations

The court maintains that the reorganisation agreement authorised by each class of impaired participating persons complies with Section 1129(a) of the United States Bankruptcy Code. A court shall confirm a proposal only if the plan and its sponsor comply with the US Bankruptcy Code, the plan

[19] *Id.*
[20] L. S. Sealy, David Milman, *Annotated Guide to the Insolvency Legislation*, Volume 2, Sweet & Maxwell, p.538 (2011).
[21] Insolvency Act, 1986, Schedule B1, Para 3(2).

has been submitted in good conscience, and the plan is not prohibited by law.[22]

The court shall ensure that any class has accepted the plan and that each borrower receives a sum equal to or greater than what he would receive if the debtor were liquidated. If the proposal is not accepted by all classes of concerned parties, the court will confirm the plan if the plan is in accordance with Section 1129 (a) at the request of the plan supporter with the exception of Section 1129(a)(8) of the US Bankruptcy Code.

As is apparent, the Courts in the US are accorded a greater ambit of jurisdiction while sanctioning a resolution plan, to ensure that the it efficiently restructures the corporate debtor, while simultaneously also complying with the objectives of the insolvency law and accounting for the interest of all classes of creditors. The 2021 Bill confers powers to the AA to either approve or reject the resolution plan which has been approved by the CoC. The AA has also played a similar role when it comes to traditional CIRPs. However, the debate surrounding whether primacy must be given to of the commercial wisdom of the CoC or the jurisdiction of the AA to approve or reject a plan, has been persistent since the inception of the IBC. In the case of PPIRP, since the process lacks transparency, there is a need for a broader jurisdiction of the AA for ensuring that the restructuring scheme is not just beneficial to borrowers, but also to the debtor's stakeholders. The AA's acceptance of a resolution plan under the Pre Pack scheme is needed to instil trust and impose legal sanctity on the system and hence, the AA must be allowed to play a

[22] 11 U.S. Code § 1129(a).

proactive role and act as a protectorate for the rights of the corporate debtor, unsecured creditors, and other stakeholders.

D. Transparency

In the United Kingdom, the SIP offers a helpful list of disclosure rules. The insolvency lawyer gives enough evidence to creditors for a fair and knowledgeable third party to believe that the pre-pack sale was satisfactory and that he behaved in the creditors' best interests. In a linked party transaction, the degree of information is higher. However, in the United Kingdom, pre-packaged sales have been chastised for a lack of accountability and for failure to defend the needs of unsecured creditors. The Code attempts to strike a balance between stakeholders' needs and profit maximisation, which could be challenging if the pre-pack does not use a straightforward competitive approach. However, once a fully open democratic mechanism is used, it becomes as good as CIRP, and the underlying benefits can be missed. In addition, the pre-pack phase entails a confidential agreement between the debtor and creditors. This is especially dangerous in the case of publicly traded firms since the debtor must have proprietary documents in order to negotiate the plan, and the nature of the negotiation may be price-sensitive information. Confidentiality documents must be signed by those involved in the negotiations. As a result, there is a balance between disclosure and confidentiality.

Systemic accountability and disclosure processes should be implemented to hold insolvency professionals accountable whether they act in bad faith or commit fraud. Statements of Insolvency Practice 16 (SIP 16) of the UK,

which discuss the role of IRP, may provide guidance on other such relevant aspects.[23]

VI. CONCLUSION

The 2021 Bill has indeed been a step in the positive direction, to not only lower the burdens on the NCLT and subsequent adjudicating authorities but also to ensure quicker resolution of the corporate debtor. According to data published by the Insolvency Service in the United Kingdom, of the 1,464 administrations in 2018 there were 450 pre-packs, with 241 being connected party sales. This compares to 1,289 administrations in 2017 and reflects an increase of 13.5% in administrations generally. The proportion of pre-packs compared to total administrations in 2018 also appears to have increased slightly to approximately 30%. As far as survival rates in general are concerned, the rate for pre-packs in the sample is 69%, 7% higher than that for business sales, and something of a turnaround from the previous position. Survival rates of both business sales and pre-packs to connected parties rose significantly in the new sample, coming in at 61% and 67% respectively, and again pre-packs perform better than business sales in this regard. It is hence clear that the process brings with it significant rates of success. The need of the hour is to identify the addressed shortcomings and rectify them after a thorough understanding of the practicability meted out by respective legal positions in the US and the UK.

[23] *Statement of Insolvency Practice 16*, INSOLVENCY PRACTITIONERS ASSOCIATION, https://insolvency-practitioners.org.uk/uploads/documents/f30389ce35ed923c06b2879fecdb61.

Further, the 2021 Bill will prove to be instrumental in protecting MSMEs from shutting down, which form the foundation of the Indian economy and have a unique nature of business. The pre-pack scheme can also offer an effective alternative to the CIRP for all corporate debtors while also identifying and amending the implementation challenges that exist in the legislation.

The emphasis should be on expanding the options and results of pre-packaged negotiations while ensuring that the provisions for protection of stakeholders under the IBC are upheld. Security Enforcement and credit improvement may appear to be effective protections to take when major loans are sanctioned, but these safeguards appear to be insufficient in the long run, and the situation can be made better through recognition of pre-pack pools.

In addition to the numerous advantages that pre-packs pose, as identified, it becomes a viable option in force majeure situations that pose financial difficulties, as it saves costs and business. PPIRPs assume a greater significance at a time when the economy is grappling with the ramifications of the economic distress caused by COVID-19 since it offers consensual debt restructuring with minimal cost, time and disruption of business.

GIG ECONOMY: A VIABLE OPTION FOR INDIAN LABOUR FROM THE CONTEXT OF SOCIAL SECURITY?

Parul Sardana and Akshit Gupta[*1]

ABSTRACT

It's not a long time since we have heard the term "Gig economy or Sharing economy". The economy which no one has heard of in recent past years has come into existence and is now in trend. The trend of Gig economy came into emergence after the successful operation of companies like Swiggy and Uber. This model has promised various things, but the point to be noted herein is that are they successful in completing those promises. This Research paper evaluates the impact of the Gig Economy on the labor market. Thus, the question which emerges in our mind is whether the Gig Economy is a good positive response towards Indian laborers or not? Hence, based on all these questions, this Research paper evaluates the framework of the Gig economy in India. Till date, attention is always given to the impact of activities of Gig workers, but no attention is given to Gig workers for their social protection. This Research paper focuses on the social protection of Gig workers as well.

*[1]*Parul is a 4th Year B.A. L.L. B [Hons.] student from Banasthali Vidyapith University, Rajasthan. Akshit Gupta is a 4th Year BBA L.L.B [Hons.] student from Bharati Vidyapeeth College, Pune.*

***Keywords*:** Gig economy, Labour, Gig, Gig workers, wages, social security, platform workers

I. INTRODUCTION

The literal meaning of the word "Gig" is project to project basis. The term has been used these days worldwide. Thus, the Gig economy can be said to be such an economy where there is short term work and projects and a person will be paid after each gig (task). Freelancers, Independent Contractors, Project based workers, Temporary hires are some categories which fall within the ambit of "Gig workers". Though the categories differ from one another.

With the effect of Covid-19 pandemic, millions of workers have been deprived of their incomes. The global economy has helped to control this situation via the concept of Gig workers. People are favouring the Gig economy model because of its flexibility.

Moreover, Customers always want everything at ease and at an affordable price and a customer gets all this in the Gig economy. The Gig economy has laid down its hand not only on one service but in fact in numerous different areas providing different services. By numerous areas, authors meant that their service range from a musical performance to fix a leaky faucet[2]. Gig Economy can be bifurcated into 2 main broadheads, one

[2]Dr. Emilia Istrate & Jonathan Harris, The Rise of the Gig Economy: The Future of work (2017), National Association of Countries

covering Digital Gig economy and other being Physical gig economy.[3] There are numerous factors which have given birth to the Gig economy model. The crucial reason why people are chasing after the Gig economy is because of its cheap services. There is no doubt that the Gig economy has already increased the pace of employment and all this is because of the fact that there are only a few barriers in this kind of model. People are moving towards the Gig model as it gives them freedom and flexibility to work.

Though there is no doubt that in the coming years, more and more youngsters would move towards this model. But, apart from all this transformation, the main point of discussion should be: is the Gig economy safer from the context of social security? Will India be able to adopt this form of model of work?

II. GIG ECONOMY IN INDIA

India has historically been an economy with abundant workforce, even today it is second behind only China in terms of standing labour force. With the advent of technology, coupled with a steadily churing skilled workforce[4], it became necessary to expand employment avenues for the workers. With the start - up culture witnessing a massive boom after the 2010s, it became visibly evident that an alternative form of employment model was set to become widely prevalent and provide jobs to millions of workers in the unorganized sector. The Gig worker's economy spread to

[3]Ruchika Chaudhary & Sona Mitra, Labour Practises in the emerging Gig economy in India: A case study of Urban Clap (2019), 22 November, 2019
[4]Labour Force by Country, World Atlas

different parts of the country primarily as a result of large-scale urbanization and rise in standard of living among the working middle - class sector -which are the largest consumers of the services provided by the gig employees.

A. Gig workers clash: Employees or Contractors?

It's a trite fact that any person would be able to get the amenities based on his/her status. To explain this statement in a very lucid way, it can be said that an Employee would get much better protection as compared to an independent contractor. Similarly, a protected workmen get protection within the ambit of Industrial Dispute Act via Section 33 of the Industrial dispute act[5]. Thus, it can be asserted that a person would be entitled to get benefits based on its status.[6] Yet, another aspect of Contract-based, daily waged labour, with respect to their perceived legal status in terms of awarding monetary compensation can be seen in the event of change in labour's employment status. As it was recently observed by the Tripura High Court in a judgement[7] of 2021 that workers' claim for regularization in state employment cannot be denied, provided that the workers fulfil certain perquisite conditions required for regularization i.e. the worker has completed at least 10 years of employment and hold necessary educational qualifications as such required by the job. Keeping in view this judgment, it can be inferred that the status of the worker can be changed. Hence, the judgment ruled in favor of the workers and for their protection.

[5] Rahat Dhawan, "Protected Workmen under Industrial Dispute Act", Law Brigade

[6]Seth D. Harris and Alan B. Krueger, "Is your Uber Driver an Employee or an Independent Contractor? Perspectives on Work", Vol. 20 (2016), pp. 30-33, 80

[7] 'Umadevi Judgment Cannot Be Seen As Providing A Rigid Cut-Off Date' : Tripura HC Upholds Workers' Claim For Regularization'(2021) ,Livelaw.

It is rather a strange phenomenon which was observed in the Indian context that Gig-workers' economy gained ground much faster and more steadily than the historically present Contract-labour regime. The contract -based worker regime has been a well-structured, well- articulated, legislation - based model of hiring labour. The Contract Labour (regulation and Abolition), Act 1970 spells out a host of compulsory compliances which a contractor must abide by while hiring contractual - labour, including several basic amenities which the workers should be entitled to at the workplace. Despite the absence of any such legislation at it's head, the Gig - worker based economy thrived at a crucial juncture in the country. Matter of fact during the pre- pandemic time, the sole propelling force behind the thrust of Gig - Work was the large - scale technological innovation. Thus, at this point, it would be self - evident to state that the advent of the gig- worker model served as a threshold to integrate a nation's economy with the world via the window of the gig - workforce. This whole contract vs. gig worker debate finds its root in the basic understanding of these twin terms. According to section 2(35) of the Code on Social Security, 2020 a Gig worker may be defined as any person who derives income from any non-traditional source and out of any conventional employer-employee relationship, whereas Contract workers are defined as per the Contract Labour (Regulation and Abolition) Act,1970 (CLRA). As per the act a 'contract labour' shall mean and include any worker "employed in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer". This legislation applies primarily to establishments employing

20 or more workmen on any day in the preceding 12 months.[8] On several occasions, gig workers are also identified as platform worker as they ply their services and trade to the concerned customer through the medium of a certain platform (mostly electronic).The term platform workers is, infact, a narrower definition for those employees who are engaged in wholly tech-driven industries, and both types of workers tend to remain outside the traditional "employer - employee relationship"[9]. Despite the stark distinction created by their names the two contending classes of labour actually have more in common than different, for example as against the fact that the' Gig workers are even informally called as "ghost" workers in certain cultures[10] , like their contractual counterparts, they too can have certain rights of employment pertaining to tenure, wage, working conditions, security from termination etc. In case of recruitment, the gig workers need to submit a self-declaration electronically as well as make an application for registration in the prescribed form, along with all the necessary documents (Clause 112, Code on Social Security,2020). Thus a valid registration would make a gig worker eligible for all the state-sponsored benefits as contained in Chapter IX of the code. The benefits enumerated herein this Section are that Gig workers shall be given information on available social security schemes, they shall be entitled to get assistance regarding registration. Furthemore, Clause 114 contains a separate and comprehensive list of employment benefits provided to the class of gig and platform workers. But the only thing which chased the

[8] The Contract Labour (Regulation and Abolition)Act 1970 ,s.1(4), 2(b)

[9] KingshukSarkar, 'Under new labour code, an Uber driver can be both gig and platform worker. It's a problem'(2020) ,The Wire

[10] Julian Friedland, David Balkin, and Ramiro Montealegre ,``A ghost worker's Bill of Rights : how to establish and safe Gig work Platform'(2020) ,California Management Review

authors is that the code had yet not been implemented and executed. On the other hand, we can see that Contract workers have a certain different model of employer - management framework, however they are basically on the same lines as gig workers are in terms of registration.

B. Recognition of Gig Workers - Stance of the Indian Judiciary

In the wake of a nation-wide migrant crisis in mid-2020 which left hundreds of thousands, if not millions, of workers and employees working in the unorganized sector not just without work, but also stranded and severely distressed. This widespread incidence of abhorrent abuse of the human rights of the workers riled up the judiciary to take cognizance of the issue. Hence in the judgement of Bandhua Mukti Morcha vs. Union of India and Ors (2021)[11] , the Apex Court put the class of Gig workers within the ambit of the unorganized employment sector. This landmark judgement was perhaps the first instance where the judiciary not only made explicit mention of the term, but also spelled out their entitlements to social security, schemes and other benefits provided by the State as well as the Central Government. On the lines of the Social Security Code and various other laws, the Central Government expressed it's affirmation is building a comprehensive and useful Database for the registration of workers employed in the unorganized sector known as National Database for Unorganized Workers (NDUW). Under the NDUW scheme, the State Governments are tasked with getting each worker registered through their district administration machinery. For the purpose of facilitating identification, each registered worker would be allotted a twelve -digit

[11]Bandhua Mukti Morcha vs. Union of India Writ Petition (C) No. 916 of 2020

unique number, much like the AADHAR scheme, which would help them avail social security schemes of the state[12].

C. Is Our Gig worker protected?

This section of the Research Paper focuses on the protection of Labors. The Gig economy is good from the aspect of Businesses, Industries and Clients. It's good for a customer as it is cost-effective. But ultimately, who is to suffer from this, is again these Labourers. Thus, it is only these gig workers whose state is left vulnerable. As they have no "Social Security" at all. Thus, what can be done for Gig workers is to protect and provide Gig workers with a Legislative Framework for their protection. Currently, it can be inferred that this new kind of class "which is known by various names" is not having enough protection. And thus, the labor laws should be amended keeping in view the emergence of independent workers. Therefore, keeping in view the pitiful situation of gig workers having been in a weak position, it is unrealistic for them also, unless there is any legal framework for their protection.

The first attempted step towards giving Gig workers their rights was in the case of Ayantika Mondal v. State of Karnataka.[13] The case revolves around the fact that even though Gig workers do contribute to the economy of the country, they are not given any protection. And considering this recent pandemic, this has triggered their problem. And therefore, they too need some protection. This case is the recent case related to protection of gig workers.

[12] Basant Kumar Mohanty, 'Bhupender Yadav on Tuesday launches logo of National Database of Unorganized Workers'(2021), The Telegraph

[13] Ayantika Mondal vs. State of Karnataka, 2020 Indlaw KAR 4522

III. SOCIAL SECURITY CODE, 2020 VIS-À-VIS SITUATION OF GIG WORKERS

This part of the Research paper focuses on the aspect of Social Security. As it is a trite law in India, which is based on an Employer-Employee relationship that only in this kind of relationship, social security is being accrued upon. But the question here is, why is this done? Why to get social security, there is a need for any relationship. The major critique attached with the Gig worker is that as the Gig workers are not considered as Employee, hence this restriction stops the Gig workers from availing any social protection within the present labor codes.

By Social security schemes, worker coils get some benefits. These benefits can be availed in the form of cash or in any other form.

In the year 2020, Parliament had passed a Code on Social Security. This is the first attempt of the Indian Government where they had sought to provide some social security to Gig workers.[14] The huge uprising of Gig workers had prompted the Legislature to inculcate Gig workers within the ambit of new "Code on Social Security, 2019". Worker in the Code has been described as "*a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationships".*[15]Via this code, some social security would be provided as mentioned in clause 78.[16] But till now, nothing has been finalised. The State Government is being advised to work on different aspects of social security for the benefit of Gig workers.

[14]Somesh Jha & Samreen Ahmad, 'Employees or contractors? Gig Universe faces a social code Dilemma' (2020),Business standard

[15]The Code on Social Security, 2020

[16] Ibid

A. Shortcomings in the Gig Economy model

1. **Lack of Employer's accountability and guidance:** As in this model, Gig workers are not even considered as an employee. Hence, there is no such guidance which they can get from someone. This is considered as one of the most basic demerits.
2. **Low wages/uncertainty of work:** It is a fact that workers hired on contractual and temporary basis enjoy much less wages as compared to permanent workers. They face job insecurity, regular workers are given preference over them in terms of recruitment, restrictions on regularization of employment and many other cons. It was held by the Uttarakhand Highcourt in the judgement of Khadi and Village Industries Commission vs. Industrial Tribunal, Haldwani[17] that there is no specific law or procedure established by any statute or even any criteria prescribed under the Industrial Disputes Act , 1947 for the regularization of the services of a daily - wage worker.
3. **Inflexible time:** As they are appointed mainly on gig basis, there is no such time fixed for their work. They are not given any regular job-related benefits as well like overtime pay or bonus. Their life and work balance can be disrupted if they are to get more gigs, which will ultimately dis-manage their schedule. But, with a view to earn and lead a stable life, they will work for more gigs and this will lead to burnout.
4. As Gig workers are not considered as an employee, they are not given any sick leave. Sick leaves among workers employed in ride

[17] Khadi and Village Industry Commission vs. Industrial Tribunal, Uttaranchal, Nainital,Haldwani W.P. 1196 of 2004 (M/S)

- hailing and delivery - based industries virtually have no sick leave provision provided by their employers.[18] Gig workers are not even given any benefits like health insurance as compared to a normal employee.[19]

5. **Lack of Social Security benefits:** Despite the fact that the government has tried to bring gig workers at - par with other traditional workers in terms of on-job benefits, yet a vast majority of the workers have been excluded from any semblance of any kind of health or welfare related benefits guaranteed under clause 114 of the act. Save for a few big corporate giants, gig and platform workers do not receive any kind of health cover or insurance as part of job prerequisites.[20]
6. **Lack of Basic employment amenities:** As the gig economy model is quite distinguished from the normal model, there is no such protection which can be claimed by gig worker. [21] There is no compensation, no paid leaves and all such amenities which are generally provided to the employees in the labor law. In the Gig model of economy, a person is termed as "Independent Contractor " meaning thereby that he will have to lose all benefits which a labor would get from his Employer. And thus, it results and places the Gig worker at a low-level situation from others.[22]As Gig workers are not

[18]Rupa Korde, Prachi Agarwal, Deepthi Adimulam, Mahika Gandhi , "Gig Economy India 2020/202"(2020)., Wage Indicator
[19]Alexander S. Gillis, 'Gig Economy'(2020), www.Whatls.com.
[20]*Supra* note 18
[21] Travis Clark, "The Gig is up: An Analysis of the Gig economy and an Outdated Worker Classification System in need of Reform", (2021) 19 Seattle J Soc Just 769
[22]Bhanu Mati Doshi & Hitesh Tikyani, "A Theoretical Integration of Gig Economy: Advancing Opportunity, Challenges and Growth", International Journal of Management, Volume 11, Issue 12, pp, 3013-3019

covered within the ambit of Labor laws, they are not entitled to any of the Social securities which are provided under the act.

7. **No provision and lack of support to Gig workers to form Trade Union:** The issues of any community or group are best understood, addressed and resolved when they are equipped with a mechanism of collective grievance - redressal. The very basic function of a trade union is to lobby for the rights and fair demands of the workers who may be inefficient to do so individually. The Trade Unions Act, 1926 governs the formation and regulation of trade unions pertaining to all types of workers engaged in a particular industry. However, as for the gig - workers, the incidence of a strong, well - organized union is rare, given the fact that gig - workers are temporary, remote and an uncertain section of workers, therefore, unionizing becomes a very challenging task. So far only a handful of trade unions in India represent the interest of Gig - workers and are relatively fragmented and new. Formed about a year back in 2020, All India Gig Workers Union (AIGWU) is one of the most popular among all "gig- workers unions" which are active in India. It voiced against harsh working conditions, low wages and unjustified firings of the workers of Swiggy, a food delivery corporation, amid the COVID-19 pandemic[23]

8. Gig economy is emerging due to strong technology, but many people are not able to engage and adapt to this technology due to lack of knowledge and sufficient means.

[23] P.K. Anand, 'The All India Gig- Workers Union - A Case Study'(2020) China Labour Bulletin.

B. Critical Analysis

Gig economy can be bad in a sense when there is no work or no demand, then it would be extremely difficult to cope up with that choice and in that situation we are not in a position to even question anyone. Just because Uber alone has gained success in this type of model, it does not in any way prove and promote India to adopt this model. The primary reason for the emergence of the Gig economy was Technology and Globalization. And most Indian laborers are lacking in these skills. Thus, in one way or another it can be said that the Gig economy is there till the time you have skills.

People supporting the Gig economy always favor it due to the benefits it provides to the entrepreneurship sector. But what everyone ignores is its impact on the Labors. The jobs provided by the Gig economy are full of exploitation. Moreover, jobs are not so stable and secure here.[24] There are no fixed hours of work, no fixed wages. Some people are really living in a myth as they believe that the Gig economy is a good way to generate jobs for labor. But the gig economy is not well suited for future work. Thus, the authors are of the suggestion that India needs to focus on a right approach by making some valuable opportunities for youngsters. Another suggestion which can be brought forth is that India should focus on upskilling workers. Because if we skill workers from MSME, then it can have a lot of impact. Moreover, the biggest disadvantage is that there is no stability in employment in the Gig economy and nor do we have any

[24] Arne L. Kalleberg & Michael Dunn, "Good Jobs, Bad Jobs in the Gig Economy", University of Illinois Press on behalf of Labor and Employment Relations Association, (2016) Vol. 20 (2016), pp. 10-13, 74-75

guidance as there is no supervisor who is sitting upon us.[25] Moreover, Gig workers are not identified as "Workers", meaning thereby that they do not come within the ambit of "workers". And moreover, Social Security has been recognized as a basic human right vide the Article 22 of the Universal Declaration of Human Rights.[26]

Moreover, Uber founder Travis Kalanick has himself considered that Gig workers face more obstacles as compared to traditional economy workers[27].

C. Comparison of Gig Economy - India against other countries

1. Legislative frameworks

Gig economy is certainly a domain which has very few laws framed to regulate its functioning all over the world. Different countries have varied shades of definitions and classifications of the term gig workers and it's allied classes. The United States of America, being the largest cradle for gig - economy companies in the world, has perhaps the most conducive environment required for the growth and enrichment of the gig economy per se. In the state of California, the landmark judgement of Dynamex Operations West,Inc vs. Superior Court of Los Angeles (2018) paved way for the passing of the California Assembly Bill 5 (AB5)[28] , also known as the "gig -workers bill". The bill mandated that the companies must use a three - tier test while classifying employees as independent contractors or workers. This test puts the burden on the employer to prove that-

[25]Hilary Hogan, "Rewinding the Clock: Workers's Rights in the Gig Economy", (2020) 9 King's Inns Student L Rev 114.

[26] Article 22, Universal Declaration of Human Rights.

[27] Steven Greenhouse, "On Demand and Demanding their Rights", Perspectives on Work, 2016 Vol. 20 (2016), pp. 6-9, 70-73

[28] Rebecca Lake, 'California Assembly Bill 5 (AB5)'(2021), Investopedia

- "The worker is free to perform services without the control or direction of the company.
- The worker is performing work tasks that are outside the usual course of the company's business activities.
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

Akin to the US, The Indian Judiciary too has a well-established rule which is employed while determining whether a direct relationship exists between a contract employer and an employee. Such reasoning was devised by the Apex Court in the judgement of General Manager, (OSD), Bengal Nagpur, Cotton Mills, Rajnandgaon v. Bharat Lala and Another,2011 that "Two of the well-recognized tests to find out whether the contract labourers are the direct employees of the principal employer are: (i)whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee"[29]

The United Kingdom witnessed a landmark judgement in the favour of the gig - workers, who had previously been in adequately represented in the nation's legal framework, Particularly the Employment Rights Act, 1996, wherein the definition of "workers" does not explicitly makes the mention of gig-workers, but merely defines what a contractual employer - employee relationship is . Gig - workers enjoyed a decent standard of

[29] Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lala and Another (2011 1 SCC 635)

living, yet there were ambiguities on their official status and thenceforth, all the statutory benefits they would be entitled to receive in due course of their employment. In the landmark judgement of Uber BV vs. Aslam, the UK Supreme Court held that all the drivers working for Uber , indeed came under the category of "workers" and not self-employed as contended by the defendants . This can be seen a major victory for the gig - working populace of Britain, since the judgement culled the profeterring contentions of the Corporation and enforced the mandate that the gig - workers should be treated in line with other employees in terms of fair wages in proportion to the work done, adequate working hours, overtime, leave benefits, among others[30].

2. Is the Welfare scheme made under Social Security Code 2020 enough for Gig Workers?

The Social Security Code, 2020 aims for the betterment of Gig workers by providing them some social security benefits. Thus, it can be viewed that this is the first and foremost important step being taken by the Government. But till now, it has not been notified yet.

Moreover, the only act in India which is "unorganised workers Social Security Act, 2008" also does not take "Gig workers" within their ambit. Unorganised Workers Social Security Act 2008 define "Home based worker" as "a person engaged in the production of goods or services for an employer in his or her home or other premises of his or her choice other than workplace of employer". Therefore, authors assert that till the time,

[30] *Recent Case: Uber BV vs. Aslam, Harvard Law Review March 8 ,2021*

the Social Security Code 2020 is being implemented, Gig workers need a legislation which cover and protect them.

A way forward towards this is that an Indian Federation of App-based Transport Workers (hereinafter referred to as IFAT) had filled a PIL. In the PIL it is being alleged that Gig workers should be classified as "Wage workers", so that they could secure better social security and benefits[31].

IV. SUGGESTIONS AND WAY FORWARD

A. Redefining the Legal Framework of Labor Law:

It is a trite fact that no sector would be able to grow unless there is its proper Legal framework for the same. Till now, there is no such law or framework which could specifically deal in the Gig economy for laborers. Thus the need is to make a systematic framework for protection of workers and laborers in the Gig economy. Hence, the authors are of the suggestion that Gig workers should too get some regular amenities like normal workers get and their activities and work should also be brought up within the ambit of Labor and Employment laws.[32] Considering the present regime, where the Gig economy is now unregulated, the need is to provide these gig workers with some social security by enacting a legislative framework. And all this is required at a very fast pace keeping into consideration the hardships being faced by people.[33] Though one step towards achieving this end has been done by the Indian Government, But

[31]Orchie Bandyopadhyay, 'India Gig workers lunch legal bid for social security benefits'(2021), British Safety Council.

[32]Dr. D. Thirumala Rao, "Gig Economy": A study on its Growing Relevance in India", Global Journal of Scientific and Research Publications

[33] Justin Azar, "Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy" (2020) 27 Geo J on Poverty L & Pol'y 409.

a lot more needs to be done because till now, it has not been notified.[34] The status of the Gig worker should be included in the current sphere of Laws. Categorizing Gig workers as equal to an employee and providing them with sufficient protection is the only way out.

B. Future of Gig workers in the Indian Scenario

The post -pandemic era has laid bare the vulnerabilities of the traditional job culture. The pandemic crisis is reported to have absorbed close to 135 million jobs from the economy[35] . With the pandemic's compounding effect predicted to continue for several years, the gig economy is capable of acting as a safety net in providing financial stability to the ones affected badly due to retrenchment or layoff in the full - time workforce. It is estimated that the gig and platform workers market will rise by 17% and is expected to touch $455 billion by 2024[36]. Therefore, it becomes imperative that the Government will take statutory measures to consolidate the gig sector through various regulatory frameworks and laws. One of the foremost requirements in the present gig sector is that of providing social security benefits to the workers, since the workers are majorly involved in potentially unpredictable jobs - driving cabs, bikes, autos etc. For the same purpose, the central government has proposed to introduce a healthcare scheme for the employees engaged in the gig workforce, which would allow them to avail medical facilities under the Employees State Insurance Corporation (ESIC) scheme. As part of the

[34] Baishali Pal, 'Rising Popularity of Gig economy', International Journal of Religious and Cultural Studies, Vol. 3, No.2 (September 2021), pp. 203-208

[35]Preei Padma K , 'India to Face 135 Million loss in jobs Due to COVID-19: Says Report' (2020),Industry Wired

[36]Indian Brand Equity Foundation , 'Emergence of India's Gig Economy'(2021)

proposed benefit scheme, the gig company / employer would have to set aside 1-2% of the total annual turnover, which would go towards the Social Security Fund meant for the welfare of the workers. Since ESI scheme is applicable to all organizations employing 10 or more employees, the proposed welfare scheme specifically targeted towards gig and temporary workers would be expected to reach a much larger pool of employees who are engaged in smaller, more remote and temporary employment establishments. With the number of workers who are expected to join the ESI scheme is already predicted to reach about 50 lakh, after the draft of this employee welfare scheme is tabled and implemented, the number of subscribers is likely to go up; and after the promulgation of the new labour codes last year, the likelihood of a state-sponsored framework on healthcare and social security seems imminent in the near future. [37]

Moreover, denial of social protection and benefits to Gig worker is a violation of their Article 14 and 21 of the Indian Constitution. A step which can be done in this grey area is by recognizing Gig workers as workers in the Unorganized workers in the Social Security act of 2008.

C. Way Forward

1. Ruling of UK Supreme Court:

The UK Supreme Court in their latest ruling of Uber BV and Others vs. Aslam and Others[38] has agreed to treat the Gig workers as Workers, which is a great step ahead for the protection of Gig workers. Now, Gig workers

[37] '50 lakh gig workers under ESIC to be brought under social security net', Financial Express (2021)

[38] Uber BV and others vs. Aslam and Others [2021] UKSC 5

of the UK would be considered and treated as Workers and not Independent Contractors.[39] This decision in the foreign is a great step ahead. Thus, India too needs to adopt this approach and should move ahead by including Gig workers fully into the system.

2. Another achievement: Dutch Court view:

Recently, a Dutch Court in Federation of Dutch Trade Unions vs. Deliveroo[40] has ruled in favor of categorising Gig workers as employees and not independent contractors and thus, it proves that now Gig workers would too get some amenities.

Another way by which we can give possible potential to Gig workers is by giving them access to form Trade Unions**.** Because the role of Trade Union is well known by everyone. Thus, steps should be made to give gig workers right to raise their voice through the medium of Unions[41].

3. Secretary State of Karnataka and Ors vs. Uma Devi:[42]

A great step had been taken by the Hon'ble Supreme Court in the case of Secretary State of Karnataka and Ors. Vs. Uma Devi. Steps have been taken in this judgment to regularize the services of such persons who had already worked for ten years. In this case, the Respondents had raised their point that they should be made permanent, considering the fact that they

[39]Jack Kelly, 'U.K. Supreme Court Rules Uber Drivers are workers and not independent Contractors: The Ruling could be an Existential Threat to App- based Tech Companies', Feb 19, 2021

[40] Federation of Dutch Trade Unions vs. Deliveroo 7044576 CV EXPL 18-14762 (NED 2019)

[41]Ken Green, "Unionizing the Gig Economy: A Path Forward for Gig Workers", July 6, 2021

[42] Secretary State of Karnataka and Ors vs. Uma Devi (2006) Civil Appeal no. 3595-3612 of 1999

are being engaged in their work for continuous period of time. Therefore, they demanded that they should too be made permanent employees. Thus, this judgment is a way forward as it had recognized the view of Respondent.

Thus, if the Court has considered in the case of Uma devi that if the concerned person has worked for some time, they had continuously worked for some period, they should be regularized and be treated as an employee. This view can be too adopted by whole of the courts towards Gig workers.

4. Daily Rated Casual Labour vs. Union of India & Ors.[43]

In this case, court had directed the Government to frame some schemes so that daily rated casual labourers can be absorbed. Thus, it can be seen that, though the casual labourers were working continuously in the Posts and Telegraphs Department for more than one year but court vide this judgment laid down some important points ensuring protection of these labourers in absence of any law. Thus, same is required to be done in case of gig workers. Gig workers are no different. They work day and night and they should be granted protection too.

Thus, it can be viewed that there have been some decisions directions were issued in favor of contract labors and that too were without following the due process. Hence, the authors relying on the above views by the Hon'ble court pray and submit that this philosophy should be adopted in the present context of Gig workers. India can consider the fact that courts in Spain, UK and Netherlands had too ruled in favor of Gig workers allowing them

[43] Daily Rated Casual Labour vs. Union of India & Ors. 1998 (1) SCR 598

social welfare and employment rights[44]. Therefore, India too needs to adopt this approach.

V. CONCLUSION

Thus, at present it can be said that Technology has indeed changed the purview and landscape of Labor and the result of course is the emergence of the "Gig economy". The Gig Economy can be proved to be beneficial. But the lack of legal framework on this aspect is unignorable. Thus, this Research paper presents what needs to be done in the Gig economy to make it reach the wonders. But the current structure of the Gig economy should be restructured, keeping in view the emerging landscape of this new model and rights of gig workers. Thus, it is concluded that the Legislature would pass an act to address all the issues of Gig workers. To craft such a law where all nuances of hardship of Gig workers are covered with possible solutions is a very tedious task. But this is the only best way, which we can do to benefit this model of our economy. Moreover, Authors conclude the Research paper by stating that at present, the model does not offer a good decent scope of work to Gig workers if we see it from an angle of social protection and higher standard of laws and protections is must for gig workers. Only with these reforms, India can shift from the Traditional model to the Gig model. Role of Government is much needed in this if we want Gig workers to get benefit and protection. Therefore, it is critical to extend social protection to Gig workers via the present structure in India unless the Gig workers are either given protection via the Unorganised Workers Social Welfare Act,2008 or through Social

[44] *Supra* note 31

Security Code of 2020. Though the basic purpose for which the Unorganised Workers act was organized was to give benefits to unorganized workers, but it has not been yet fulfilled because Gig workers are not been included within its ambit. Hence, steps should be taken to give recognition to Gig workers in the 2008 act and the new Social Security Code 2020 should be enforced now.

HIDDEN REALITIES OF MANUAL SCAVENGING IN INDIA IN LIGHT OF WHO'S ASSESSMENT AND MALAYSIAN SUCCESS

Khushal Gurjar and Anurag Sharma[1]*

ABSTRACT

Manual scavenging, the vile practice of clearing sewers and drains manually, is antithesis to equality and human dignity. It is a practice rooted in our culture, traditionally performed by people of lower caste and attaches with itself an irreparable social stigma, impairing the workers from their own intrinsic dignity. Referring to these workers as 'Bhangi' itself reflects their true status in society. Despite laws and regulations being in place and various efforts of the judiciary, the practice of manual scavenging has not been curtailed but has been forced underground.

The only way out from this centuries old problem is investment and innovation in modern technology for the sewerage management system, which has worked phenomenally well in Malaysia. The stigma attached with these workers can be changed only with proper awareness and sensitivity in the mindset of citizens towards dignity of the scavengers and importance of sanitation. This paper aims to

*[1]*Khushal Gurjar is a LL.M student at National Law University Delhi. Anurag Sharma is a LL.M student at West Bengal National University of Juridical Sciences, Kolkata.*

highlight the caste-based character of the practice of manual scavenging. The Author has analysed the issue with a comparative study of India and Malaysia with respect to manual scavenging and sanitation systems. With this paper the author critically analyses various conventions, statutes and administrative safeguards dealing with manual scavenging and aims to find out the reasons for the persistence of this derogatory practice. While trying to find out possible solutions, the research focuses on the steps taken by Malaysia to curb this practice and how the same can be applied in India.

Keywords: Manual Scavenging, Equality, Dignity, Caste, Basic Rights, Judicial Activism, India, Malaysia

I. INTRODUCTION

"*We soil ourselves, so that others can look clean.*"

~ A Manual Scavenger

It can only be imagined that one's career is decided at the moment they are born, and they are then obligated to clean and carry the filth of the society on their head so that the so-called sophisticated society could maintain its clean image. In return for this great service they are paid in pennies, and if they are to demand an alternate job, they are systematically (by community and government) denied that opportunity. This scenario,

very vividly describes the situation and centuries long oppression of dalit manaual scavengers in India.[2]

Manual Scavenging leads to a grave violation of right to equality and right to life and human dignity. The term is used mainly for people who are "manually cleaning, carrying, disposing of, or otherwise handling, human excreta in an insanitary latrine or in an open drain or pit". There have been ample researches, judicial decisions and legislations on this issue, but still in time as modern as ours, where the world is thinking of making flying cars and searching for life on mars, there are some people who are dying while cleaning a fellow human's waste. A report by the World Health Organization released on November 14th, 2019 states that despite laws and regulations being in place in India, the practice of manual scavenging has not been curtailed but has been forced underground. [3]

In light of the above statement, this paper focuses on the currently existing practice of manual scavenging and how it violates basic human rights such as the right to equality and basic human dignity. Firstly, the research attempts at giving a brief background about the problem and its historical genesis. Further, it depicts the current condition and reasons for the persistence of this anathema, followed by an examination of how these people are facing systematic violations of right to equality and right to human dignity. Additionally, various laws directly or indirectly dealing with manual scavenging have been discussed and in light of a critical

[2] Varun K. Aery, "Born into Bondage: Enforcing Human Rights of India's Manual Scavengers" 2 Indon. J. Int'l & Comp. L. 719, 720 (2015).
[3] World Bank, ILO, WaterAid, and WHO, Health, Safety and Dignity of Sanitation Workers: An Initial Assessment, 9 (2019) [Hereinafter WHO Report]

analysis of those laws, an attempt has been made towards finding reasons for the persistence of this derogatory practice. The research focuses upon performing a critical analysis of existing legislation, judicial decisions and their implementation to deal with the problem in order to suggest reforms that could be brought to the existing system. Finally, the paper also dissects the manual scavenging and sanitation system in Malaysia, and does a comparative analysis with the system in India. In an effort to improve the Indian system, the paper evaluates the steps taken by Malaysia to curb this practice, and delves into ways to apply these steps to the country.

II. EQUALITY AND DIGNITY : A MYTH FOR MANUAL SCAVENGERS

A. Origins of the anathema

The term 'scavenge' traditionally means ‘to cleanse’ and 'savagery' means street cleaning.[4] It is an ancient customary practice in India, passed down from generation to generation of specific families for centuries. Both men and women of these groups are even employed by local authorities like municipal corporations or village panchayats (a body responsible for the administration of a village). Interestingly, women from these groups inherit this practice as a jagir (an estate) from their mother-in-law.[5]

Manual scavenging, as a practice is deeply rooted in Indian culture and existed since vedic times. According to Naradiya Samhita, manual

[4] Narasimha Rao, “Employment of Manual Scavengers: A Curse on Human Dignity” Lawasia J. 77, 77 (2015).
[5] Ibid.

scavenging was one of the fifteen duties of slaves in those times.[6] In the Medieval era, evidence has been found of scavenging done by lower castes of Hindus for enclosed toilets of Mughal women. Municipalities under the British era hired manual scavengers to collect waste from public toilets. With time these were equipped with flush system, but general households started having dry latrines which required manual scavengers.[7]

The roots of this anathema lie deeply in the early occupation system of India, which was primarily based on caste based identity. This system was broadly categorised into four varnas or categories namely 1) Brahmans (Priests and scholars at the top of hierarchy), 2) Kshatriyas(Rulers and Soldiers), 3) Vaishyas (Merchants and business class) and 4) Shudras (Servants, Labourers etc.). The current problem persists in relation to the community that falls at the very bottom of this hierarchy, generally considered as 'untouchables'. The worst part about these divisions is that they depend on the birth of the person and he/she doesn't have any choice in this regard.

Traditionally lowest in the hierarchy, Dalits are still employed as scavengers and even within them the lowest sub-castes are forced to do this work either because of economic or social pressure. Bhangis in Uttar Pradesh and Gujarat, Balmikis in Haryana, Phakis in Andhra Pradesh, and Sikkaliars in Tamil Nadu are some of the examples of these groups. Infact, the word 'Bhangi' means 'a person with broken identity' and a very

[6] Bindeshwar Pathak (ed.), Road to Freedom: A Sociological Study on the Abolition of Scavenging in India, 37 (Motilal Banarsidass Publisher, Delhi, 1999).
[7] Swagata, "Manual Scaveginng in India: A National Scourge" 11 TeraGreen, January 2019, at 22-24.

general use of this term reflects the true status of these groups in Indian society.[8] This deeply-rooted and highly rigid caste system is the reason for the individuals from these groups to be employed as as manual scavengers even in 21st century

B. Contemporary Condition of Manual Scavengers:

Despite several statutes, judgments and policies, the condition of manual scavengers in India is deplorable. Practices like, Untouchability and manual scavenging are specifically prohibited under the Constitution and other special statutes but the implementation is weak. The worst part is that even if they are somehow removed from the vicious cycle of caste and economic division, then they get pushed back because of lack of proper rehabilitation.

The problem in contemporary times is three fold. *Firstly*, these marginalized groups have to face social exclusion and deprivation from multiple dimensions of a social life. Social and Economic deprivation from generation to generation has also deprived them from opportunity to be trained for something else. Even if someone tries to challenge the system, they are rewarded with social exclusion and ostracization and in some cases even physical thrashings.[9] Denial of access to communal water sources, cultural events and places of worship are a common sight even in the 21st century.[10]

[8] Id. at 25
[9] Ibid.
[10] Supra note 3, at 78.

Secondly, the lack of proper safety measures add up to the problem. Working in these dangerous manholes without proper safety kits can be severely dangerous and can have temporary or permanent effects on the health of these workers. This lack of protection has led to many of these scavengers suffering from permanent diseases or in some cases even death. As per the National Commission for Safai Karamcharis, a total of 774 people have been victims of sewer deaths between the years 1993 to 2019.[11] The year 2019 recorded the death of 110 workers while cleaning sewers and septic tanks, which is the highest in the past five years. [12]

Thirdly, the informal nature of their work is another problem that leads to the difficulties in proper identification and rehabilitation of these workers. These workers are poorly paid, mostly below the minimum wage level, which reflects a form of economic slavery. The nature of work is temporary, income is irregular and to make the condition worse, their social status makes them vulnerable to extortion. Whereas, on the other hand, the few workers having a formal and permanent employment are typically better paid (sometimes upto three times more) than their informal counterparts.[13] Interestingly, the age old practice of paying these workers through food and clothing rather than actual money is still prevalent in India.[14]

[11] National Commission for Safai Karamcharis, Annual Report 2018-19, 54 (2019). [hereinafter NSCK Report]
[12]The Hindu Net Desk, India's Manual Scavenging Problem- Available at https://www.thehindu.com/news/national/indias-manual-scavenging-problem/article30834545.ece (Last visited on Nov. 15, 2021).
[13] Supra note 2, at 1.
[14] Id. at 35.

According to a national survey conducted by Niti Aayog in the year 2018, a total of 54,130 manual scavengers (from 17 states and 170 districts) have been identified after coming into force of PEMSR Act, 2013 till 18/07/2019.[15] Out of these, 35397 were given only one time cash assistance, very few (7383) received skill development training and merely 1007 workers received capital subsidies.[16] This clearly reflects that the rehabilitation process is just a one time cash payment scheme which doesn't really change the social and economic realities of these marginalized groups. The reliability of the government data can be questioned on many fronts. For example, in the abovementioned report, a contrast is depicted between the survey as conducted under the PEMSR Act, 2013 initially when the act came into force and on the other hand the national survey done by Niti Aayog in 2018. The earlier survey was only able to identify 14505 people as manual scavengers, while the later survey came up with a number of 39625.[17] This contrast puts serious questions on the means and methods used by the government for such surveys which are mostly based on the voluntary information given by state governments and other organizations. Further, the social organizations working in this area, strongly deny the reality of government data.

The government has not been able to come up with a reliable figure even after 7 years of the PEMSR Act. The figures from different sources have sharp contrast between them leading to a failed implementation of reforms. Even the National Commission for Safai Karamchari in its 18th

[15]Ministry of Social Justice & Empowerment, Survey Regarding Manual Scavenging: Answer to Unstarred Question No. 3639 in Rajya Sabha, 3 (2019).
[16] Id. at 4.
[17] Id. at 3.

Annual report questioned the reliability of government data and stated that effective remedial measures can not be taken unless actual quantification of the problem is done.[18] According to a recent report by WHO, the efforts done by the government to prohibit manual emptying have not necessarily curtailed the practice but instead have forced it underground.[19]

C. Denial of Basic Rights:

Manual scavenging, rather than a form of employment, must be seen as a systematic violation of inherent human rights of a person.[20] This practice is in grave violation of Right to Human Dignity[21] as it impairs the workers from their own intrinsic sense of value right from the moment of their birth.[22] Working with human feces and filth attaches an irreparable social stigma which cannot be changed merely by attempting to change their nomenclature to "sanitation workers" or equipping them with better tools.[23] It further violates the basic tenets of right to equality[24] and protection from caste based discrimination.[25] The Hon`ble Supreme Court discussed its nexus with caste system in India and determined that it suffieciently violates the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[26] According to UN's authoritative Committee for the ICERD, "any distinction, exclusion,

[18] Supra note 10, at 43.
[19] Supra note 2.
[20] Supra note 1, at 721.
[21] The Constitution of India, art. 21; See also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art 1 (Dec. 10, 1948); UN General Assembly, International Covenant on Economic, Social and Cultural Rights, preamble, Dec. 16, 1966, 993 U.N.T.S. 3.
[22] Supra note 3.
[23] Supra note 1, at 726.
[24]The Constitution of India, art. 14.
[25] The Constitution of India, arts. 15(1), 15(2), 16(2), 17
[26] Safai Karamchari Andolan v. Union of India, 2014 (4) SCALE 165.

restriction or preference based on race, colour, *descent*, or national or ethnic origin" would come under the definition of racial discrimination in ICERD.[27] Furthermore, other rights like The Right to Health[28] and Right to Gender Equality[29] are also grossly violated as already discussed in the previous sub-chapter.

If we talk about the Indian Constitution, then the preamble itself guarantees to all India "Justice, Liberty, Equality and Fraternity".[30] Manual Scavenging as a practice, is inherently antithetical to the above-mentioned ideas and violates these most basic guarantees provided by the highest authority in India. Apart from other fundamental rights, the drafters of the Indian Constitution took into consideration the need to redress the wrongs done to particular groups of people through constitutional means. By constitutionally abolishing untouchability and its practice in any form[31], they made the government responsible for eradication of social disabilities. This article along with others[32] gives power to Indian Parliament to legislate for the protection of these marginalized groups considered to be 'untouchables.[33] In the Next chapter we are going to discuss the specific laws for protection of manual scavengers.

[27] CERD, Concluding Observation of the Committee on the Elimination of Racial Discrimination, CERD/C/IND/CO/19, (March 2007).
[28] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, art. 12.
[29] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, art. 5.
[30] The Constitution of India, Preamble.
[31] The Constitution of India, art. 17.
[32] The Constitution of India, art. 23(1), 41, 42, 46, 47.
[33] Samuel D. Permutt, "The Manual Scavenging Problem: A Case for the Supreme Court of India" 20 Cardozo J. Int'l & Comp. L. 277, 291 (2011).

III. EXISTING FRAMEWORK FOR PROTECTION OF MANUAL SCAVENGERS

A. The Laws

The first statute that provided some protection to manual scavengers by expressly prohibiting the practice of untouchability was the Protection of Civil Rights Act, 1955. Secondly, in the year 1989, the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act was enacted to deal with specific atrocities faced by lower castes and further provides for speedy relief and rehabilitation. A recent amendment[34] to this act in 2015, made it a punishable offence to employ or force any person to do manual scavenging, if he/she belongs to SC/ST community.[35]

Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, was the first act which specifically provided for prohibition of employment of manual scavengers along with a blanket prohibition on continuance or construction of dry latrines.[36]

Further, in the same year, National Commission for Safai Karamcharis Act, 1993 was passed, which established an autonomous organization namely "the National Commission for Safai Karamcharis" with an aim to study, evaluate and monitor the implementations of schemes for the benefit of safai karamcharis and further to redress their grievances.

[34] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, (Act 1 of 2016).
[35] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, (Act 1 of 2016); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, ss. 4(j), 3.
[36] Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, (Act 46 of 1993) s. 3.

Finally in 2013, Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act was introduced as legislation primarily focusing on identification, welfare and rehabilitation of manual scavengers.[37] This Act further prohibits manual cleaning of septic tanks and sewers without protective equipment as well as the construction of insanitary latrines.[38] Offences under this act are cognizable and non-bailable[39] which may be tried summarily.[40] This act prescribes an improved definition of specific terms such as 'manual scavenger' [41], 'sewer'.[42] insanitary latrine,[43] 'hazardous cleaning[44]. This act also puts an obligation on local authorities to carry out surveys for the efficient working of the act.[45]

B. Judicial Activism

1. Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers[46]

[37] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 11.
[38] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 11.
[39] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 22.
[40] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 21(2).
[41] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 2(1)(g).
[42] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 2(1)(q).
[43] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 2(1)(e).
[44] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 2(1)(d).
[45] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 4.
[46] (2011) 8 SCC 568.

The supreme court in this landmark judgement identified and highlighted the problems of disadvantaged sections of the society (sewage workers and scavengers). These people risk their lives by going into the sewers without proper safety equipment and are still being denied fundamental rights of life, liberty and equality. They also criticised the government on account of being insensitive towards the safety and wellbeing of these people. The court directed the concerned departments to ensure compliance to the directions in question, given by the Delhi High Court and also directed to give an even higher compensation to the family of the deceased.

2. Safai Karamchari Andolan v. Union of India[47]

This writ petition was filed by safai karamchari andolan, a social organisation working for the welfare of manual scavengers, for a strict enforcement and implementation of EMSCDL Act, 1993 along with proper enforcement of various fundamental rights guaranteed in Art 14, 17, 21 and 47. According to the data provided to the court, a huge difference was found in the government data and the data collected by other independent organizations. Moreover 95% of these workers were found to be Dalits, who have historically performed this denigrating task.

The Court directed the state for the proper implementation of the PEMSR Act, 2013. Apart from a complete ban on dry latrines and this practice, the court also gave directions for rehabilitation of persons identified as manual scavengers. They are to be given a one time assistance, scholarships, financial assistance for housing, training in livelihood skill

[47] (2014) 4 SCALE 165.

along with a monthly stipend and other special subsidies and concessional loans.

The court further directed that a compensation of Rs. 10 Lakhs has to be given to the family of a manual scavenger who has been a victim of sewer death after 1993. The Court stressed on the eradication of the hurdles that these people have to cross to receive their legitimate due under the law and for that rehabilitation has to be based on the basic principles of justice and transformation.

IV. CRITICAL ANALYSIS OF THE EXISTING SYSTEM

Many laws and judgments, as discussed above, have been passed to deal with the problem of manual scavenging including the latest i.e PEMSR Act. But the age-old practice still persists and deeply questions the spirit of the basic guarantees provided by the constitution of India to every citizen.

PEMSR Act was a significant improvement from the earlier act, but the continuity of the anathema reflects that even this act has a lot of problems. *Firstly*, the definition of manual scavengers[48] is itself flawed as it excludes the people working with protective gear from its purview. Interestingly, the term protective gear is nowhere defined in the act and could be interpreted to include even minimal gear like gloves and clothing only, which could result in arbitrary exclusion of people in need of protection.[49] Moreover, no protective gear can protect their right to human dignity

[48] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 2(1)(g).

[49] Samuel Sathyaseelan, "Neglect of Sewage Workers: Concerns about the New" 48 (49) Economic & Political Weekly. 33, 34 (2013).

which is consistently violated each time they involve in such work.[50] Furthermore, section 7 of the act increases the confusion as it puts a complete ban on "direct or indirect employment/ engagement of any person for hazardous cleaning of sewer and septic tanks" and on the other hand section 2(1)(g)(b) allows it with protective gear.[51] Moreover, this act includes an exception for latrines on railways,[52] an industry which is considered to be one of the major employers of manual scavengers and hence directly going against the basic purpose of this Act.[53]

Secondly, offences under ths act have a limitation period of only 3 months,[54] which means after 3 months of the alleged commission of the offence, the courts would not take cognizance of the case. This time period is too short and allows ample scope to the violators to escape penalties on technical grounds.

Thirdly, Even though this act provides for rehabilitation, it does not provide any concrete measures for its implementation. Neither mechanism of implementation is clearly defined, nor the responsibility for such implementation. It leaves the implementation of the government schemes on the whims and fancies of local authorities, who were not able to do so in the 20 years regime of the EMSCDL Act, 1993.[55] Moreover, the rules

[50] Supra note 3, at 82.
[51] Supra note 48.
[52] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 2(1)(e).
[53] Supra note 1, at 733.
[54] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 10.
[55] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, (Act 25 of 2013), s. 18.

made for implementation of this act lack any efficient efforts.[56] The rules neither have any specific point on the manner of rehabilitation nor cover the people who left scavenging since 1993. Further, it doesn't contain any clear provisions for enforcing the act against government institutions.[57]

Fourthly, the penalties provided in the act are not very stringent and even those meagre ones are not enforced easily.[58] The prohibition is only on paper and consists of no proper explanation as to how the perpetrator would be held accountable. Although, Section 8 and 9 provide for upto five years of imprisonment along with fines, in reality the number of people actually sentenced under these sections is negligible.[59] This may be connected to the very short period of limitation as discussed above. Apart from these legal gaps, there are many other implementation and policy issues that are also equally liable for the persistence of this anathema in India.

V. SANITATION SUCCESS IN MALAYSIA

The Continuing persistence of manual scavenging is the direct result of poor sanitation system in India. We need to look at other developing countries with similar socio-economic backgrounds to understand the critical aspect of the Indian sanitation system. The sewerage management system in Malaysia has evolved in multiple phases since its independence in 1957. The primitive systems (poor flush or pit latrines) have

[56] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Rules, 2013, The Gazette of India, Notification No. D.L. 33004/99, (Dec. 12, 2013).
[57] Human Rights Watch, Cleaning Human Waste "Manual Scavenging," Caste, and Discrimination in India, at 25 (August, 2014) [hereinafter HRW Report]
[58] Supra note 3, at 83.
[59] Supra note 1, at 733.

transformed into a more mechanical and automated one. This was possible because of the continuous improvement in the technology along with a stern attitude of the government. The Department of Statistics in Malaysia in 2007 stated that almost 99% of the country's urban population has access to latrine facilities with only 1% of them still having a pit or enclosed space over water space. These statistics differ drastically when compared to the Indian census of 2011 i.e 18.6% households even in urban areas not having latrine facilities and 12.63% still resorting to open defecation along with 2.6 million insanitary latrines which need to be cleaned manually.[60]

Although, Malaysia does not have the specific caste discrimination problem as in India, but still manual scavenging was pertinent for some people. Earlier during 1950s, chinese migrants were made to do manual scavenging[61] facing a similar issue as by dalits in India. But the change that we can see today in Malaysia came, not because of any activism to curb this menace, but because a perfect sewage sanitation system was essential to promote their country as a tourist destination.[62] Meanwhile in India, the government is not focusing much on technological solutions because they know that a certain group of people are there to do the dirty work for them. If there was no specific community, forced to this job

[60] Centre for Policy Research, Improving Urban Sanitation in India – Lessons from Malaysia (June, 2017).
[61] Centre for Policy Research, Institutional and Technological Reforms in Urban Wastewater Management: Story of Malaysia (April 2018).
[62] Vijayta Lalwani, How do other countries clean their sewers and is there something India can learn from them?, available at https://scroll.in/article/895013/how-do-other-countries-clean-their-sewers-and-is-there-something-india-can-learn-from-them (Last visited on Nov. 15, 2021).

because of social hierarchy then probably they would have had to think of modern solutions very quickly.

In Malaysia, the government provided high subsidies for construction of sewage plants along with a great focus on surveys and outreach programs to educate citizens about efficient cleaning. They have institutionalized capacity building programmes which address concerns like planning and design of sewerage systems and health & safety.[63] According to the laws and judgments in India, even our government is supposed to have surveys for identification of scavengers and dry latrines, but the implementation of these obligations has been poor as we have already discussed in the previous chapters. The Indian government further needs to focus on changing the mindset of the people through efficient sensitisation programmes.

The specific acts for the development and proper regulation of sewage system[64] have been vital in Malaysia`s success along with a decent investment and privatisation of sewer and septic tank management. The Sewerage Services Department is the federal agency which is responsible to look after the sewage system, the task which traditionally belonged to local authorities.[65] While, in India the Ministry of Urban Development is the key agency responsible for sanitation standards in the country. The Central Pollution Control Board has also the power to set basic standards in this field. But still the implementation of these standards are responsibility of the local government bodies, which they are not able to

[63] Supra note 59, at 4.
[64] Water Services Industry Act (WSIA), 2006 (Malaysia); See also Environmental Quality Act (EQA), 1974 (Malaysia) & Environmental Quality (Sewage) Regulations, 2009(Malaysia).
[65] Supra note 60.

fulfill properly because of many reasons like, budget constraints, old technology, lack of sensitisation in the community and above all the availability of old caste-based and socially forced labourers know as manual scavengers.

VI. CONCLUSION AND SUGGESTIONS

The important question which arises now is that, if technical solutions are available and other developing countries like malaysia are using those efficiently, then what's stopping India from following the process. In this paper we tried to find the reasons for persistence of manual scavenging, the gaps in the existing system and a comparison with another country`s system. The principal reason why it still persists is that there is a demand for it by the local authorities and private individuals. The state machinery is in complete denial when it comes to the question of the existence of this practice. The government, rather than taking responsibility for its eradication, tries to run away from them by taking inefficient measures which lack any conscious and active efforts. The laws are flawed and do not actually put any direct liability on anyone for their proper implementation. Although, Judiciary took some measures, even that could not change the situation much.

A multifaceted approach would be required to deal with this problem. Modern Technology is the most efficient way of changing the realities of manual scavengers, as we saw in the case of Malaysia. Active government initiatives to invest in innovations are required so that machinery can be deployed as a substitute to humans. The Government's Make in India initiative could be a key player in this process. Recently in april 2019, a

group of students from IIT Madras made a robot which could clear drains very efficiently. According to a WHO report, this problem requires a three step solution i.e Recognition of all manual scavengers through surveys and other methods, gradual formalization and mechanization of the work and further articulating proper and efficient mechanisms which would include both legislations and standard operating procedures.[66]

In the light of these steps, the Indian government should primarily focus on the quantification of the real situation, then only any of the above steps could be efficiently applied. For this, surveys in partnership with the civil organization working in this field could be a good alternative. Other steps could include ensuring the proper disbursal of assistance prescribed in the act, facilitating immediate and long term access to livelihoods.

An amendment in the existing law is required to reform the gaps as discussed in the paper. Interestingly, the Ministry of Social Justice and Empowerment has recently announced their plan to introduce an amendment to the PEMSR Act, 2013 which would focus on completely mechanising sewer cleaning along with better protection at work and compensation for accidents.[67] This amendment, if implemented properly, would have a great impact on the health perspective of manual scavengers, but still a lot of work is needed to do away with the social stigma and other inherent problems.

[66] Supra note 2, at 18

[67] Editorial, "Govt. to introduce bill to make law banning manual scavenging more stringent" The Hindu (Sept. 12, 2020), available at https://www.thehindu.com/news/national/govt-to-introduce-bill-to-make-law-banning-manual-scavenging-more-stringent/article32587429.ece (Last visited on Nov. 15, 2021).

Lastly, there is a dire need of proper awareness and sensitivity in the mindset of citizens towards dignity of the scavengers and importance of sanitation. This could be done through awareness campaigns and sensitisation programmes. But most importantly, only a combined effort of government, civil organizations and Citizens can lead to a permanent solution to the anathema i.e Manual Scavenging.

PANDEMIC REGULATIONS AND IMPLEMENTATION IN INDIA: NEED FOR SINGLE COMPREHENSIVE LEGISLATION

Merin Mathew[*1]

ABSTRACT

India was not equipped to deal with a pandemic when COVID-19 started being intractable. The legal framework with respect to public health in India is still limited to a great extent when it comes to controlling and curing a pandemic like COVID-19. In India, there is no single comprehensive legislation dealing with the rules and regulations in a pandemic situation, but the regulations are imposed under the purview of multiple legislations and the Constitution of India. This article discusses the various legislations and the relevant provisions under which COVID-19 regulations were imposed and the implementation of the same. This article also deals with international regulations applicable to India and various Bills which tried to deal with situations like a global pandemic. The article emphasises on the need for single comprehensive legislation due to the inefficiency and ambiguities with respect to several legislations which were not enacted, keeping in mind a global health crisis like COVID-19.

*[1] *Author is a LL.M student at National University of Advanced Legal Studies, Kochi*

Keywords : Covid-19, epidemic, health, regulations, comprehensive legislation

I. INTRODUCTION

A pandemic is defined as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people."[2] India's public health system and legislations were not equipped to combat a pandemic like COVID-19 when it started being intractable. India's laws and regulations are inadequate with respect to controlling, preventing and treating pandemics, especially a global health crisis like COVID-19. One of the major problems is that India lacks a single comprehensive legislation dealing with the rules and regulations in a pandemic situation and the same is imposed under the purview of multiple legislations and the Constitution of India which has significant drawbacks.

The rules and regulations imposed during a pandemic can be mainly traced to the following legislations in India:

1) The Epidemic Diseases Act, 1897
2) The Disaster Management Act, 2005
3) The Drugs and Cosmetics Act, 1940
4) Indian Penal Code, 1860
5) Code of Criminal Procedure, 1973
6) Constitution of India

Several other legislations including Essential Commodities Act 1955, Essential Services Maintenance Act 1981, the Aircraft Act 1934 and the

[2] JM Last, A Dictionary of Epidemiology (Oxford University Press, 4th edn. 2001).

Indian Ports Act 1908 also play a significant role in imposing rules and regulations during a pandemic in India. Ministry of Consumer Affairs, Food and Public Distribution regulated the production, quality, distribution, logistics and price of masks and hand sanitizers for combating COVID-19 under the provisions of the Essential Commodities Act. Meanwhile, the Essential Services Maintenance Act helps various state governments to maintain uniformity by providing minimum conditions of essential services in the state during an outbreak. The provisions under the Aircraft Act are used to cease the operation of various flights to stop the spread of the disease while the Indian Ports Act helps in directing the ports for screening, detection and quarantine system for disembarking Seafarer or cruise passengers, to install thermal scanners and procure Personal Protection Equipment readiness.[3] India as a signatory to International Health Regulations (2005) is also bound by these regulations which oblige it to establish an appropriate public health response to the international spread of diseases.

Many of the State governments in addition to the Central legislations have adopted or used various State Public Health Acts (such as Tamil Nadu Public Health Act, 1939), to deal with the current pandemic. As suggested under the "Containment Plan for Large Outbreaks (COVID 19)" issued by the Ministry of Health and Family Welfare which is the Nodal Ministry for biological disaster, several states have issued regulations and laws specifically for COVID-19. For example, Kerala invoked legislative power under Entry 6 of State List in the Seventh Schedule of the

[3] Durgesh Prasad Sahoo et al., "COVID-19 pandemic: a narrative review on legislative and regulatory framework in India for disaster and epidemic" 8(7) IJRMS 2724-2729 (2000).

Constitution which deals with public health and sanitation, hospitals and dispensaries and issued Kerala Epidemic Diseases Ordinance, 2020.[4]

II. THE EPIDEMIC DISEASES ACT' 1897

A. Overview

In 1896, one case of Bubonic Plague was detected in the Bombay Presidency. The plague epidemic spread rapidly and hence, British Parliament enacted the Epidemic Diseases Act, 1897 to prevent Plaque from spreading across the country. It is one of the shortest legislations in India consisting of 4 sections that provides broad powers to the government. Section 2 of the Act provides any state government with authority to take special measures and prescribe regulations as to dangerous epidemic diseases. Under this provision, state government if satisfied that any area is affected or threatened to be affected by the outbreak of any dangerous epidemic disease and that there are no general provisions for the same, it may inspect the person travelling or segregate people who are suspected of being identified with the disease in hospital or temporary accommodations.

Section 2A deals with the power of the Central Government to inspect ships and vessels leaving or arriving in the territories of India. It also empowers the government to detain any such vessels if necessary. Section 3 deals with the penalties for disobeying the regulations or orders passed by the Central and State governments under Section 2 and Section 2A. The punishment shall be under Section 188 of the Indian Penal Code which provides for imprisonment of 1 month to 6 months and/ or fine of

[4] The Kerala Epidemic Diseases Ordinance (No. 18 of 2020).

Rs.1000/- to the person who is in violation of the regulations imposed by the government. Section 4 protects every person acting in good faith under the Act from any prosecution, civil or criminal. The powers under the Act have been invoked in the past by states to control the spread of H1N1, dengue, malaria, etc. Some such instances include Maharashtra invoking powers under the Act in 2009 to combat the outbreak of swine flu and Chandigarh to control dengue and malaria in 2015.

B. **Implementation**

In the absence of a new legislation, India resorted to this 123-year-old colonial legislation for imposing regulations during COVID-19 pandemic. Acting under Section 2 of the Act, states and union territories issued notifications for mandating the norm of social distancing and the voluntary public curfew. Most Indian states notified regulations authorising government officials to admit, isolate and quarantine people and issued advisories on containment of COVID-19 invoking the provisions of the Act.[5] This also enabled them to undertake Non-Pharmaceutical Interventions in the absence of medicines to treat the disease including shutting down educational institutions, malls, airports and issue advisories on social distancing as well as regulations on home isolation and quarantine. Central and State governments have been provided with wide powers to issue lockdowns and impose other regulations during an epidemic under the said Act.

[5] For example, the Karnataka Epidemic Diseases, COVID-19 Regulations, 2020, Haryana Epidemic Diseases, COVID-19 Regulations, 2020, the Delhi Epidemic Diseases, COVID-19 Regulations, 2020 the Maharashtra COVID-19 Regulations, 2020, etc.

In April 2020, considering the pandemic situation, Epidemic Diseases (Amendment) Ordinance, 2020 was promulgated by the President.[6] In essence, this amendment intends to protect the healthcare personnel engaged in combating the COVID-19 and to expand powers of the central government to prevent the spread of such infectious diseases. The amendment inserted a definition clause defining acts of violence, healthcare service personnel, property, etc., and provided punishments against healthcare workforce and damage to any property during an epidemic. The punishment for the same is imprisonment upto seven years, a fine upto Rs 7 lakh and compensation to such healthcare personnel. The said ordinance was introduced as a bill in the Parliament and was passed by both houses and received the assent of the President on 28 September 2020, thereby bringing into effect the Epidemic Diseases (Amendment) Act, 2020, incorporating the afore-discussed changes.

Many states have prepared their own public health laws and many amended the provisions of their Epidemic Disease Acts. The Madras Public Health Act passed in 1939 was the first of its kind in the country. In its Epidemic Diseases Act, the Himachal Pradesh government had included provisions for compulsory vaccinations while Madhya Pradesh, Punjab, Haryana and Chandigarh conferred powers on specific authorities and officials to execute the Act effectively.[7] Most of the state public health Acts are policing Acts which is intended to control epidemics, but do not deal with coordinated and scientific responses to prevent and tackle epidemic outbreaks. Recently, many states, such as Gujarat and Karnataka

[6] The Epidemic Diseases (Amendment) Ordinance (No. 5 of 2020).
[7] Rakesh PS, "The Epidemic Diseases Act of 1897: public health relevance in the current scenario" 1(3) IJME (2016).

have drafted Public Health Bills which seem promising, as they provide for a structure capable of better surveillance while ensuring that citizens are not denied their fundamental health rights.[8]

C. Drawbacks

The Act has significant drawbacks in this modern era of changing dynamics in public health management. A century old law despite recent amendments cannot be considered as an efficient piece of legislation for controlling and curing a pandemic like COVID-19. It does not provide a definition for "dangerous epidemic disease" and hence there is no clarity on what constitutes a dangerous epidemic disease. The Act also contains no provision on the distribution of drugs/vaccines and quarantine measures to be taken. In this modern era, when there is increased international travel, global connectivity, greater migration, climate changes, etc., the Act is not in consonance with the changing requirements of modern-day epidemic disease prevention and control.[9] The Act is purely regulatory in nature and lacks a specific public health focus. It also does not deal with the duties of the government in preventing and controlling the spread of epidemics. The Act mainly emphasises on the power of the government, but is silent on the rights of citizens.[10] The Act has been widely criticised on it being a redundant law without any

[8] Ibid.
[9] Parikshit Goyal, The Epidemic Diseases Act, 1897 Needs an Urgent Overhaul, available at: https://www.epw.in/engage/article/epidemic-diseases-act-1897-needs-urgent-overhaul. (last visited on Dec. 17, 2020).
[10] Supra note 6.

provisions for quarantine measures, vaccination regulations and social distancing norms and how it would tackle a novel public health crisis.

III. THE DISASTER MANAGEMENT ACT' 2005

A. Overview

The objective of the Disaster Management Act, 2005 is to provide for the effective management of disasters and for other incidental matters and "disaster" is defined under Section 2(d) of the Act.[11] The Act mandates the Central Government to establish National Disaster Management Authority (NDMA) as the nodal authority that will be responsible for formulating policies, plans and guidelines for disaster management to ensure a prompt and effective response to the disaster.[12] NDMA and State Disaster Management Authority (SDMA) are also mandated to recommend appropriate guidelines with respect to the minimum standards of relief to be provided to the people affected by disaster.[13] A plan for disaster management has to be prepared by National Executive Committee constituted under the Act with due regard to the National Policy in consultation with the authorities and the same has to be approved by NDMA. This plan includes measures for the prevention of disasters or mitigation of their effects, standards for integration of mitigation measures

[11] A catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.

[12] The Disaster Management Act (No. 53 of 2005), s. 3.

[13] Id. ss. 12, 19.

in the development plans, etc., and it has to be reviewed and updated annually.[14]

The Central Government, irrespective of any law in force can issue any directions to any authority to facilitate or assist in disaster management.[15] It is also crucial that any such directions must necessarily be followed by the Union Ministries, State Governments and State Disaster Management Authorities.[16] National Disaster Management Guidelines, 2008 covers biological disasters that may be caused by epidemics and these guidelines have been drafted by NDMA for the management of biological disasters.[17] As per the mandate of the Act, the NDMA came out with the first National Policy for Disaster Management in 2009.[18] A National Disaster Management Plan, 2019 has also been drafted to strengthen disaster resilient development and enhance our capacity to recover from them which is the updated version of the 2016 plan.[19] As compared to the 2016 plan, 2019 plan is more comprehensive and includes Biological and Public Health Emergencies (BPHE) as a sub-category of disasters.

B. Implementation

As suggested by NDMA guidelines, 2008 the immediate response to the outbreak of a pandemic is that the affected persons be quarantined and put under observation for any atypical or typical signs and symptoms appearing during the period of observation. Health professionals who are

[14] Id. s. 11.
[15] Id. ss. 35, 62, 72.
[16] Id. ss. 18(2)(b), 36, 38(1), 38(2)(b), 39(a), 39(d).
[17] National Disaster Management Authority, Government of India, National Disaster Management Guidelines-Management of Biological Disasters (2008).
[18] National Disaster Management Authority, National Policy on Disaster Management (2009).
[19] National Disaster Management Authority, National Disaster Management Plan (2019).

associated with such investigations should be given adequate protection and should adopt recognised universal precautions.[20] It also mentions about strengthening of surveillance at all airports, seaports, and border crossings, in case of disasters and stringent inspection methodologies to be adopted during biological disasters.[21]

To address the current pandemic situation, the Central government in March 2020 had declared COVID-19 as "Notified Disaster" as a "critical medical condition or pandemic situation" thus bringing COVID-19 under the purview of the Act.[22] The national lockdown was imposed under Section 6 (2) (i) of the Act "to take measures for ensuring social distancing so as to prevent the spread of COVID-19". [23] The said order directed the ministries and departments of Central Government and State Governments along with SDMAs to take appropriate measures for ensuring social distancing in the country. Several other guidelines were also issued by the Ministry of Home Affairs, being the Ministry having administrative control of disaster management.[24] Indian Council of Medical Research, the apex body for the formulation, coordination and promotion of biomedical research in India has also issued various guidelines with respect to control and prevention of the spread of current pandemic.

[20] Supra note 16 at 37.
[21] Supra note 16 at 39.
[22] "India declares COVID-19 a 'Notified Disaster'", The Economic Times, Mar. 14, 2020.
[23] Order No. 1-29/2020-PP (Pt. II), National Disaster Management Authority [NDMA] (2020), available at: https://www.mha.gov.in/sites/default/files/ndma%20order%20copy.pdf.(last visited on Dec. 18, 2020).
[24]Annexure to Ministry of Home Affairs Order No. 40-3/2020-D dated 24.03.2020, https://www.mha.gov.in/sites/default/files/Guidelines.pdf.; Order No. 40-3/2020-DM-I(A), Ministry of Home Affairs Government of India [MHA] (Mar. 27, 2020), available at: https://www.mha.gov.in/sites/default/files/PR_SecondAddendum_27032020.pdf (last visited on Dec. 18, 2020).

Sections 51-60 of the Act deals with offences and penalties. Under Section 54, anyone who makes or circulates a false alarm or warning as to disaster, its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment extending to one year or with fine. This provision has been used to punish spreading of fake news related to COVID-19 pandemic to a limited extent. In Alakh Alok Srivastava v Union of India,[25] the issue of fake news has been discussed by the Supreme Court of India. A writ was filed by lawyers in public interest to address the grievances faced by migrant workers. Panic was created in the society by some fake news that the lockdown would last for more than three months which resulted in the migrant workers walking hundreds of kilometres to their villages or hometowns. The Court quoted Dr Tedros Adhanom Ghebreyesus, Director General of World Health Organisation who stated that: *"We are not just fighting an epidemic; we are fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous."* The Media was directed to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated. The Court also directed that a daily bulletin by the Government through all media platforms including social media to clear the doubts of people be made active.

C. Drawbacks

The Report of the Task Force to review Disaster Management Act 2013 suggested that the present structure of various authorities under the Act are not conducive for carrying out the tasks it has been mandated to

[25] Alakh Alok Srivastava v. Union of India, 2020 SCC OnLine SC 345.

perform. It was also stated that there is a lack of functional integration between the NDMA and the National Executive Committee on the one hand, and the NDMA and the Ministry of Home Affairs on the other.[26] The definition of disaster under the Act does not expressly cover a pandemic and the COVID-19 was brought under the ambit of the Act by notifying the same as a disaster. Despite the NDMA guidelines in 2008 covering biological disasters, the Act was not passed with an intent to combat such serious health emergencies. In addition to the lack of integration and limitations of various authorities under the Act, the Act is not equipped to deal with a crisis like COVID-19 due to the lack of express provisions to combat the same.

IV. THE DRUGS AND COSMETICS ACT' 1949

A. Overview

The Act aims to regulate the import, manufacture, distribution and sale of drugs and cosmetics. Section 3(b) of the Act provides a broad definition of "drugs" to include all medicines, substances and devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in humans or animals. The Drugs Technical Advisory Board, The Central Drugs Laboratory and The Drugs Consultative Committee have been established under the Act to carry out the functions entrusted to it by the provisions of the Act. The provisions of the Act are read with the Drugs and Cosmetics Rules, 1945. New Drugs and Clinical Trials Rules, 2019 also play a pivotal role in regulating

[26] Government of India, A Review of the Disaster Management Act 2005, Ministry of Home Affairs (March 2013), at 18.

clinical trials of vaccines during the pandemic and these rules are applicable to all new drugs, investigational new drugs for human use, clinical trial, bioequivalence study, bioavailability study and Ethics Committee. A drug has to comply with the standards set out in the Second schedule of the Act. The Act prevents substandard drugs and ensures that the drugs produced and sold in the country are safe and conform to the quality standards. Section 26B of the Act empowers the Central Government to regulate or restrict, manufacture, etc., of a drug in public interest. Under this provision, if the Central Government is satisfied that a particular drug is essential to deal with an emergency arising due to epidemic or natural calamities, it can regulate or restrict the manufacture, sale or distribution of such drug in public interest. This provision is used by the government to release notifications regarding the regulation and restriction of drugs during a pandemic.

B. Implementation

During the current pandemic, Central Government considering it essential to make available suitable vaccines to meet the requirements of emergency due to pandemic and acting under the powers conferred by Section 26B of the Act, issued notifications for regulating the manufacture and stock for sale or distribution of vaccines for prevention and treatment of the disease.[27] The requirement of prior permission from the Central Licensing Authority to manufacture the vaccine was deferred in public interest to meet the current emergency and such person could obtain the said permission after successful completion of the clinical trial. Central

[27] S.O. 1511(E), Ministry of Health and Family Welfare [MoHFW], (May. 18, 2020).

government also issued notifications on satisfied that hand sanitizers are essential to meet the current requirements and is to be made available widely to the public, and directed hand sanitizer to be exempted from the necessity of sale licence for its stocking or sale under the provisions of the Act and Rules subject to the condition that no drug is sold or stocked by the licensee after the date of expiration of potency recorded on the container, label or wrapper.[28]

C. Drawbacks

Despite the Act being in existence for many decades, the implementation in various states has not been effective. The non-uniformity in the interpretation of the law and their implementation and the varying levels of competence of the regulatory officials led to less than satisfactory performance. Most of the cases on offences related to spurious drugs remain undecided for years.[29] Though various amendments were incorporated in the Act and Rules including stringent penalties, retail sale of drugs to the doorstep of consumers to meet the emergency requirements during COVID-19, declaring medical device as drug, etc., issues like black marketing and hoarding are still in existence and the effects are significantly grave during the pandemic. The Act has not been effective in curbing practices like diversion, hoarding and black-marketing of remdesivir, oximeters and oxygen cylinders across the country during

[28] S.O 2451(E), Ministry of Health and Family Welfare [MoHFW], (Jul. 27, 2020).
[29] Report of the Expert Committee on a Comprehensive Examination of Drug Regulatory Issues, including the Problem of Spurious Drugs, Ministry of Health and Family Welfare (Nov. 2003).

COVID-19. The systemic flaws have been contributing to such serious offences being unseen or ignored. [30]

A. INDIAN PENAL CODE, 1860

A. Overview

Indian Penal Code, 1860 is the comprehensive legislation providing for definitions of various criminal acts and punishments of those acts in India. The code was drafted on the recommendations of the First Law Commission under Lord Macaulay. The objective of the Act is to provide for a general penal code in India. In the absence of a comprehensive health law, IPC has been used widely to impose criminal liability on the people violating the orders of the government relating to the pandemic. IPC plays a significant role in a pandemic situation by imposing punishments on those who violate the orders and regulations imposed by the government under other laws as well as violations of provisions of IPC.

B. Implementation

Several provisions of IPC including Section 188, Section 269, Section 270 and Section 271 deal with criminal liability with respect to various offences that can arise during a pandemic situation. Section 188 of IPC has been a consistent feature in most of the orders or notifications issued by central and state governments during COVID-19 pandemic which deals with disobedience to order duly promulgated by public servant. As mentioned under the Epidemic diseases Act, any person acting in

[30] Bibek Debroy, **"**Black marketing during the pandemic comes from longstanding, systemic flaws" The Indian Express, May 13, 2021.

contravention to the provisions of Act would be liable for punishment under Section 188. Section 188 states that a person shall be punished with imprisonment extending to six months and fine when he disobeys an order promulgated by a public servant and if such disobedience causes obstruction, annoyance or injury, danger to human life, health or safety, etc. This provision comes into play when any person acts in contravention to any orders or regulations issued by the government to control the spread of pandemic and includes the violation of mandatory quarantine. Since such breach would result in danger to human life, health or safety, he shall be imprisoned for a term extending to six months and/or with a fine upto thousand rupees.

Section 269 of IPC deals specifically with negligent act likely to spread infection of disease dangerous to life which states that anyone who unlawfully or negligently contributes to the spread of a disease which is hazardous to life has to be punished with imprisonment extending to six months and/or with fine. Likewise, Section 270 of IPC states that someone who malignantly does any act which is expected to spread the infection of any disease dangerous to life has to be punished with imprisonment extending to two years and/or with fine. Several people have been arrested under these provisions during the current pandemic for violating the quarantine and lockdown regulations. History of such instances can be traced back to the Madras High Court convicting a person under Section 269 for travelling by train despite suffering from cholera in the year 1886.[31]

[31] The Queen Empress v. Krishnappa and Murugappa, (1883) ILR 7 Mad 276.

Section 271 of IPC deals with disobedience to quarantine rule. The section states that if someone knowingly disobeys any rule promulgated by the government for putting any vessel into a state of quarantine or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, for regulating the intercourse between places where an infectious disease prevails and other places, that person will be punished with imprisonment extending to six months and/or with fine. Section 505 deals with statements conducing public mischief which can be invoked when a person spreads fake news related to the pandemic and cause panic among the public and such a person shall be punished with imprisonment extending to three years and/or with fine.

C. Drawbacks

Though these provisions act as a great measure to prevent and punish violations in a pandemic situation, it has been widely criticised that these provisions are very ineffective and broad. Several First Information Reports were registered under Section 188 of IPC for alleged violations of lockdown guidelines and other petty offences.[32] A Public Interest Litigation was filed in the Supreme Court stating that registration of F.I.R under this provision is illegal and that the Court could take cognizance of the offence only on a written complaint by the concerned public servant as per Section 195 of Code of Criminal Procedure.[33] The petition sought

[32] As per research conducted by CASC, between 23 March 2020 and 13 April 2020, 848 FIRs under S. 188 IPC have been registered in 50 Police Stations of Delhi alone and according to the Uttar Pradesh Government's Twitter handle, 15,378 FIRs have been registered in Uttar Pradesh against 48,503 persons as stated in "Supreme Court rejects plea seeking quashing of FIRs for petty offences during COVID-19 lockdown" The Economic Times, May 5, 2020.

[33] Dr. Vikram Singh v. Union of India, Writ Petition (Crl.) Diary Nos. 10953/2020.

for directions to quash FIRs registered under Section 188 of IPC during COVID-19 for violating lockdown and other petty offences. The Supreme Court dismissed this petition raising a question as to how the lockdown is expected to be implemented if these provisions are not invoked.

D. THE CODE OF CRIMINAL PROCEDURE, 1973

A. Overview

The Code of Criminal Procedure is a procedural law intending to provide a mechanism for the enforcement of criminal law. The Code is meant to be complementary to IPC and the provisions are applicable to every investigation, enquiry or trial of an offence under IPC. Both IPC and Cr.P.C play a pivotal role in enforcing the provisions of Epidemic Diseases Act and Disaster Management Act.

B. Implementation

Section 144 of Cr.P.C has been widely used during COVID-19 in India to prohibit public gathering or unlawful assemblies and impose other restrictions relating to mass gatherings. It deals with the power to issue order in urgent cases of nuisance of apprehended danger. Section 144(1) states that a District Magistrate, a Sub- divisional Magistrate or any other Executive Magistrate specially empowered by the State Government can direct any person to abstain from an act if such direction is likely to prevent obstruction, injury, danger to human life, health or safety, a disturbance of the public tranquillity, etc.

Section 144(4) states that an order issued under this provision shall not remain in force for more than two months. However, if the State Government feels that it is necessary to extent the same for preventing

danger to human life, health, safety or for preventing a riot or affray, it may by a notification, direct that the order remains in force for such further period not exceeding six months from the date on which the order would have expired. Most of the states in India have issued prohibitory orders restraining the assembly of more than five people under Section 144 to curb transmission of COVID-19.

E. CONSTITUTION OF INDIA

A. Overview

Constitution of India provides various powers to the Central and State governments to deal with an epidemic disease as well as protects the rights of the citizens in a pandemic situation. Several provisions of the Constitution set a base for the government to impose restrictions and make laws to protect the health of the people. All rules and regulations imposed in such a situation can be traced to a constitutional provision. Articles 19, Article 21, Article 47, Article 245, Article 246 read with seventh schedule and Article 256 are some of the significant provisions applicable in a pandemic situation. However, right to health is not expressly guaranteed as a fundamental right under the Constitution of India though it has been brought under the ambit of Article 21 by the Supreme Court in various judgements.

B. Implementation

Article 19 of the Constitution provides for freedom of speech and expression, to assemble peacefully, to move freely within the territory of India, to carry out any occupation, trade or business and to practice any

profession in this country, etc., subject to reasonable restrictions.[34] During the COVID-19 pandemic, several restrictions were placed on these rights in the form of lockdowns, quarantines, isolation, etc in the interests of general public. Hence, restricting movement of people, imposing mandatory quarantines, restrictions on news related to the pandemic to prevent the spread of fake news, etc., can be considered as an outcome of the power of the government to impose restrictions. However, whether these restrictions are reasonable is a highly debated question.

As already mentioned, right to health has been brought under the wide ambit of Article 21 through various decisions of the Supreme Court. According to the provision, no person shall be deprived of his life or personal liberty except according to procedure established by law. This provision acts as a foundation stone for the protection of health of the people in India though it is not expressly stated that right to health is a fundamental right under the Constitution. According to Article 47 of the Constitution, it is the primary duty of a state to have due regard in raising the level of nutrition and the standard of living of its people and the improvement of public health. This duty cast upon the government to improve the public health of its people plays a pivotal role in the imposition of regulations and issuance of guidelines during a pandemic by the government.

Article 245 and Article 246 of the Indian Constitution deals with extent and subject matter of laws made by Parliament and by the Legislatures of States. Division of power is enshrined in the three lists in the Seventh

[34] The Constitution of India, arts. 19, cl. 2; cl. 3; cl. 5; cl. 6.

Schedule i.e., the Union List, State List and the Concurrent List. Entry 1 of the State List deals with public order and Entry 6 deals with public health and sanitation: hospitals and dispensaries. These entries empower the States to make laws and issue directions on the subjects related to public health, sanitation, hospitals and dispensaries. Likewise, Entry 81 of the Union List empowers the Central Government to make laws on inter-state quarantine and inter-state migration. Entry 29 of the Concurrent List provides for the prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants. All these entries provide the Union and the states with the power to make new laws, issue directions, guidelines or regulations during a pandemic like COVID-19.

As per Article 256 of the Constitution, the state has to act in compliance with the laws made by the Parliament and other laws applicable. The Central Government can give directions for the proper implementation of such laws and those directions would be binding on the states. During the pandemic, Ministry of Health Affairs issued various orders under the purview of Disaster Management Act calling for strict compliance with the lockdown guidelines. These orders would come under the ambit of "directions" under Article 256. Hence, states are bound to follow various regulations imposed by the Central Government to prevent the spread of the coronavirus including the lockdown, restriction in movement, etc.

F. Other Rules and Regulations

A. International Health Regulations (2005)

The International Health Regulations, 2005 (IHR) are an international law which helps the countries to work together in saving lives and livelihoods caused by the international spread of diseases and other health risks. They came into force on 15 June 2007 and are binding on all the countries across the globe, including all WHO Member States. The IHR aim to prevent, protect against, control and respond to the international spread of disease while avoiding unnecessary interference with international traffic and trade. The IHR are also designed to reduce the risk of disease spread at international airports, ports and ground crossings. All States are bound and are responsible for implementing the IHR at the national level. WHO collaborates with and supports States in the implementation of these regulations.[35] The member states of WHO are required to comply with the IHR by designating a national IHR focal point, strengthening core capacity to detect, report and respond promptly to public health emergencies (PHE), assessing events that may constitute a PHE of International Concern within 48 hours and notifying WHO within 24 hours of assessment, providing routine inspection and control activities at international airports, ports and examining national laws, revising health documents, rules and regulations and establishing a legal and administrative framework to suit with the IHR requirements.

[35] World Health Organisation, "Frequently asked questions about the International Health Regulations (2005)*",* at 3.

The requirements and regulations under IHR have been actively implemented in India. National Institute of Communicable diseases is considered as the national focal point for IHR by Indian government. As in 2007, Rs 4.08 billion was allocated by the government for the Integrated Disease Surveillance Project over 5 years for building infrastructural and human capacity at the district and state levels. However, India as a large and diverse country has been facing some challenges with respect to the effective implementation of IHR. India needs to substantially enhance its financial investments in the health sector in order to be able to detect and control infectious diseases and implement the requirements under IHR. Health being a state subject, it is very important that the local and district administration and state governments are fully involved, information is shared in a timely manner and are committed to enforce the IHR in their respective areas of jurisdiction.[36]

B. Other Restrictions and Regulations

Ministry of Health and Family Welfare has issued various guidelines and restrictions related to COVID-19 pandemic. One of them is the Containment Plan for large outbreaks created by the Ministry.[37] Several measures were suggested in the plan including containment plans for large outbreaks through geographic quarantine which consists of Geographic Quarantine and Cluster Containment. Geographic quarantine requires the restriction of movement of people to and from a defined geographic area

[36] Jai P Narain et. al., "Implementing the Revised International Health Regulations in India" 20(5) NMJI, (2007).
[37] Ministry of Health and Family Welfare Government of India, "Containment Plan for Large Outbreaks Novel Coronavirus Disease 2019 (COVID-19)".

where there is a large outbreak like a barrier erected around the focus of infection whereas Cluster Containment will contain the disease within a defined geographic area by early detection of cases. Cluster containment will include geographic quarantine, social distancing, testing all suspected cases, and awareness amongst the public. This plan is updated from time to time. Quarantines and other social distancing measures as suggested by the plan were imposed in India during COVID-19 pandemic. Several travel restrictions including suspension of domestic and international air travel, suspension of visas, stoppage of railways, other public transport, etc., were also issued by the Ministry of Health and Family Welfare and Ministry of Home Affairs. There is a plethora of regulations and guidelines issued and implemented by the Central governments and the State governments during the current pandemic. Some of them were efficiently implemented while some did not really result in the expected outcome.

C. National Health Bill. 2009

There have been multiple attempts by the Central Government to put forward an adequate legal framework for providing essential public health services and to handle outbreaks of epidemics in an efficient manner. The National Health Bill, 2009 was one such proposed legislation that aimed at providing protection and fulfilment of rights in relation to health and well-being of the public. The Bill has set a clear contrast between the powers and duties of the Central Government and State Governments with respect to public health. It also laid down individual and collective rights in relation to health which included the right to health, right to access, right against discrimination, right to dignity, right to the use of healthcare,

etc. It also mentioned about the formation of public health boards at the national and state levels for smooth implementation and effective coordination. It also contained provisions for community-based monitoring and mention of grievance redressal mechanisms which would ensure transparency. However, the Bill was not assed as public health is a state subject.[38]

D. The Public Health (Prevention, Control and Management of Epidemics, Bioterrorism and Disasters) Bill, 2017

Later in 2017, the Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill, 2017 was introduced by the government. The Bill provided for repealing the Epidemic Diseases Act, 1897. It aimed at providing for the prevention, control and management of epidemics, public health consequences of disasters, acts of bioterrorism or threats thereof and for related matters. It tried to cure the defects of the obsolete Epidemic Diseases Act and was expected to replace it. The bill defined "epidemic," "outbreak," "bioterrorism", "social distancing", "public health emergency", etc., clearly as opposed to Epidemic Diseases Act. It puts forward measures like social distancing, quarantine, isolation, diagnosis and guidelines for treatment, instead of segregation and detention of people. It also enumerated various diseases which falls under the category of epidemic-prone diseases in the First Schedule. It also envisaged and laid down provisions for a public health emergency of international concern, like the outbreak of COVID-19. However, the bill did not receive adequate support and lapsed as concerns were raised over

[38] Supra note 6.

the sweeping powers it envisaged for the State to subject a person to compulsory treatment even without his consent.[39] It would have played a crucial role in controlling the current pandemic if it was enacted.

G. NEED FOR SINGLE COMPREHENSIVE LEGISLATION

India's response to pandemic has brought to light severe inadequacies and ambiguities in the legal framework with respect to public health, especially in dealing with a unique crisis like the COVID-19 pandemic. The pandemic has exposed the deep vulnerabilities and glaring gaps in the country's healthcare system and domestic laws pertaining to epidemics.[40] The absence of a comprehensive legislation to deal with pandemic has taken a huge toll on India's efficiency in tackling COVID-19. It is inexcusable that the authorities have not yet come up with an effective legislation instead of resorting to century old legislations and legislations passed for other purposes even though it has been almost two years since the outbreak of COVID-19.

As mentioned above, the Acts used for preventing and controlling the spread of a pandemic have significant drawbacks and the same can be resolved only by a comprehensive legislation to deal with all the scenarios that might arise during an epidemic or pandemic. The Epidemic Diseases Act is outdated and there is a lack of uniformity in the provisions of Acts in various states. The Disaster Management Act which was not enacted in order to deal with a health catastrophe cannot be resorted for the effective

[39] Supra note 8.

[40] Ramesh Shankar, "Bring the Public Health Bill", available at: http://www.pharmabiz.com/ArticleDetails.aspx?aid=131341&sid=3. (last visited on Dec. 17, 2020).

combating of dangerous infectious diseases. Relying on a number of legislations to deal with a major health crisis also leads to overlapping of powers and functions which make the measures less effective. A comprehensive public health legislation incorporating the provisions empowering the government to take appropriate and reasonable measures, regulate quarantine, isolation, pricing and distribution of drugs, etc., is highly needed for the effective management of a pandemic. All the provisions implemented during the current pandemic under multiple legislations has to be brought under one integrated and comprehensive legislation addressing the above-mentioned drawbacks. Public Health Bill, 2017 has the potential to fill the void in India's various public health legislations. The government should review and re-introduce the lapsed Public Health Bill, 2017 to meet the current needs with respect to public health and control the pandemic efficiently. It is also crucial that India make more investments in public health trying to build an efficient and effective public health system.

H. CONCLUSION

According to the University of Oxford, India had one of the most stringent lockdowns in the world during the first wave of COVID-19.[41] One of the major concerns raised with respect to the issuance and implementation of the above discussed regulations is the customary question on the constitutionality of these regulations including the reasonability of them. It has been a highly debated question which has many people speaking for and against the same. While a considerable number of restrictions imposed

[41] Karishma Mehrotra, "Explained: India enforced one of the strongest lockdowns, here's how it stacks up against other countries" The Indian Express, May 8, 2020.

were highly unreasonable violating the fundamental rights of the citizens to a great extent, some of them were rational and necessary considering the overriding public interest. All these restrictions have to be issued and implemented in a rational manner only and should not result in distressing situations like migrants walking hundreds of kilometres and losing their lives. Though the current pandemic exposed various irregularities and inadequacies in the Indian health care and concerned legislations, it is acknowledged that the health system of the country has progressed to a better level due to the outbreak of COVID-19 and that is a positive thing left behind by any epidemic or pandemic.

ISSN 2249-4421 Previously UGC Approved Journal No. 42016

AN ANALYSIS OF THE DOCTRINE OF SECONDARY LIABILITY UNDER COPYRIGHT LAW WITH REFERENCE TO INDIA AND THE UNITED STATES

Nehal Ahmed[*1]

ABSTRACT

The paper deals with secondary liability under copyright law with reference to India and the United States. It primarily tackles the issues about contributory infringement which have been highlighted in various litigations involving P2P technology, the latest being the *MGM* v *Grokster*, *Myspace* cases. Interestingly, new methods have been developed in each case which reveals a contradiction in the decisions taken by the US Supreme court and the Courts in India. It is apprehended that the pro-right holder decision in the *Grokster* case may harm the innovators in terms of curbing the innovation and scientific development and tilt the balance between the conflicting interests of protection and innovation.

Keywords: Secondary Liability, Copyright Laws, intermediaries,

I. INTRODUCTION

Secondary liability refers to liability on the account of acts committed by another. It is imposed on someone who is not directly involved in the infringement activity, but would be considered as responsible for

*[*1] Author is a LLM Graduate, National Law School of India University (NLSIU) Bangalore*

facilitating, encouraging, and profiting from such activity. Meaning thereby, certain people should be held liable for harms even if they did not directly participate in such activity. There are two grounds for rationalizing the secondary liability doctrine, for instance, economic efficiency ground and moral ground.

As per the economic efficiency grounds, it shifts the injury costs to such defendants who have the ability to prevent future injuries. As far as the moral ground is concerned, it refers to those who intentionally commit any tortious activity, they should be considered responsible, even though their actions do not reflect the direct cause of harm for the victim.[2] Many scholars are of the opinion that secondary liability owes its origin to "Common law of Torts" and "Agency". There is no statutory provision available against secondary infringers in the Copyright Act, 1909 in the United States (US). Consequently, the provisions of secondary liability under Copyright law are judge-developed.

Secondary liability under copyright law has evolved from various types of internet crimes because of the advancement of science and technology. It consists of illegal selling and distribution of copyrighted music and video files over the peer-to-peer network. Now the simple question for us is what will be considered as secondary liability? It simply means that when an infringing activity takes place intentionally and knowingly through direct

[2] Mark Bartholomew & John Tehranian, "The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law" 21 Berkeley Tech. L.J. 1363 (2006).

inducement or encouragement and assistance; one gains direct benefit from such infringement, it is known as the secondary liability.

The large-scale copyright infringement that the internet and personal computers have jeopardized has left no option for copyright owners except to sue software and service providers as facilitators under doctrine of secondary liability. The most landmark and unprecedented lawsuits have been brought against sellers of peer-to-peer file sharing software-Napster, Aimster, and Grokster-who have been deemed to be liable under the prominent judicial doctrines of vicarious liability and contributory infringement on the grounds of the copyright violations committed by their users or consumers. It goes beyond any reasonable doubt that these secondary liability doctrines are well established and further structured through judicial pronouncement in copyright law, the Napster and Aimster decisions have made an expansion of the role that illicit intent to profit from others' copyrighted works are able to play a pivotal role for the purpose of determining the secondary liability.

This paper will analyze these issues through four substantive chapters, analyzing the evolution of secondary liability in the United States in the light of leading judgments. It further examines the knowledge, intention and material contribution for constituting the secondary liability under Copyright law. Later on, it discusses the intermediary liability in India and whether India is moving away from the secondary liability principle. Finally, it examines the challenges pertaining to secondary liability and provides suggestions and conclusions.

A. **Research Design**

1. Aims and Objective

The aim of this study is to analyze and evaluate the concept of secondary liability under Copyright Law in the light of landmark judgments. The study targets to evaluate the secondary liability jurisprudence given the development of two leading jurisdictions namely the United States and India in particular and other jurisdictions in general. The focus of this study is to examine how intention, knowledge or material contribution plays such a vital role in the evolution of secondary liability under Copyright law. The researcher aims to put forward a pragmatic method to analyze the inducement theory, constructive knowledge and willful blindness. The research will also see whether the existing safe harbor provisions under the Information technology Act is viable for the growth of secondary liability jurisprudence in India, and therefore, whether the changes are required or not. Additionally, other objectives of the research is to understand the scope of secondary liability, whether India is trying to escape from the secondary liability rules.

2. Hypothesis

The secondary liability jurisprudence of Copyright law developed and interpreted by the Courts are not able to strike a balance between the rights of intermediaries, creators and consumers.

3. Research Questions

i. What is the objective of "the Digital Millennium Copyright Act" and what have been its implications on safe harbor provisions?
ii. What is the scope of secondary liability under "the Copyright Law" and whether India is moving away from secondary liability rules?
iii. What are the new IT guidelines for intermediary liability in India and whether it is beneficial to address the future challenges?
iv. How to protect the rights of the intermediaries, creators, innovators, manufacturers and consumers while maintaining the principle of public policy and inclusive development?

4. Research Methodology

This research is fundamentally an exercise in qualitative research in order to understand, study, explore and analyze the legal regulatory framework pertaining to secondary liability under Copyright law and numerous challenges it faces for determining secondary liability. Hence, a doctrinal method has been adopted to prepare this research given the parameters of descriptive-analytical method of research.

5. Scope and Limitations

Through this research, I aim to analyze the secondary liability under Copyright law at the conceptual level, and analyze the efficacy of knowledge, intention or material contribution in establishing the liability. The research is focused on the secondary liability jurisprudence evolved in the United States and India in particular and other jurisdictions in general. No comparison has been drawn on the secondary liability between copyright and trademark. Similarly, the application of secondary liability under Copyright law has been critically analyzed based on the

doctrines evolved in India and the United States. Furthermore, the research is analytical in nature which analyzes the potential problems and challenges faced by the secondary liability doctrine under Copyright law in both the countries. More importantly, the research restricts its scope to just examining the solutions provided by the different organizations and judicial institutions.

6. Research Gap

While there is a plethora of existing literature on the 'Secondary Liability under Copyright Law' from the Sony to Grokster doctrine, there exists a viable gap in comprehensive evaluation from intention, knowledge, or material contribution perspective. The existing literature is majorly based on the intermediary liability in India but did not identify India's approach on secondary liability in the light of the new IT guidelines.

7. Review of Literature

i. Patrica Akester & Francisco Lima, *Copyright and the P2P: Law, Economics and Pattern of Evolution*, European Intellectual Property Review, (2006).

In this article, the author analyzes the collusion between copyright and P2P technology. The author tries to explain whether the displacement effect occurred for the purpose of sale of music and films and performing unauthorized file-sharing. This article helped me in understanding the

impact of these strategies and various business models which are considered suitable for this kind of environment.

ii. Andrews T K, *Control content, not innovation: Why Hollywood should embrace peer-to- peer technology despite the MGM v Grokster battle*, Loyola Los Angeles Entertainment Law Review, 25 (2005) 392.

In this article, the author argues the current speed of technological and market development. It illustrates the institutional limitations of the courts for providing fair, efficient, effective standards. It helps me understand the different narratives of Sony and Grokster doctrine like the interests of the copyright owners, innovators and consumers.

iii. Aradhya Sethia, *The Troubled Waters of Copyright Safe Harbour in India*, Journal of Intellectual Property Law & Practice 12(5) 398 (2017).

The author discusses the common law doctrine of secondary liability. So that it could be proved to be beneficial to understand the doctrinal foundations of statutory safe harbor. This piece was useful to understand the comparative analysis of knowledge standards.

iv. Connie Davis Powell, *the Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions*, Akron Intellectual Property Journal, pp. 190-191, Vol.3, (2009).

In this the author has discussed the climate of judicial expansion pertaining to statutory liability. It explains the fact that the inducement theory under Grokster was the turning point for intellectual property owners on the account of filing the infringement action. It was beneficial in analyzing the fact that the limits of secondary liability have expanded after the pronouncement of inducement theory in Grokster.

v. Danny Friedman, *Sinking the Safe Harbour with the Legal Certainty of Strict Liability in Sight*, 9 (2), Journal of Intellectual Property Law & Practice 148 (2014).

The author argues that safe harbor provisions should be substituted by the strict intermediary liability, since it will be difficult to escape from this liability.

vi. Deborah Hartnett, *A New Era for Copyright Law: Reconstituting the Fair Use Doctrine,* 34 New York Law School Law Review 267,267 (1989).

The researcher states that fair use is considered as an affirmative defense in relation to Copyright infringement. Further it argues that fair use fundamentally strikes a fine balance between author's interests so far as the commercial exploitation of the work is concerned and public interest for the purpose of free flow of information and ideas. It was useful to think that a fair balance is necessary for protecting the interests of users and developers.

vii. Gavin Sutter, *Rethinking Online Intermediary Liability: In Search of the 'Baby Bear' Approach,* Vol. 7, Indian Journal of Law and Technology, 33 (2011).

This paper evaluates the different national methods for regulations of online contents. It explains the liability of intermediary service providers on the accounts of data given by the third parties.

viii. Jeffrey R. Armstrong, *Sony, Napster, and Aimster: An Analysis of Dissimilar Application of the Copyright Law to Similar Technologies*, DePaul Journal of Art, Technology and Intellectual Property Law, Vol.13 Issue 1, Spring (2003).

The paper gives a historical analysis of the US copyright Act in relation to the right to copy and distribute copyrighted materials. This paper helped me in analyzing the evolution of secondary liability under Copyright law in the United States.

ix. Lee A J, *MGM Studios Inc v. Grokster Ltd & In Re Aimster litigation: A study of secondary copyright liability in the peer-to-peer context,* Berkeley Technology Law Journal, 20 (2005) 487.

The author examines the two P2P cases Grokster and Aimster and attempts to make an analysis of the decisions made by respective courts pertaining to secondary liability under copyright law. It helped me understand the interpretation made by the Seventh Circuit and Ninth Circuit Courts related to Sony.

x. Mark Bartholomew & John Tehranian, *the Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law,* Berkeley Technology Law Journal, 1366, fall 2006, Vol. 21, No. 4 (Fall 2006).

The author analyses the fact that why the courts have created a two-tier system of secondary liability. The author makes an assessment as to why the law of secondary copyright and trademark liability fails to provide a reasonable ground for resolving the complex issues of technological change. The author has not touched the aspect of safe harbor doctrine.

xi. Robert M. Hirning, *Contributory And Vicarious Copyright Infringement In Computer Software Harming One Form Of Intellectual Property By Protecting Another,* Chicago-Kent Journal of Intellectual Property (2006).

The author discusses the historical development of indirect infringement law and the author has also argued how different computer technologies are affected by infringement liability.

II. THE EVOLUTION OF SECONDARY LIABILITY UNDER COPYRIGHT LAW

A. Nature and scope of secondary liability

There are two forms of secondary liability: contributory infringement and vicarious liability. Contributory infringement will arise if someone causes, induces or materially contributes to the infringing conduct of another with the knowledge of infringing activity. Vicarious liability arises when someone has the capacity, right and ability to supervise and take care of the infringing activity along with direct financial interest in such activity.[3] There is no requirement of knowledge of tortious acts in vicarious liability. Hence, a direct infringement is necessary to take place before claiming the contributory or vicarious liability which would be imposed on any third party. As a matter of fact copyright law does not expressly contain the vicarious liability, but the approach of the courts has been consistently imposing vicarious liability in the presence of two factors: *"it reflects the right and ability to supervise"* the primary infringer and it reflects *"direct financial interest pertaining to the exploitation of the copyrighted material"*. Contributory liability means liability where a person may be held liable if the existence of knowledge of the infringing activity was there. It causes or materially contributes to the infringing activity of another. In contributory liability, the essential elements of knowledge and participation are benchmark.

In India, the law pertaining to secondary liability is prescribed under the Copyright Act of 1957 in section 51 (a) (ii) and (b).[4] Under these two provisions, a person is liable for an infringement act done in assistance with primary infringement and who intensifies the effect of a primary infringement.[5] Under Section 51 (a) (ii), the defense will be taken, if the

[3] *Id.*
[4] S. 51 of the Copyright Act, 1957.
[5] *Id.*

infringer is able to prove on the basis of reasonable ground such communication to the public would come under an infringing activity.[6]

B. Evolution of Secondary Liability Doctrine under Copyright Law

There is no uniform standard for determining the secondary liability under the Copyright Law. To resolve this issue, the Courts have adopted different approaches. For instance, it is incumbent upon the copyright owner to reflect that the accused (third party) intentionally or knowingly caused the infringement or facilitates the means for the primary infringer to commit the infringement. The copyright owner also needs to prove that the third party earned profits from such infringement. There are a series of landmark cases which led to the evolution of secondary liability under Copyright law.

The first issue related to secondary liability arose in 1911 in *Kalem Company v. Harper Brothers*[7]. The case marked the beginning of development of law which established the liability even for those who contributed to the infringement of Copyright. Most importantly, it stated that if a supplier of the means has sufficient knowledge of the infringement or has the ability to control the use of copyrighted works by others and authorizes the use without prior approval of the Copyright owner can be deemed to be liable and accountable for infringement.[8]

[6] *Id.*
[7] Kalem Co. v. Harper Bros. 222 U.S. 55, 63 (1911).
[8] Connie Davis Powell, "The Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions", 3 Akron L. J. 190-191 (2009).

The first landmark judgment which explained the provision relating to the imposition of the secondary liability is *Sony Corp. of Am. v. Universal City Studios, Inc*.[9] Some of the people, who purchased the home video tape recorder from the petitioner, recorded the broadcasts.[10] In other words, Sony Corp reproduced the copyright works without any permission. The issue before the court was whether the airwaves video recording by the consumers could be considered as a copyright violation. The Supreme Court reversed the decision of the Ninth Circuit and held that Sony is not liable for the contributory infringement stating the facts that Sony could have been liable for the copyright infringement if Betamax could have been primarily used for infringing purpose. But given *"the non-infringing time shifting use of VCR*" , Justice Brennan decided that Sony is not liable for contributory infringement.

The decision of the Apex Court was based on traditional patent laws *"staple article of commerce doctrine*".[11] It says that if you distribute a component of a patented device it will not violate the patent if it is suitable for use in other ways. The Court further held that if a product is capable of other non-infringing and 'substantially lawful' uses, the producer would not be held liable. *The staple article of commerce restricts the liability in terms of more acute fault than the mere understanding that one's products will be misapplied.* Therefore, the Betamax VTR was deemed to have substantial non-infringing use and Sony was not held liable for contributory infringement. Furthermore, the Court traced the

[9] Sony Corporation of America v. Universal City Studios Inc. 464 U.S. 417 (1984).
[10] supra
[11] Andrew J. Lee, "MGM Studios Inc v Grokster Ltd & In Re Aimster litigation: A study of secondary copyright liability in the peer-to-peer context", 20 Berkeley Tech. L. J. 487 (2005).

time-shifting doctrine. If Sony is held liable for authorized time shifting, it would have a negative effect on the production and distribution and sell of VCRs, and those copyright owners who authorized time shifting would get frustrated in their works to access more television viewers by doing such a thing.[12] An unlicensed use of the copyright will not be considered as an infringement until and unless it contradicts with the specific exclusive rights provided by the copyright statute.[13].

The next landmark and unprecedented judgment on contributory infringement is *A & M Records Inc. v. Napster Inc*.[14] It is a controversial case which appeared in the judicial history of the US between the Recording Industry of America (RIAA) and Napster. The music industry expressed concern over this use of MP3 and P2P sharing technology, since it could have hampered and reduced their business and music distribution in the shape of downloadable MP3. Given this, the major companies filed a suit against Napster on the basis of contributory and vicarious infringement thereby claiming their copyright.[15] Napster argued that their service was none other than a *"staple article of commerce*" capable of "*Substantial Non-Infringing Use*". The District Court did not agree and distinguished it from the Sony case.[16]

[12] Termini M, "Time-Shifting in The Internet Age: Peer-To-Peer Sharing of Television Content", 38 Columbia J. L. S. P. 422 (2005).
[13] supra note 393 at 126
[14] A & M Records Inc. v. Napster Inc. 114 F. Supp. 2d 896 (N.D. Cal. 2000).
[15] Lisa M. Zepeda, "Copyright : Digital Media : Digital Music Distribution A&M Records, Inc. V. Napster, Inc." 17 Berkeley Tech. L. J. 71-90 (2002).
[16] supra note 398

There was a minor difference between Sony and Napster. For instance, in the Sony case, the only contact between Sony and the consumers of Betamax was at the time of sale whereas this is not the case with Napster.[17] In Napster's case, it was not only Napster Inc. who maintains the system, but it also supervises an integrated system which is accessed by its consumers for uploading and downloading files.[18] Therefore, Napster's fundamental role is that of facilitating copying without prior permission. Hence, Sony doctrine is inapplicable. The contention was rejected by the Judge that Napster had the capability to be used for SNIU at the level of the District Court.[19] It was held that the Napster service has the potential of SNIU. The Court further said that Napster could have denied the access but it could not do so. Thus, Napster was directed to take responsibility for preventing the infringing activities on its system thereby discontinuing the access to infringing materials. The plaintiff alleged that Napster was liable for contributory infringement as well as vicarious infringement. Napster facilitated the consumers with the software called Music-share through which a user could upload and download songs with the help of P2P network. Further, Napster did provide technical support for searching MP3 files.[20] Thus, they tried to shield itself from Sony doctrine by contending that he is not liable for secondary liability.[21] It was surprisingly observed that 87 percent of the materials on Napster were deemed as copyrighted. Out of which 70 percent of the copyrighted works available on Napster belonged to the plaintiff. It established the liability

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Akester P, "Copyright and the P2P Challenge" 27(3) E. Int. Prop. R. 106-112 (2005).
[21] Andrews T K, "Control content, not innovation: Why Hollywood should embrace peer-to-peer technology despite the MGM v Grokster battle", 25 L. L. A. E. L. R. 392 (2005).

of direct infringement.[22] Moreover, the constructive knowledge of the infringer and the material contribution at the same time is essential to establish the secondary liability.

Another important case in which the issue of contributory copyright infringement was raised was *Re Aimster Copyright Litigation*.[23] Like Napster, the American Recording Companies filed a suit against Aimster for contributory copyright infringement.[24] The Court held that there is a huge difference between Sony and Aimster, since Aimster was a service not a product. The Court held that it is essential to treat these two things in a different way.[25] It was further held that the VCR was essentially a product which did not maintain any relationship as such between the manufacturer and the user whereas this is not the case with Aimster file. In fact, Aimster's wilful blindness was vehemently condemned and considered it to be knowledge of guilt. There was refusal to provide any relief which was based on Aimster's refusal to discover to such extent to which its system was being operated to violate copyright.

In *Metro Goldwyn Mayer Studios v. Grokster*[26] The doctrine of secondary liability was again raised in this case. The fact of this case is that Grokster Ltd. and StreamCast gave out free software for the purpose of sharing the files through the P2P network. Since the software had not sought the help

[22] Myrick R M, "Peer-to-peer and substantial non-infringing use: Giving the term 'substantial' some meaning" J. Int. P. L., 12 (2005) 546.
[23] Re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).
[24] Jeffrey R. Armstrong, "Sony, Napster, and Aimster: An Analysis of Dissimilar Application of the Copyright Law to Similar Technologies" 13(1) D. P. J. A. Tech. I. P. L. (2003).
[25] *Id*.
[26] Metro Goldwyn Mayer Studios v. Grokster 545 U.S. 913, 125 S. Ct. 2764 (2005).

of a central server it worked quite faster.[27] Whether or not the software distributors would be liable for copyright infringement at a time when the products were used by the third party. The Court manifestly said that the software distributor is liable for contributory copyright infringement on the ground of not using the tools for diminishing the copyright infringement. The Supreme Court has basically maintained a balance between the creative pursuit and restricting the copyright infringement for the sake of the innovation of the technology. The court further opined that there was the presence of inducement unlike Sony case.[28]

Consequently, MGM complained about the same activity by stating that P2P software was used by the respondent to transfer the copyrighted files.[29] The District Court did not hold the respondent company liable for contributory or vicarious infringement. The Supreme Court relied upon four important contentions in order to derive an inevitable conclusion. The first contention is "*non-filtration of copyrighted materials*". The court found that there was the absence of any constructive act for the purpose of filtering out the contents of infringing works. The second important contention is "*taking over from Napster*". The intention behind involvement in the non-infringing activity is apparently clear. The third contention is "profit motive". The last contention is "practical alternative". According to this contention, the distributors had knowledge of the unlawful activity. Most importantly, the Court actually failed to indicate

[27] supra.
[28] Nayomi Goonesekere, "A Critical Analysis of Secondary Liability under Copyright Laws in the United States and in India" 5(2) W. L. R. (2016).
[29] Max Stul Oppenheimer, "Yours For Keeps: MGM v. Grokster" 23 J. Marshall J. Computer & Info. L. 209 (2005).

the application of Sony principles. Certain questions were left unanswered.

C. The DMCA safe harbors and the doctrines of secondary liability

It is interesting to mention that *Viacom v. YouTube* provides a good opportunity to think on the very meaning and operation of the hosting safe harbor and its ability to exercise legal certainty for user-generated content (hereinafter referred to as UGC) platforms and other Web service providers.[30] Since the DMCA is meant to strike a fine balance between the interests of service providers and copyright owners, the parties involved in the lawsuit seem to have strongly different views and opinions as to how some of the key points of the statute are supposed to be understood. In *Viacom Intern Inc. v. YouTube, Inc*.[31] In its lawsuit against YouTube, Viacom contended that defendants are held to be liable under both doctrines of secondary liability. First, it contends defendants are held liable under ambit of the inducement rule which was adopted in Grokster, a contributory liability on the ground of "intentionally using YouTube as a haven for widespread infringement.[32]" Second, it contends defendants are vicariously to be held liable since they "extract a direct financial benefit from infringement activity. In this regard, it is clear that they had the right and ability to control." Both the contentions were vehemently rejected by YouTube since they are entitled to the DMCA hosting safe

[30] Priyambada Mishra, Angsuman Dutta, "Striking a Balance between Liability of Internet Service Providers and Protection of Copyright over Internet: A need of the hour" 14 J. I. P. R. (2009).
[31] Viacom Intern. Inc. v. YouTube, Inc. 2010 WL 2532404.
[32] *Id.*

harbor[33], which gives protection against all liability claims. To put more simply, even if YouTube could be deemed to be liable under the common law's doctrines of secondary liability—which it strongly denies—they would be exempted from that liability on the account of the hosting safe harbor provision. Viacom asserted that they do not exempt defendants from secondary liability claims. More specifically, Viacom stressed upon the fact that the DMCA does not provide protection to defendants against liability for inducement.[34] Moreover, it does not protect them against vicarious liability as well.

The claim that a defendant who would be considered liable under the spectrum of common law's criteria of derivative liability as well as inducement. This is not protected by the DMCA safe harbors. There are two reasons for such arguments. First, by demonstrating that the terms and conditions by the DMCA for the purpose of benefiting from the safe harbors fundamentally track the common law standards of secondary liability and thus, and if anyone is held liable under common law criteria of secondary liability, it would lead to failure to meet the DMCA statutory requirements. Second, taking into consideration the purpose of the statute in terms of reasoning that the safe harbors, it was never intended for application to an intentional wrongdoer.[35] As a consequence of this, where a defendant fulfills the standard on inducement, section 512 would not be required to come into play. Section 512(c) provides an exemption to a

[33] U.S. Code § 512
[34] *Id.*
[35] Miquel Peguera, "Secondary Liability for Copyright Infringement in the Web 2.0 Environment: Some Reflections on Viacom v. YouTube" 6(1) J. I. C. L. T. (2011).

service provider from liability for all monetary relief. The limitation of liability is subject to several terms and conditions.

It is pertinent to mention that the DMCA meant to provide legal certainty to internet entrepreneurs pertaining to potential copyright liability. Following this approach, it provides some clear rules constituting safe harbors from liability, even if the circumstances protected under those harbors might have given rise to liability irrespective of the fact whether it is a direct or secondary liability.[36] From this historical point of view, it can be said that all this was meant for the protection of online providers from facing excessive risk in terms of potential liability, or to liberate them from having to invest too much in policing and effectively preventing their users' infringements.[37] Though it is meant to strike a fine balance between the interests of copyright owners and service providers, the DMCA seems to be turning out to be easier for the purpose of fulfillment than expected, almost converting into a mere takedown notice statute.[38]

D. Secondary liability doctrine of Copyright law in India

There have been no cases dealing with contributory infringement so far in India. India is witnessing a rapid technological development. Due to this, the Indian judiciary as well is about to face similar cases in future. To fill up the gap, it is imperative for the Indian judiciary to look at the principles of common law. While doing so, the judiciary can take the reference from Grokster but they have to be cautious while applying the principle, since

[36] *Id.*
[37] *Id.*
[38] *Id.*

the judgment cuts to the heart of scientific innovation. Additionally, given the Indian IPR regime, there is no specific provision related to contributory infringement.

There are two types of secondary infringement. The first one is that which is done in assistance of primary infringement, and the one which emphasizes the effect of a primary infringement that has already occurred.[39] So far as the Section 51 (a) (ii) of the Copyright Act 1957 is concerned, it covers that which is done in assistance of primary infringement.[40] For example, allowing for profit at any place which would be used for communication of the ongoing work to the public at large, if such communication itself would violate the copyright. The defense which would be pleaded is that the person was not aware of infringement or there was the absence of reasonable ground to believe that such communication would be the root-cause of the copyright violation.

It is pertinent to mention that section 52 (1) (k) of the Copyright Act 1957 would not be considered as an exception for making a person liable for secondary infringement under the ambit of section 51 (a) (ii) of the Copyright Act 1957. Furthermore, it is actually an exception to the unauthorized communication of sound recording to the public which will be treated as an act of primary infringement. If a person is unable to satisfy the condition for defense section 51 (a), if a person rents out a venue for conducting a live band, and meanwhile, he did not seek permission from

[39] Justice P.S. Narayana, Intellectual Property Law in India, 773 (Gogia Law Agency, 2nd edn. 2003).
[40] The Copyright Act, 1957 (Act 14 of 1957), s. 51.

the very owner of the sound recording, will be eventually deemed liable for secondary copyright infringement. There are four different acts which cannot be committed and if it is committed, it results in copyright violation. For instance, *selling or hiring by way of trade and business* or displaying the infringing copies, *distributing on account of trade* in such a way as it affects the owner of the copyright or doing exhibition of such copies publicly in terms of trade and subsequently, importing such copies into India.[41] Hence, if a person commits any of the abovementioned acts, he would be treated to have committed the secondary copyright infringer under section 51 (a) (ii) or (b).

E. Application of Sony and Grokster in India

There is no doubt that the widespread piracy issues questioned the specific enumeration of infringing circumstances given under section 51.[42] The regulatory institutions and organizations have been facing major challenges particularly in India about the question whether the software developer can be held liable in such a scenario as a secondary infringer? The Indian judiciary did not face questions of this kind, the two path breaking and unprecedented decisions of the U.S. Supreme Court in Sony and Grokster say that the extension of secondary infringement is more than what is enumerated under section 51 (a) (ii) and (b). Furthermore, the robust principles which have been laid down in Grokster are specifically of relevance for technologies that enable file transferring and

[41] V.J. Taraporevala, Law of intellectual property, 278, (Thomson Reuters, 2nd edn. 2013).
[42] Ananth Padmanabhan, Intellectual property rights – Infringement and remedies 401 (LexisNexis Butterworths
Wadhawa, Nagpur, 1st edn, 2012).

technological protection measures. In such situations, the promoters of such technology will be culpable.[43]

F. Theories of Secondary Liability under Copyright Law

The contributory and vicarious infringement liability under copyright law has undergone a rapid transformation in the last couple of years. The reason for such transformation is extension of liability from manufacturers to distributors on the account of consumer products, computer technologies and peer-to-peer file sharing software. *According to Black Law Dictionary*[44]*,* contributory copyright infringement means "active inducement", causation, material contribution related to the infringing conduct of another person, providing the goods or facilitating the goods, doing its arrangement for another person to infringe. A full and concise determination is necessary for products and technology for effect of indirect infringement liability under copyright law.

The concept of contributory liability originates from the law of torts. It is considered as a judicial tool evolved to bridge the gap created by the legislature. The purpose of contributory copyright liability is the empowerment of copyright owners to sue the root cause of numerous infringements, rather than having to sue a 'multitude of individuals' for committing direct infringements.[45] The essential elements of contributory infringement liability is that it either takes place through encouragement

[43] *Id.*
[44] https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionery.pdf.
[45] Moye J M, "How Sony survived: peer-to-peer software, Grokster, and contributory copyright liability in the twenty first century", 84 N. C. L. R. 646 (2006).

or assistance for conduct or through machinery or goods which acts as facilitation for infringement. Additionally, the infringer knowingly aids or induces the infringing act. The development of vicarious liability may be traced from "dance hall" case[46], wherein the dance hall operator was held liable for getting profits from the acts of performers. The presence of profits is a requirement of vicarious liability from such acts of infringement. Though, they could have taken place to stop the same. The difference between contributory and vicarious infringement liability is that contributory infringement is supposed to meet the higher standards. However, where the knowledge aspect is incomplete, the vicarious liability would be a viable option. According to the Supreme Court, there is no clear demarcation between the vicarious and contributory infringement.

The Grokster judgment was vehemently criticized on the basis that contributory infringement goes against Article 1, Section 8, of the US Constitution, since the Constitution of US provides guarantee that the *'creators of expressive works are conferred a limited monopoly not as an individual reward*,[47] but rather as an incentive given the creation of future creative work. Thus, it is apparent that excessive rights on account of copyright protection are being provided which is an assault on the inclusive growth of communication technologies.

[46] Foreningen Af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315, ECJ.
[47] Carter E L and Frank A, "The day Grokster ate Sony: Examining the rationale behind the Supreme Court's new rule of copyright infringement liability for inducement" 10 I. P. L. B. 115 (2006).

The decision of Ninth Circuit court was appealed before the Supreme Court, wherein a new theory was propounded by the court i.e. "inducement theory". As per this theory, "one, who makes distribution of a device with the object of promoting and advertising its use to infringe copyright, as reflected by clear expression or other affirmative step taken for infringement, is held liable for infringement by third parties.". The Supreme Court has taken many factors into consideration while arriving at such a decision. For instance, absence of safety filters. It means if it is claimed that there was no intention to commit infringement on the part of defendants, they could have used safety filters for the purpose of filtering out contents of infringing works. Another important factor is substituting Napster. As per the observation of the court the aim of respondents was to satisfy the rise in demand which happened due to closure of Napster. The factor of profit motive was also taken into account. The business model of the two companies was of different nature that the companies would gain more revenue by way of selling advertising space.

III. APPLICATION OF PRINCIPLES OF SECONDARY LIABILITY UNDER COPYRIGHT LAW

A. Knowledge, intention and material contribution

Fault may be of various kinds. Intention and knowledge are most important among them.[48] Moreover, there are different standards of knowledge like actual knowledge or constructive knowledge.[49] When it

[48] Kamiel J. Koelman and P B Hugenholtz, "Online Intermediary Liability" 10 (Kluwer Law, 2000).
[49] *Id.*

comes to actual knowledge, it requires the infringer to actually know.[50] As far as constructive knowledge is concerned, it exists even if the person should have known.

In contributory copyright infringement, knowledge of the specific infringement and material contribution play such a pivotal role. When it comes to the question of knowledge requirement, some courts have taken the notice of the "knowledge of the specific infringement" others have thought of knowledge requirement in general. For instance, one of the courts decided that in order to establish contributory copyright infringement, "reasonable knowledge" is all which is required. Though, the court has given a broader interpretation of the knowledge in Grokster case in order to satisfy the knowledge requirement.[51]

The first important question which arises is, whether 'knowledge' implies actual knowledge or constructive knowledge? The second question is, whether the knowledge, actual or constructive, is considered as general or infringement-specific? For example, an intermediary is not necessary to have actual knowledge about a particular infringement, but it is possible that he may have constructive knowledge about it.[52] Furthermore, even if an intermediary doesn't have constructive knowledge of a specific infringement, it is possible that he may still have constructive knowledge

[50] Danny Friedman, "Sinking the Safe Harbour with the Legal Certainty of Strict Liability in Sight" 9(2) J. I. P. L. & P. 148 (2014).
[51] Mark Bartholomew, "Copyright, Trademark and Secondary Liability after Grokster", 32 Colum. J.L. & Arts 445 (2009).
[52] Stefano Barazza, "Secondary Liability for IP Infringement: Converging Patterns and Approaches in Comparative Case Law" 7(12) J. I. P. L. & P. 879 (2012).

of the activity of infringement generally happening on its platform. Nonetheless, general knowledge is not applicable.

What would be the interpretation of "the reasonable knowledge" for establishing contributory infringement is something which would depend on a person of ordinary prudence and understanding. Since Groster case[53] is a suitable example of the broader interpretation that the court has adopted for showing the knowledge requirement, what the defendant here failed in doing was that they did not take any step to prevent the users of software from the infringement of copyrighted music and video files. They did not provide any tool to the users to diminish the infringing activity. Hence, it could be concluded that specific knowledge of the infringing activity is essential. Either he "*knows or has reason to know"* about the activity. The general knowledge would not be enough to constitute a contributory infringement.[54]

For example, in the Sony case, it was proved that there was no direct relationship between the manufacturers and users. There was no instance of the material contribution as such to constitute the infringing activity. On the contrary, in the Groster case, it was established that there was a link in terms of a direct relationship between producers and the users of the software. Therefore, Groster was held liable for contributory infringement. It is important to mention that knowledge and material contribution to the infringement are the essential elements of contributory

[53] Metro Goldwyn Mayer Studios v. Grokster 545 U.S. 913, 125 S. Ct. 2764 (2005).
[54] Sneha Jha & Samar Jha, "An Analysis of the Theory of Contributory Infringement" 11 J. I. P. R. 319 (2006).

infringement.[55] Nonetheless, in Sony Corp, the court interpreted the doctrine of contributory infringement holding that if the commercial product has the potential of substantial non-infringing use, the distributor should have actual knowledge of the specific infringement and subsequently failed to act on it.[56]

In other words, the secondary infringer is supposed to 'know or have reason to know' of direct infringement.[57] General knowledge is not sufficient that an infringement is about to occur,[58] rather it is necessary to have actual and constructive knowledge of the infringement activity. Hence, the court will be interested to look into the evidence of the defendant's actual and constructive knowledge taking consideration of the defendant's conduct.[59] If the product is found to be capable of substantial non-infringing use, the issue of constructive knowledge of the defendant will not arise.

The district court came to the conclusion that Napster possessed both actual and constructive knowledge that its users exchanged copyrighted music. Conversely, absent any specific information which makes identification of infringing activity, a computer system operator cannot be held liable for contributory infringement just because the structure of the system permits for the exchange of copyrighted material.

[55] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
[56] Sony Corp v. Universal City Studios, 464 U.S. 417 (1984).
[57] A&M Records, Inc v Napster Inc, 239 F 3d 1004 at 1020.
[58] Graves T, "Picking up the pieces of Grokster: A new approach to file sharing", 27 H. Com. Ent. L. J. 148 (2004).
[59] Miles E, "In Re Aimster & MGM Inc v. Grokster Ltd: Peer-to-peer and the Sony doctrine" 19 Berkeley Tech. L. J. 28 (2004).

B. Financial Benefit

The district court held that plaintiffs had shown that they succeeded in claiming that Napster was involved in direct financial interest in the infringing activity. The existence of financial benefit would arise where the availability of infringing material "acts as a 'draw' for customers." There is sufficient evidence to prove that the evidence corroborates the district court's finding that Napster's future revenue is directly based upon increasing and adding more user-base. More users will register and subscribe with the Napster system as the *"quality and quantity of available music increases and enhances*." Thus, we say that the district court did not err in determining the fact that Napster was generating financial benefits from the availability and existence of protected works on its operating system.

C. Supervision

The district court held that Napster has the potential and ability to supervise its users' conduct. Napster has the ability to stop and block infringers' access to a particular environment. Here, it was demonstrated by the plaintiff that Napster gains the right to control access to its system. The express reservation of rights policy was held by Napster, mentioning on its website that it has the discretionary right to refuse service and terminate accounts.

For imposing contributory infringement liability, knowledge of direct infringement is not by itself sufficient,[60] but it is necessary to show the

[60] supra note 437 at 134

intent for the purpose of distribution of an infringing product. Hence, the question is what degree of knowledge, associated with a lack of action to stop infringement? If anyone discovers the internet review of the software indicating an infringing use, will it be considered sufficient? How about encouraging users who try out "new file trading features"? Or what would happen in case of "unsolicited email from users", pointing out the fact that they basically use the product for infringement, whether it will be sufficient?[61] The conclusion is that a distributor should not be liable for an illegal use if the affirmative steps have not been taken for the purpose of distribution or facilitation operation of the program.[62] In addition to this, on the basis of such standard, no court would impose liability for an unforeseen or unexpected use if it infringes the copyright.[63]

D. Fair Use and Substantial Non-infringing Use

As far as the doctrine of fair use is concerned, it is used as a defense to a copyright infringement claim, and it maintains a balance between protecting the very exclusive rights of the copyright owner and the interest of the public, taking into consideration the free flow of information. Law certainly works like a shield in protecting a copyright owner, the fundamental purpose of a copyright is the promotion of learning and culture for the public welfare at large. The presence of a "black letter" of fair use is available in a combination of case law and statutory provisions. According to the United States Supreme Court in *Sony Corp. of America*

[61] Supra
[62] Robert M. Hirning, "Contributory And Vicarious Copyright Infringement In Computer Software Harming One Form Of Intellectual Property By Protecting Another", 6 Chi. Kent J. Intell. Prop. 10 (2006).
[63] *Id.*

v. Universal City Studios, Inc.[64], the privilege of fair use is available for every individual. It is important to mention that the copyright holder does not have the exclusive right to such a use. It was rightly said by a commentator that "fair use is fundamentally the privilege to use copyrighted material in a reasonable manner without consent." Specifically, 17 U.S.C. § 107[65] enumerate six different circumstances in which use might be treated as 'fair': criticism; comment; news reporting; teaching; scholarship or research; and parody.'"

It is mandatory upon the defendant to prove the affirmative defense of fair use doctrine. Moreover, § 107 provides a comprehensive factors to be considered in determining whether a use is a fair one or not: (1) one has to consider the purpose and character of the use along with the fact whether such use is of a commercial nature or is for nonprofit educational purposes; (2) it is essential to consider the nature of the copyrighted work; (3) one has to look the amount and substantiality of the portion used pertaining to the copyrighted work as a whole; and (4) and finally what is the effect of the use upon the potential market for figuring out the value of the copyrighted work.

Intent and knowledge are interconnected and interdependent: courts may easily infer one from the other, but the Courts are usually unable to impose liability when one of the two elements seems to be absent.[66] Further, the two elements cannot be separated: the first one is the intention to induce

[64] Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417 (1984).
[65] 17 U.S. Code, s. 107.
[66] Lynda J. Oswald, "The Intent Element of Inducement to Infringe under Patent Law: Reflections on Grokster" 13 MICH. TELECOMM. & TECH. L. REV. 225 (2006).

infringement which reflects constructive knowledge of the subsequent infringing acts; and secondly the very intention to aid infringement originates from the choice of continuing to supply products used for infringement, once acquired actual knowledge of their unlawful use. Case law points out that intent can be shown by either 'affirmative steps taken to foster infringement which symbolizes the use of the rule of inducement, or 'affirmative steps that foster infringement' which goes beyond the purview of ordinary commercial practices and does include the failure to adopt any preventive measures.[67]

The reasonable question which arises is how third parties can get specific knowledge of infringing acts. Specific procedures are laid down within the purview of online service providers. *In Perfect 10 Inc v CCBill LLC*,[68] The plaintiffs contended that the hosting provider could have easily recognized infringing websites, by observing their domain name as well as main content. The court, nonetheless, refused to interconnect liability to generic knowledge and to 'place the burden of determining whether materials could be considered as illegal on a service provider' or to 'impose such investigative duties on service providers. Applying the same principle, in *UMG Recordings Inc. and others v Shelter Capital LLC* et al.[69] it was propounded that, by not identifying to the service provider any specific infringing material hosted on its website, the plaintiff had removed itself the powerful evidence of a service provider's knowledge

[67] DSU Medical Corp v JMS Co. 471 F 3d 1293, 2006).
[68] In Perfect 10 Inc v CCBill LLC, 488 F 3d 1102 (2007).
[69]UMG Recordings Inc. and others v Shelter Capital LLC, DJDAR 18112 (2011)

which is none other than actual notice of infringement from the copyright holder.

E. Willful blindness and constructive knowledge

If one is not able to prove the actual knowledge, courts may look into the issue of 'willful shutting of eyes, or where the person commits willful and reckless failure to do such inquiries being an honest and reasonable person would make or knowledge of circumstances which would demonstrate the facts to such a person'.[70] Willful blindness, red flags and constructive knowledge If actual knowledge is unable to be proved, courts may take into consideration the 'willful shutting of eyes, or willful and reckless failure for conducting such enquiries as an honest and reasonable person would conduct, or, at least, knowledge of circumstances which would indicate the facts to such a person'.

F. The duty of care

The identification of a fulcrum of secondary liability could come out from the duty of care, since it is imposed upon the third party for setting the balance between the competing interests at stake. A third party is required to ensure that its actions are not going to extend beyond the "maximum degree of indifference", pertaining to other parties' rights that the jurisdiction entertains.[71] The duty of care rests mainly upon "foreseeability" and "likelihood" "possibility" or knowledge of infringing

[70] Farah Constructions Pty Ltd v Say-Dee Pty Ltd HCA 22, (2007).
[71] Mark McKenna, "Probabilistic Knowledge of Third-Party Trademark Infringement" 10 Stan. Tech. L. Rev. (2011).

use. It is pertinent to mention that in the recent YouTube judgment, a German court held that its scope is dependent upon the balancing of the interests and rights of all the parties who are genuinely involved on the account of reasonableness and proportionality. It further clarified that an excessive burden upon the third party should not be imposed in terms of duty, as its execution is expected to be financially and technically feasible.

IV. INDIAN SAFE HARBOUR PROVISIONS AND SECONDARY LIABILITY

A. Intermediary Liability Framework in India

It is generally agreed that we shouldn't shoot the messenger when it comes to online transactions because legal systems around the world have been struggling to find the right balance for safe harbor.[72] The intermediary liability framework in India is prescribed under Section 79 of the IT Act. It provides the relief in terms of "safe harbour" to online intermediaries for all types of liabilities.[73] Furthermore, Section 81 of the IT Act, which granted an overriding status to the IT Act over various other laws, sustained the standardization. The single judge bench of the Delhi High Court in its decision in the *Myspace*[74] (hereinafter "*Myspace* I") held that intermediaries are actually immune from liability against copyright

[72] Gavin Sutter, "Rethinking Online Intermediary Liability: In Search of the 'Baby Bear' Approach" 7 I. J. L. Tech. 33 (2011).
[73] Robert M. Hirning, "Contributory and Vicarious Copyright Infringement in Computer Software: Harming One Form of Intellectual Property by Protecting Another", 6 Chi. Kent J. Intell. Prop. 10 (2006).
[74] My Space Inc. v. Super Cassettes Industries Ltd, 2011 (48) PTC 49 (Del).

infringement for third party content unless "actual knowledge" on their part can be demonstrated and proved. The judgment brings about the much needed clarification on the question of intermediary liability in India.[75] Nevertheless, the interpretation provided by the Single Judge on the interconnection between S.79 and 81 of the IT Act had resulted in an absurd end result.

One of the demerits of such provision is that there is no uniformity in the judgments of the High Courts pertaining to the exclusion of Section 79 from purview of copyright cases. *In Vodafone case*[76]For instance, it was decided by the Madras High Court that Section 79 was applicable to copyright infringement as well whereas in the Myspace case, the court failed in applying an important nuance.

It is important to mention that the moment *Myspace* was decided there was no existence of separate safe harbor provision under the Copyright Act. This gap triggered a debate on the need for a safe harbour specifically for copyright infringement. When in the year 2012, the Copyright (Amendment) Act introduced Section 52(b) and Section 52(c) it actually appeared as a positive version of intermediary safe harbour provisions. Therefore, copyright safe harbours in India currently consists of Section 51(a) (ii)[77], Section 52(b) and Section 52(c) of the Copyright Act, 1957

[75] Balu Nair, Delhi HC Division Bench Rules in Favour of Safe Harbour for Intermediaries in MySpace-T Series Copyright Dispute, Spicy IP, available at: https://spicyip.com/2016/12/breaking-news-division-bench-rules-in-favour-of-safe-harbour-for-intermediaries-in-myspace-t-series-dispute.html (last visited on Nov 15, 2021)
[76] Vodafone India Ltd. v. R.K. Productions, 2013 (54) PTC 149 (Mad).
[77] The Copyright Act, 1957, s. 51(a) (ii), 51(b).

read with Rule 75 of the Copyright Rules, 2013. In India, safe harbour is prescribed in terms of a 'fair use' exception.

The arrest of Avnish Bajaj[78], CEO of Baazee.com a subsidiary of Ebay.com in December 2004 by the Delhi Police for failing to comply "due diligence" by permitting hosting of pornographic clip for sale by third party in his website. This case was that the law related to the turning point for intermediary liability was unable to meet the needs of the generation. On the other hand, the amendment of section 79 of the Information Technology Act expanded the ambit of intermediary liability in India on the lines of the safe harbour provisions under S.512 of DMCA.[79] The definition of intermediaries under Section 2 (w) was also made clear. The expression "intermediary" is defined as *"with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online-marketplaces and cyber cafes.[80]"* The definition of intermediary as provided by the Act is inclusive in nature, which leaves possibility for a wider interpretation with the march of time and technological advancement.

[78] Avnish Bajaj v. State, 2008 (150) DLT 769.
[79] Amlan Mohanty, Intermediary Liability for Copyright Infringement in India: Few Thoughts in the Wake of Viacom v. Youtube, available at: http://spicyipindia.blogspot.com/2010/07/intermediary-liability-for-copyright.html (last visited on Nov 17, 2021).
[80] The Information Technology Act, 2000, s. 2 (w).

As per the words of Section 79, "*an intermediary shall not be held liable for any third party information, data, or communication link made available or hosted by him"*[81] for third party information or user generated contents (hereinafter UGC) with an overriding effect in relation to the present laws.

However, there are two exceptions to the rule, where the intermediary will be liable. First, if he conspired or abetted in the commission of the unlawful act; and second, he will be liable upon receiving actual knowledge, or that he was notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource which is controlled and exercised by the intermediary is fundamentally being used to commit the unlawful act. Another essential element is that if the intermediary possesses actual knowledge and fails to remove it expeditiously, it will be liable for contravention which is commonly known as 'notice and take down clause'. It is important to mention that a minor change was noticed in the 2008 amendment from "knowledge" to "actual knowledge", meaning thereby that only when the ISPs receive or get information about an infringement and fails to remove it, it will be made liable.

B. **New Development related to Intermediary Liability in India**

On February 25, 2021, the Ministry of Electronics and Information Technology of India announced the notification namely the *Information*

[81] The Information Technology Act, 2000, s. 79.

Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.[82] As per the Rule 4(1), a "significant social media intermediary"[83] like a social media intermediary who has more than 5 million registered users in India has to establish a three-tier mechanism for observation of due diligence within three months, consisting of a Chief Compliance Officer.[84] He shall be responsible to ensure compliance with the Act and rules. He shall be held liable in any proceedings pertaining to any relevant third-party information, data or communication link. It shall include a Nodal Contact Person for the purposes of coordination with law enforcement agencies and a Resident Grievance Officer, all the above-mentioned residing in India.[85]

According to Rule 4(2), a "significant social media intermediary"[86] who provides services fundamentally in the form of messaging, such as WhatsApp, Facebook Messenger, Telegram, etc., it is mandatory to them to enable the identification of the first originator of the information on its

[82] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

[83] Sharad Vadehra, Due Diligence to Be Observed by Social Media Intermediaries and Significant Social Media Intermediaries Under Information Technology Rules, 2021 available at: http://blog.galalaw.com/post/102gwsu/due-diligence-to-be-observed-by-social-media-intermediaries-and-significant-socia (last visited on 21 Nov, 2021).

[84] Raj Dev Singh & Yash Raj, Safe Harbour Principle and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (2021), available at: https://www.mondaq.com/india/social-media/1093222/safe-harbour-principle-and-the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 (last visited on Oct 31, 2021).

[85] Vibhuti Kaushik, Brief Note On The Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021, available at: https://www.mondaq.com/india/social-media/1074450/brief-note-on-the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 (last visited on Oct 31, 2021)

[86] Sharad Vadehra, An Update on India's Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021, available at: https://www.mondaq.com/india/social-media/1074774/an-update-on-india39s-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021 (last visited on Nov 02, 2021).

computer system as it is possible that it may be required by a judicial order passed by a competent Court or Authority.[87]

It is mandatory for them to observe the due diligence. It is necessary for them to have informed the users about the prohibited content. Moreover, upon receiving actual knowledge in terms of an order by a court or on being notified by the appropriate Government or its agency, the intermediary shall not host, store or publish anything related to prohibited information. It is also worthy to note that the intermediary shall also preserve such information and associated records for one hundred and eighty days. Intermediaries are also required to expeditiously add information pertaining to verification of identity, or prevention, detection, investigation, or prosecution. The IT Rules 2021 have undoubtedly brought about a drastic and radical revolution to the requirements as compared to IT Rules 2011 that had gained minimal compliance for claiming safe harbour protection. The intermediary only works as a medium between the content creator and the consumers/viewers/users. Therefore, making an intermediary liable for anything which was posted on the platform by a third-party user is unreasonable, illogical just because of the vast amounts of data exchanged (between users) that is next to impossible to track continuously. It also leads to infringement to the freedom of speech and expression of the users owing to possible arbitrary censorship of online content. This is also problematic and difficult since it confers the power to decide the connotation of the freedom of speech and expression in the hands of private corporations. India ensures and cherishes its commitment, firm conviction and determination to the

[87] *Id.*

fundamental right to freedom of speech and expression and exchange of ideas. This commitment will have to be extended and widened to the intermediaries while examining and observing the validity of the IT Rules, 2021. It is essential to demonstrate that the balance will have to be maintained between the compelling state interest to maintain law and order situation, eradicate and combat social media manipulation and the necessity to confirm that the intermediaries are not supposed to lose their original character i.e., platforms which promote the exchange of information. In addition to this, they also promote free and liberal debates on the very matters of public importance.

V. SUGGESTIONS AND CONCLUSIONS

A. Future challenges regarding determining the proper scope of secondary liability in the digital age

The personal nature of the new technology is an interesting phenomenon of the rapid evolution of digital technologies in the past decade. In the United States, we have observed companies install peer-to-peer networking technology for taking advantage of this fact, particularly registering millions of consumers into a network of copyright infringement on a quantity never seen before.[88] A lot of serious questions may arise through large and massive scale of infringement which usually occurs because of the activities of individuals. It is difficult for copyright owners not just to identify and locate but also to bring enforcement actions

[88] Marybeth Peters , "The challenge of copyright in the digital age" 9 R. L. P. I. (2006).

against the large chunk of individuals who might be violating their works. Even if the owners are able to bring such actions, it is not usually possible that such individuals would be in such a situation to pay for the damages that their actions have brought up.[89]

An effective and efficient means of enforcement has been provided by imposing liability on those who are taking advantage from the infringement and are in a position to control or restrain it. There is a huge possibility that these doctrines could play a very important role in copyright in the future since more and more scientific and technological developments allow companies to take advantage of individuals and infringing activity. Even though, it is an international matter, there does not seem much uniformity so far as the national laws pertaining to secondary liability is concerned, whether it is about the liability for a company that uses peer-to-peer technology for encouraging infringement or the liability as it was mentioned in the United States addressed in Title II of the DMCA, which is related to Internet service provider that gives facilities used by others to infringe.[90]

The acts and approaches taken by the various other jurisdictions depict the picture of theoretical and practical differences, but the evaluation and analysis of a few common elements permitted astonishingly similar conclusions. Its significance seems to be the delimitation of the duty of care, which imposes obligation upon the third parties to take necessary steps to prevent possible or known infringing acts. There are two fundamental problems related to this issue. First, the analysis of suspected infringing acts cannot be entirely inflicted upon the shoulders of service

[89] *Id.*
[90] *Id.*

providers, because of the relevant financial burden that such duty would ascertain the difficulty of assessing non-obvious infringements. Second, there is even the option of an incorrect evaluation, which may be the cause of a breach of the contract with the customer. However, courts are supposed to provide precise and clear guidance as to the measures. They are actually required to discharge uniformly the duty of care. Third parties are still groping in the dark since their liability is dependent more upon constructive knowledge. They basically conclude that in the assessment of their material contribution to the infringement, the role of intention is there.

If there are clear rules and principles, it would help to impose the balance from an assessment of subjective elements which is intention and knowledge to a thorough evaluation and analysis of objective factors such as causation, proximity and duty of care. These steps may be beneficial and useful both to third parties, whose duty of care and liability would be anticipated in a more uniform and predictable and rationalized way. Moreover, it is beneficial to right holders, guaranteeing a more effective protection and enforcement of their rights.[91]

B. **Legal Challenges to Information Technology Rules 2021**

A petition was filed by Quint Digital Media Ltd, an online news portal namely 'The Quint' before the Delhi High Court thereby challenging the constitutionality of the IT Rules 2021.[92] A notice was issued by the same

[91] Peter S. Menell and David Nimmer, "Unwinding Sony", 95(4) California L. R. 941–1025 (2007).

[92] Shreya Agarwal, IT Rules: Delhi High Court Refuses Interim Relief to The Wire And The Quint, available at: https://www.livelaw.in/news-updates/it-rules-delhi-high-court-the-quint-the-wire-stay-for-compliance-176998 (last visited Oct 21, 2021).

High Court. It was contended that it regulates the publishers of news and current affairs content. Interestingly, the petition has been combined with an earlier petition filed by the publisher of 'The Wire' against the same rules IT Rules.

In fact, WhatsApp has filed a Writ Petition[93] recently challenging the essential requirement in the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 which mandates private messaging intermediaries to share "the identification of the first originator of the information" in India on their "end-to-end data encrypted messaging services" popularly referred to as "traceability" upon the order of Government or Court. They further argue that this essential requirement compelled them to break "end-to-end data encryption policy" on its messaging service.[94] Subsequently, it leads to the infringement of privacy principles underlying it.

C. Suggestions

There is an urgent need for an expedited judicial process for addressing unlawful online content which may be prescribed into the Indian framework. In addition to this, the issue of overburdened judicial systems and processes would have to be seriously taken into account and it has to be effectively addressed. As far as Section 79(1), consisting of safe harbor is concerned, it should be separated from the responsibility for the purpose of taking down content upon issuance of a court order to the extent of

[93] Yuthika Bhargava, "WhatsApp moves Delhi High Court against India's new IT Rules" The Hindu, May 26, 2021.
[94] *Id.*

Section 79(3) (b).[95] The amendment should be made in the IT Act to incorporate the requirement prescribed in *Shreya Singhal*[96]. For instance, an intermediary shall only be liable to take down content upon notification by the court order. Additionally, it should only be limited for the period of time for which the illegality of the content seems to be persisting.

It is important to state that the scope of Section 79 should be clearly clarified and its application to the Copyright Act should be explicitly explained. The essential requirement under Copyright Rules relating to intermediary, a 21 days cap for making the infringing disable is supposed to be deleted, if it is served without any judicial notice. Most importantly, Criminal sanctions imposed on intermediaries for non-compliance with government orders under the ambit of Blocking Rules should be repealed since such sanctions are disproportionate and create a chilling effect on the freedom of expression.[97]

No fixed terrain of contributory infringement is there. The Supreme Court's decision in Grokster depicts the picture about the overarching influence of the big companies on the regime of intellectual property rights (IPR). The judgment is the root-cause of a cloud of uncertainty which leads to creation of a depreciation of innovation in the field of science and technology as the innovators and discoverers have to rethink and reimagine before getting entangled in the murky details of the ever confusing and uncertain regime of IPR and coming out with their products. Therefore, a uniform substantive approach to secondary liability

[95] Aradhya Sethia, "The Troubled Waters of Copyright Safe Harbour in India" 12(5) J. I. P. L. & P. 398 (2017).
[96] Shreya Singhal v. Union of India, (2013) 12 S.C.C. 73.
[97] The Center for Internet and Society, India, Indian Intermediary Liability Regime Compliance with the Manila Principles on Intermediary Liability (May, 2018).

under copyright law might be preferable.[98] The courts should observe and evaluate the extensive monopoly issue clearly and such problems should be looked into contextually. It goes beyond any reasonable doubt that P2P networks are in huge demand. Hence, this is the reason for enterprises supplying the same. Eventually, a clear line has to be drawn somewhere as to what extent the court should interfere in cases that seem to curb technological innovation and scientific development. It has to be considered as to why courts could take up an active role in promoting and advancing technological growth.

D. Conclusion

With the massive development of science and technology in terms of peer to peer network, web browser, search engines etc. the legislature and the judiciary have been facing unimaginable legal issues to tackle with and adjudicate upon the secondary liability under the Copyright law. Maintaining the principle of public policy, research & development, the Court has to adopt a balanced approach while upholding the rights of the creator, innovators, manufacturers and the consumers. The crying need of the hour is the uniform law among the TRIPS member States for the purpose of determining the secondary liability under Copyright Laws. Not just the legislative requirement but some protective measures are also required to curb the infringing activity. Common law doctrine for determining the contributory infringement is not sufficient rather the Courts should take a thorough examination of the facts involved. More precisely, the Court's narrow interpretation of conditional safe harbour,

[98]Graeme Dinwoodie, Rochelle C. Dreyfuss & Annette Kur, "The Law Applicable to Secondary Liability in Intellectual Property Cases" 42 N.Y.U. J. Int'l L. & Pol. 201 (2009).

through its interpretation of the 'actual knowledge' requirement, does not seem to strike a balance between the rights of a party affected by unlawful content, and the rights of the intermediary or general public who have the accessibility to such information. It is high time that India should take the lead when it comes to developing a legal framework based on due process and transparency requirements between intermediaries and their users.

There is a possibility of fear that unknown and unclear liability may affect the growth of the internet thereby affecting the growth of scientific and technological advancement. If we look at the situation between India and the US from a comparative perspective, the law in India is more vague, unclear and ambiguous. No specific provision has been enshrined to deal with the problem except Sec 79 of the IT Act 2000. There are certain terms which are supposed to be explained properly like 'due diligence' since the definition of such expression is not defined anywhere in the Act. In addition to this, the courts in the US also played a crucial role in the substantial development of principles of secondary liability of ISPs. There is no doubt about the fact that Sony doctrine is still relevant, but there is an urgent need for modification in doctrine as per the changes in technology. So, there is a need to maintain a fine balance between the interests of both ISPs and Copyright owners. Additionally, the economic interests of copyright owners should not be neglected.

GLOBAL MINIMUM CORPORATE TAXATION: A SOCIO-LEGAL ISSUE

Koninika Bhatacharjee[*1]

Abstract

The G7 countries have proposed a Global Minimum Tax on Corporations (GMCT). This will result in companies paying taxes in the states where they operate rather than in their headquarters. Essentially, two major aspects need to be addressed: the social cost of implementing GMCT in developing countries like India and implications that a global minimum tax has on Indian digital services. The paper talks about the challenges of taxing a 15% global rate by evaluating the impact of GMCT through international directives and indices. It assesses the effects of income inequality visa viz a component analysis of marginal efficiency of implementing the same. In conclusion, the researcher identifies the problems with GMCT and gives plausible solutions to tackle the same. Accordingly, recommendations are formulated that may increase the motivation of developing countries to adopt GMCT – paving the way for international anchoring to make GMCT a successful deal.

*[*1]Author is a 3rd Year student currently pursuing B.A. LL.B. (Hons.) from Christ University, Bangalore.*

Keywords: Digital tax, global Minimum tax, marginal efficiency, social cost

I. INTRODUCTION- IDENTIFYING THE PROBLEM

Countries have always had a tough time taxing multinational corporation (MNCs). Governments around the world lose direct tax revenue worth US$ 245 billion a year due to tax evasion by multinational corporations, according to the State of Tax Justice Report 2020.[2] According to the study, the Cayman Islands, the United Kingdom, Amsterdam, Luxembourg, and the United States generate significant tax losses for others, while the US, UK, Germany, Brazil, and France post the most critical tax losses.

India loses $10.32 billion (US) a year due to global tax evasion, equal to the salary of 4.23 million nurses and 44.7% of its health expenditures.[3] Studies indicate that MNCs practice tax evasion by shifting debt, registering intangible assets (such as trademarks and copyrights) and using strategic transfer pricing methods, which enable them to move gains to tax havens.[4] In this regard, the most pressing issue facing developing

[2]The State of Tax Justice 2020: Tax Justice in the Time of COVID-19,available at: https://taxjustice.net/wp-content/uploads/2020/11/The_State_of_Tax_Justice_2020_ENGLISH.pdf (last visited on Oct. 01, 2021).

[3]Press Trust of India, India Losing $10.3 bn Every Year Due to Tax Abuse by MNCs, Evasion: Report, available at: https://www.business-standard.com/article/economy-policy/india-losing-10-3-bn-in-taxes-per-year-due-to-tax-abuse-by-mncs-report-120112001332_1.html (last visited on Oct. 01, 2021).

[4]Misha Ketchell, How Multinationals Continue to Avoid Paying Hundreds of Billions of Dollars in Tax – New Research, available at: https://theconversation.com/how-multinationals-continue-to-avoid-paying-hundreds-of-billions-of-dollars-in-tax-new-research-124323 (last visited on Oct. 01, 2021).

countries such as India is Base Erosion and Profit Shifting (BEPS), exploitation of tax laws by cross-border companies. Tax haven economies are known to shift profits to low-tax economies. Tax havens like Switzerland, Hong Kong, Ireland, and Switzerland are the most popular. Furthermore, a shift in yields has become more evident since the explosion of the digital economy. Digital services are hugely popular in emerging markets, such as India, and they want a share of the profits that global telecommunications' giants reap there - especially since the new OECD arrangements call for the taxation of giant multinational companies that have online ventures but no physical presence in the country in which they earn their profits.

To address companies' "aggressive tax planning" as well as those challenges of taxing large distributions of income made by gig economy firms, India and 129 other nations have called for a global minimum tax as a worldwide effort to prevent multinational corporations from shifting profits to low-tax jurisdictions to avoid taxes. G7 countries' fiscal framework rests on two pillars:

- There is a primary pillar: Taxation of the country's largest and most profitable multinational companies. The companies should allocate and tax at least 20% of their profits above the profit margin of 10% within the countries where they operate.
- Secondly, a global minimum tax rate of 15% is set to prevent any undercutting of corporate profits.

By establishing a minimum corporate tax rate, some of the world's most prominent companies would be able to address low effective tax rates paid

by subsidiaries created to channel profits to nations with low tax systems, such as Ireland, the British Virgin Islands, the Bahamas, or Central America, such as Panama.

II. INDIA'S DIGITAL TAX

The Indian government has introduced a 2% equalisation levy on foreign e-commerce sellers who don't pay taxes in India to reduce BEPS.[5] US companies have called India's policy biased against them because it is perceived as biased against US firms. Retaliatory tariffs were imposed in response to this move on Indian products like shrimp, rice, gold, silver, and many more. Retaliatory tariffs were suspended for six months as a result.[6]

The Indian government also redefines income that is subject to taxation. The Significant Economic Presence (SEP) rule stipulates that a business entity exceeding the threshold for revenues (20 million INR) or users (30000 users) is a non-resident of India. From 2021-22, the rule will be in effect.[7]

However, the domestic tax rate in the Indian economy will not affect India's Foreign Direct Investment (FDI). Over the past 2-3 years, India has

[5]Finance Act, 2016 (Act 28 of 2016), s. 165 A.
[6]Dilasha Seth & Shreya Nandi, Google Tax: US Imposes Tariffs on India, But With Six-Month Delay, available at: https://www.business-standard.com/article/economy-policy/google-tax-us-imposes-tariffs-on-india-but-with-six-month-delay-121060201669_1.html (last visited on Oct. 01, 2021).
[7]Sudhir Kapadia, FDI in India – Now, Next and Beyond: Reforms and Opportunities, available at: https://www.ey.com/en_in/tax/fdi-in-india-now-next-and-beyond-reforms-and-opportunities (last visited on Oct. 01, 2021).; Executive Summary, India Issues Thresholds for Triggering Significant Economic Presence in India, available at: https://www.ey.com/en_gl/tax-alerts/india-issues-thresholds-for-triggering--significant-economic-presence--in-india (last visited on Oct. 01, 2021).

ranked as one of the top three foreign direct investment destinations, according to a recent survey by CII-EY.[8] Investors find the market attractive owing to the skilled workforce, a potential market, and political stability. India has around INR 4,000 crore (approx. 6%) as revenue from the equalisation levy.[9] After the imposition of GMCT, the removal of the equalisation levy is expected to cost India in terms of revenue.

"Income inclusion" is another factor affecting developing countries in the deal. Suppose a multinational group's profits are taxed below the minimum global rate in any of its operating countries. In that case, its parent company will have to pay the additional top-up tax based on where it operates. Tax havens are expected to lose out to countries as the threshold under the deal becomes operational globally. India is estimated to have gained at least US$ 4 billion as a result of the tax changes, according to the Tax Justice Network.[10]

Adding a 15% tax threshold to the bottom line worldwide is expected to bring in more than $100 billion in revenue annually.[11] Finally, a uniform global framework is paramount to effectively preventing tax evasion by

[8]CII Media Releases, India Amongst the Top Three Choices for Future Investments: CII – EY FDI Survey of MNCs, available at https://www.cii.in/PressreleasesDetail.aspx?enc=q73UVW2gfolsA+MrPNDqbHnlTnCxK4w7frVxTgeAOoE= (last visited on Oct 10, 2021).

[9]Dipak Mondal, India Collected Rs 4,000 Crore 'Google Tax' Since 2016; Rs 1,100 Crore in FY20, available at: https://www.businesstoday.in/latest/economy-politics/story/india-collected-rs-4000-crore-google-tax-since-2016-rs-1100-crore-in-fy20-267794-2020-07-21 (last visited on Oct. 01, 2021).

[10]Sudhir Kapadia, What G7's Global Minimum Tax Holds for India, available at: https://www.ey.com/en_in/tax/what-g7s-global-minimum-tax-holds-for-india (last visited on Oct. 01, 2021).

[11]Newsroom, 130 Countries and Jurisdictions Join Bold New Framework for International Tax Reform, available at https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm (last visited on Oct 10, 2021).

multinationals. By allocating the profits equitably, countries would better tax their profits from multinational corporations.

III. A COMPONENT ANALYSIS OF THE COSTS OF GMCT: PROPERTIES AND MODELLING ISSUES WITH EXISTING TAX STRUCTURES

1. **Costs associated with administration:** Tax administrations gather information, among other things. Because data quality can vary, this is a complicated problem to model. Auditors "know" that a taxpayer is evading taxes, but it is quite another thing to have enough evidence to sustain a court finding to this effect. It is also essential to consider whether data can be concealed easily and how accessible it is. There are two parties with conflicting interests in any market transaction, so it is desirable to tax them globally instead of taxing an individual's consumption.[12] First of all, in any market transaction, two parties have conflicting interests. As a result, any deal designed to conceal information is liable to be reported to the authorities by at least one party unhappy with the result. Another property is that information on a transaction is easier to gather when well documented. The documentation requirement of a large corporation makes it easier to tax a significant transaction than a transaction involving a small firm.

[12] Joel Slemrod and Yitzhaki Shlomo. "The Costs of Taxation and the Marginal Efficiency Cost of Funds." 43(1) Staff Papers (Int. Monetary Fund) 172-98 (1996), available at: https://doi.org/10.2307/3867356.

2. **Compliance Cost: Consider this problem:**

- Is it best to delegate countries the authority to collect taxes and relay information about companies operating within their jurisdiction, which requires the administration to audit both the taxpayer agent and the taxpayer,
- or would it be more efficient only to deal with the companies themselves?

Moreover, by forcing the tax administrator to forward this information, administrative costs would be reduced significantly. In addition, the government can reduce total social costs by imposing a two-stage collection system if the value of collecting information is higher than the cost of collecting information.

3. **Deadweight loss:** It occurs when taxes are imposed on taxpayers that create a wedge between their relative prices (Parent-Subsidiary Company operating in different jurisdictions). There is a continuous and increasing loss of weight created by the tax rates and the combined taxes used. The deadweight loss cannot be characterised as a constant function if the set of taxed commodities isn't given.

4. **Risks of Tax Evasion:** In the Allingham and Sandmo model, the taxpayer only engages in tax evasion if he anticipates that his expected income will increase, including the typical fine he would have to pay if caught. Therefore, MNCs' risk exposure and income expectations

that evade taxes are raised. As a result, society is exposed to additional risks. An agreement that requires the taxpaying MNC to pay a global corporate income tax rate of 15% would be better for the host country if it would receive its due share of the revenue. GMCT can only be implemented if every country worldwide agrees. Unless it's done, either existing tax havens will be preserved, or new ones will be created. A developing country like India will suffer in either case. The excess burden of tax evasion attributable to Indian government risk neutrality equals the risk premium that a multinational company would be willing to pay to eliminate the exposure to risk (Yitzhaki, 1987). In light of the assumption that detection is one-sided, the penalty structure is asymmetric, and risk aversion is constant, the excess burden of evasion will increase with the rate of taxation.

5. **From a social standpoint, reducing taxes creates a deadweight loss**. Because the distinction between avoidance and compliance costs depends on the taxpayers' intentions, it isn't easy to distinguish between the two in practice. Identifying who controls each activity will become apparent later on. Taxpayers are responsible for activities that produce excessive burdens (such as avoidance), while tax administrators are responsible for compliance and administration costs.

6. **Problems of Normative Models for Enforcing GMCT**: With a few exceptions, normative models of tax evasion enforcement suggest that the most effective penalty to abolish all evasion is a sufficiently severe penalty. This is a fundamental principle. In the case of a rational

taxpayer, evasion is impossible if the sentences are too high. By increasing the penalties to infinity, the tax administrator can maximise the private price. The amount of monitoring will almost be zero since there will be no evasion. In addition, this kind of model disregards the possibility of an abuser of the system or the harsh punishment of an honest mistake. Whether the sentence is severe or not, the system is cruel and unfair in the event of an evil administrator or genuine harm: the harsher the penalty, the more rigorous the prosecution, which may increase administrative costs. Analytical models usually establish a ceiling on the penalty rate by assumption due to not modelling the interaction between the penalty rate and administrative expenses.

IV. EVALUATING MARGINAL EFFICIENCY OF 15% GLOBAL BENCHMARK. VIS- A-VIS INCOME INEQUALITIES

Raising the domestic corporate tax rate may address income inequality between the host country and tax havens. Individuals with higher incomes tend to own more corporate shares and bear the burden of a tax increase on corporate income (under the income inclusion rule). Nevertheless, this thinking fails to remember that corporate income taxes are borne by high-income shareholders and their stockholders and by lower-income employees of these firms, which reduces everyone's total income. In other words, higher corporate income taxes would result in lower wages for workers, lowering after-tax incomes for them. If an MNC, thus, wants to prevent this reduction of employee's income, it has to shift gains to tax havens. To understand this better in the Indian context, let us analyse the

patterns of household incomes annually. This way, we can understand the income disparity and corporate taxation prevalent in India.

In 2011, the National Council for Applied Economic Research conducted the Indian Human Development Survey II (IHDS-II) based on a nationally representative sample about the income of households. IHDS-II indicates that families are earning more than Rs. 1.6 lakh belong to the wealthiest 20% in the country.

Income Quintiles	**Annual Income Range (in Rs.)**
Poorest Quintile (Poorest 20%)	1,000 – 33,000
2nd Quintile	33,001 – 55,640
3rd Quintile	55,641 – 88,820
4th Quintile	88,821 – 1,59,600
Richest Quintile (Richest 20%)	1,59,601+

Note: Quantile represents 20% of a given population

Data Source: India Human Development Survey, 2011-12

The survey demonstrates that India is not a rich country. Because of this, it is not surprising that only a tiny fraction of Indians pays income tax. Additionally, it portrays that the incidence of a global minimum corporate income tax impacts the state of income inequality in developing countries. Tax increases discourage corporate activity, which leads to a rise in non-corporate activity. In the presence of non-corporate activities, it may be

possible for the risk to rise through personal reasons (as opposed to market trends), leading both to more successful and unsuccessful business owners. A reallocation favouring non-corporate business can result in an uneven income distribution due to this effect. This creates an unstable market and an unpredictable environment for attracting foreign investors.

Suppose that an MNC operates in the GMCT ecosystem and therefore can evade a portion of the additional tax. Saving one dollar by evasion or by substituting cheaper but less satisfying forms of activity would permit him to sacrifice the value of one dollar to save one dollar. We can estimate the costs to society without knowing whether the "leak" occurred through evasion or substitution.

The same rule applies to avoidance activities, as well as substitution, evasion, and avoidance, as well as any other action controlled by the corporation. It is sufficient then to compute the marginal efficiency cost of raising revenue if we know the potential tax (taking into account an adjustable tax base) from a change in a parameter of the tax system and the actual tax increase (tailoring all behavioural responses).

GMCT's marginal efficiency can be evaluated by examining two critical assumptions. One assumption is that taxpayers are not constrained. There is no reason to presume that in a two-taxpayer economy, the taxpayer would lose more money from a corner solution than from saving one; therefore, the profit loss from the "leak" may be greater than the cost of the revenue loss. Consider a taxpayer who does not report any payroll income; since the taxpayer is bearing the risk of not reporting, he is evading one dollar; while another taxpayer who has the same payroll

income says everything. While revenue collected is exactly double the potential tax base, the MECF for an increased tax rate is only 1.2. If substitution and avoidance responses are not taken into account, the MECF for an increased tax rate is just 0.8.

Furthermore, it is assumed that taxpayers bear the exact cost in reducing their tax burden as the social cost. Private costs often take the form of distorted consumption baskets, for example, and this is undoubtedly true in many instances. However, the personal and social prices are not always the same. The taxpayer can deduct the costs incurred by an accountant who seeks legal ways to reduce taxable income, for example. However, the social cost here outweighs the private one.

As a result, if no nation agrees to the proposal for global minimum taxes, it may result in a new sort of competition. This can be seen in corporations opting for countries without minimum tax rules as their residences. Thus, we will end up with new tax havens that will demonstrate a more subtle divergence between the social and private costs of tax reduction. Profits being moved to a country with lower tax rates than GMCT is undoubtedly a benefit for the MNC but a cost to the nation. Because evasion results in lower revenue leakage than revenue leakage itself, the revenue leakage caused by evasion has a lower social value.

The reality is that investors are willing to accept a higher host country tax burden (and a more practical approach) if they have excellent business enabling and market conditions, a stable regulatory framework, and a number of lucrative opportunities that are specific to the host country. If a country has extensive location-specific profit opportunities, it makes

sense for policymakers to be reluctant to adopt a low tax burden. India's Finance Minister reduced corporate taxes for new domestic manufacturing companies to 22% and 15% in September 2019 to bolster investment activity. In 1961, the Income-Tax Act was amended to introduce section 115BAA, providing that businesses can qualify for a 22% tax rate if they meet certain conditions, including not availing of any incentives or deductions. For existing domestic companies applying for the concessional taxation regime, a Minimum Alternate Tax (MAT) will also not be required. As a result, India would benefit from the global agreement on a minimum 15% corporate tax rate, since the effective domestic tax rate would be higher than 15%, thus attracting investment into the country.

V. NEED FOR GLOBAL ANCHORING – AN ALTERNATIVE MINIMUM TAX

Do we have the capacity to agree on what is fair when it comes to taxation?

A global minimum tax would allow governments to convert untaxed profits into public expenditures as well as exercising their sovereignty over businesses. Nevertheless, nearly all multinational corporations are headquartered in the global North. By establishing a minimum tax, developing economies would not attract FDI, necessary for economic growth.

In that regard, the safest bet for India was not to accept GMCT in the first place. A 15% minimum corporate tax will hit India the most since it offers tax breaks. But now that many nations, including India, have accepted the

global threshold of 15%, international agencies such as World Trade Organisation (WTO) and International Monetary Fund (IMF) must make the imposition of GMCT mandatory for all countries. If this is not viable, a MAT of 15% should be decreed regardless of tax breaks. Thus, any country wishing to attain political or social goals through special incentives will have to do so through budgetary grants, not tax concessions.

Furthermore, it is reasonable to say that Ireland's growth model of the 1960s and 1970s proves that attracting FDI through low corporate taxes can lead to development. Global South countries can follow this path as well. It is common to find structurally deformed economies in countries in the South after colonisation, deindustrialisation, and, on gaining independence, independence itself. In low-value-added parts of the global value chain, minimum corporate tax rates prevent these countries from specialising. Yet, in the present day, Ireland is claiming more than just low tax rates to be competitive. The government is peaceful, has strong institutions, and its infrastructure, education, and labour force are well developed. It has contributed to Ireland's specialisation in high-value-added segments of global value chains. Corporate tax rates in the twentieth century were low due to policies that favoured corporations.

It cannot be ignored that businesses need government limits on their power. Negotiations need to be more inclusive than the G7 to reach a truly global consensus. It is also imperative that these negotiations account for divergence in economic development, allowing for the detrimental competitive advantages of the global North and granting special treatment to less developed economies

A STUDY ON THE RELATIONSHIP BETWEEN CORPORATE GOVERNANCE AND FINANCIAL PERFORMANCE OF THE IT COMPANIES IN INDIA

Nibedita Mukhoapdhyay and Mahadeb Mukhopadhyay[1]*

ABSTRACT

The performance of any organization, in developing countries like our India is of prime importance (especially financial performance). The paper tries to establish a relationship between corporate governance and corporate financial performance of 5 selected IT companies in India with respect to the performance of their board of directors. The impact is studied based on the size of the board, independence, number of meetings, the duality of CEO, sales, profit after tax, market capital-, Debt equity ratio and the Return on Capital Employed of the best Indian IT companies with the help of statistical tools. Chapter 1 of the present paper introduces the need for good corporate governance behind better corporate financial performance. Chapter 2 encompasses the "legal aspects of corporate governance in India". Chapter 3 deals with the research gap and objectives of the study with the hypothesis

*[1] *Nibedita Mukhopadhyay is a student at ICFAI Business School, Hyderabad. Mahadeb Mukhopadhyay is an Associate Professor of Commerce at Kharagpur College, Kharagpur.*

and model .The theoretical framework and research methodology are provided in chapter 4. Chapter 5 deals with data analysis and findings by using statistical tools .Chapter 6 finally provides with the concluding comments with regard to the study stressing on how IT companies in India need to follow good corporate governance for being financially successful.

Keywords: Corporate Governance, Corporate Finance, Development, Board of Directors, Financial Performance.

I. INTRODUCTION

Corporate governance is the governing procedure which any corporation follows to manage itself and ultimately proceed towards the attainment of its set goals. It focuses on the factors, both internal and external, that affect the interests of a company's stakeholders. The board of directors are collectively responsible for the creation of a corporate governance framework that suits the business's conduct .They are overseen by the board of directors who form a very crucial part of any corporation in controlling the corporate activities. The corporate board can be classified as both outside (independent directors) and inside.

Companies can do business with profit without proper corporate governance in their business. But then to run a company in perpetuity "high standards of corporate governance mechanism" is needed. This is because company is no more restricted to its shareholders' wellbeing but for all its stakeholders. And the benefit of all the stakeholders proper corporate governance is the need of the hour. The liberalization, privatization and globalization of the global business world has

recognized humanitarian needs and paved a space for human rights. For being at a pace with the liberalized , privatised and globalized world the business organizations have reproduced many reforms to form standard corporate governance norms from time to time especially in the 21st century . Their aim is to check and control the corporate activities when there is a chance of any scam so that corporate gains are not lost because of any such malpractice.

Clause 49 of the SEBI Listing Agreement[2],2000 for the listed companies has introduced the procedure for corporate governance .This was followed by the several amendments to the Companies Act of 2013[3] (including several provisions with regard to compliance of corporate governance).

The aim of new age business focuses on maximizing the profits and benefitting the all the stakeholders by maximizing their wealth (companies aim at earning profit without harming the interest of any of the parties who have interest associated with that business and is related to it). The financial performance of any company is reflected through its profitability but our aim is to add corporate governance to it and then see whether all the stakeholders are in safer hands or not .The interest of the shareholders depends on how the company operates.The functions of strategic management lies in the hands of the board of directors. And so a proper harmony is required to be maintained between all stakeholders and board of directors. It involves lots of trust and faith for investing money into any company. The modus operandi of any company should be fully

[2] Equity Listing Agreement (2000), Clause 49.
[3] The Companies Act, 2013 (Act 18 of 2013).

disclosed, for shareholders to trust any organization. And thus corporate governance can be seen as an important tool for measuring any company's board efficiency barometer.

II. LEGAL ASPECTS OF CORPORATE GOVERNANCE AND CORPORATE FINANCE IN INDIA

The Cadbury Report of 1992[4] defines corporate governance as, "the system by which businesses are directed and controlled".

"Corporate governance is the subjective device by which investors to the companies can assure themselves regarding their returns"- (Shleifer & Vishny, 1997).

OECD provides a relatively broader description of corporate governance from its principles in 2004. The definition provided by (OECD, 2004) Organization for Economic Co-operation and Development Principles[5] is, "Corporate governance includes a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the arrangement through which the objectives of the company are set, and the means of getting those objectives and monitoring performances are determined. Good corporate governance should provide proper incentives for the board and management to achieve those objectives which are in the interests of the company and its shareholders and should facilitate effective monitoring". The objective of good corporate governance should be

[4] The Financial Reporting Council of the London Stock Exchange, Report of the Committee on the Financial Aspects of Corporate Governance- Cadbury Report (1992).
[5] Organization for Economic Co-operation and Development, Principles of Corporate Governance (2004).

maximizing the value of the shareholders without hurting any other stakeholder's interest.

The Securities and Exchange Board of India (SEBI) defines corporate governance as, "The objective of good corporate governance is to increase the long term value of the company for its shareholders and all other interested partners. Corporate governance assimilates financial activity and nonfinancial activity of the company to best perform by safeguarding the interests of related parties and economy too". Corporate governance is thus all about an ethical code of conduct and ethics refers to some code of values and principles that helps us to choose between what is right and wrong.

The concept of good governance can be found in India dating back to the third century B.C. where Vishnugupta Chanakya had elaborated about the four types of duties of a king -

- Raksha,
- Vriddhi,
- Palana and
- Yogakshema.

In the case of corporate governance we need to substitute the king with the CEO or Board of Directors. The principles of Corporate Governance are related to the following -

- Protecting shareholders' wealth (Raksha),
- Enhancing the wealth through proper utilization (Vriddhi),

- Maintenance of wealth by investing in profitable ventures (Palana) and

- Safeguarding the shareholders' interest (Yogakshema).

In April 1998 "Desirable Corporate Governance" code was set up under the Rahul Bajaj Committee in 1995. In 1999 SEBI had set up a committee under the chairmanship of Shri Kumar Mangalam Birla with the objective of "promoting and rising of standards of good corporate governance". And based on its suggestions the Clause 49 of Listing Agreement was formed.

Previously in India Clause 49 of the Listing Agreement formed the model for corporate governance before the introduction of the Companies Act of 2013.[6] SEBI also approved some amendments in the Listing Agreement to improve the transparency in the transactions of listed companies and protect the minority stakeholders and let them influence the decisions of management. [7]These amendments became effective from 1st October 2014. The Indian Companies Act of 2013 has introduced certain progressive and transparent processes of corporate governance to ascertain the benefit of the stakeholders, directors as well as the management of companies. The Investment advisory services and proxy firms are ready to provide information to the shareholders about these newly introduced processes and regulations, which aim to improve the corporate governance in India.

[6] James McRitchie, Corporate Governance In India, available at: https://www.corpgov.net/2015/05/corporate-governance-in-india/ (last visited Aug 19, 2021)
[7] Grades Fixer, Corporate Governance: Indian Scenario available at: https://gradesfixer.com/free-essay-examples/corporate-governance-scenario-in-india/ (last visited Aug 21, 2021)

Following are some sources of the legal provisions of corporate finance that we do have in India-

- The Companies Act of 2013,
- The Securities Contract Regulations Act,1956,[8]
- SEBI Act[9] and its Rules and Regulations ,
- FEMA. [10]

The procedures and requirements for raising funds through initial public offer(IPO),further public offer (FPO), bonds, debentures, hybrids, deposits etc, are all contained in detailed in these above-mentioned legal provisions. So while making financial decisions a company needs to look over them and take the help of the intermediaries after making sound analysis in this regard with respect to market structure, need, reason , government policy, risk , return etc.

III. RESEARCH GAP AND OBJECTIVES OF THE STUDY WITH HYPOTHESIS AND OBJECTIVES OF THE STUDY WITH HYPOTHESIS AND MODEL OF THE STUDY

After reading the afore-mentioned literature the author has found out that they are mostly pertaining to foreign nations and do not focus on Indian Companies. Most of them are prior to 2013 Act and the author thinks that there is a gap therein and scope to do research with regard to the relationship between corporate governance and financial performance of

[8] The Securities Contract Regulations Act, 1956 (Act 42 of 1956).
[9] The Securities And Exchange Board of India Act, 1992 (Act 15 of 1992)
[10] The Foreign Exchange Management Act, 1999 (Act 42 of 1999)

the companies in India especially the most emerging IT sector post the mandatory insertion of compliance of corporate governance provisions in the new Indian Companies Act 2013. Also there is a gap in statistical interpretation and analysis.

A. **Objectives**

The objectives of the study is to find out the relationship between good corporate governance and the financial performance of the selected 5 companies over a period of 5 years, specifically vide the descriptive statistics and correlation and regression with the following two functions-

1. ROCE= "f(Board Size, Board Independence ,Board Meetings, CEO Duality and Firm Size)"
2. Market Capitalization = "f(Board Size, Board Independence ,Board Meetings, CEO Duality and Firm Size)

B. **Hypothesis**

1. H_{01}: "There is no relationship between corporate governance and return on capital employed."
2. H_{A1}: "There is a relationship between corporate governance and return on capital employed."
3. H_{02}: "There is no relationship between corporate governance and market capitalization."
4. H_{A2}: "There is a relationship between corporate governance and market capitalization.

C. **Model of the Study**

Basic Model- Financial Performance= f (Market Capitalization, Firm Characteristics)

Specific Models-

1. ROCE= f(Board Size, Board Independence ,Board Meetings, CEO Duality and Firm Size)

2. Market Capitalization =f(Board Size, Board Independence ,Board Meetings, CEO Duality and Firm Size

IV. THEORETICAL FRAMEWORK AND METHODOLOGY

A. Theoretical Framework

The principles and guidelines of corporate governance that SEBI provides majorly focus on the board's (board of directors) governance of the company. They range from ascertaining board size to its execution involving several parameters of study which companies are required to be complied with purposes. Generally it can be understood that there's a significant relationship and impact of the board of directors on any company's performance. How significant is the concern of our study. The companies are owned by shareholders but are managed and controlled by the directors who serve as the representative of the shareholders and stakeholders. The Board of Directors of any organisation is a unit that is involved in strategic decision making and needs active participation from all the directors who are a part of it. The variables relating to the board of directors that are considered in our study significantly affect its performance. These variables have been extracted from SEBI clause 49 of listing agreement. The variables are board-size, composition of board, board independence, CEO Duality and board meeting basing over which we shall analyse the sales, profit after tax, Market capital, Debt- equity

ratio and ROCE of the 5 selected IT companies of India for a period of 5 years.

The following table below provides the related information about the 5 selected IT Companies of India for a period of 5 years which is studied and analysed in further point-wise in the paper.

Company Name	Year	No. of meet-ings	CEO Duality	Board Size	Board Indepe-ndence	Sales	Profit After Tax	Market Capital	Debt Equity Ratio	ROCE %
Infosys	2015	9	0	10	80	47300	12,164	2,54,570.38	0	37.12
Infosys	2016	8	0	9	77.77	53983	12693	279256.38	0	32.22
Infosys	2017	8	0	10	80	59289	13818	234472.11	0	29.31
Infosys	2018	11	0	9	66.66	61.941	16155	247765.92	0	30.21
Infosys	2019	12	0	9	66.66	73107	14702	324305.78	0	31.46
Tech Mahindra	2015	5	0	10	50	19,162.70	2,256.20	60,476.86	0.02	25.19
Tech Mahindra	2016	4	0	10	50	20,969.80	3,172.80	46,014.53	0.01	26.42
Tech Mahindra	2017	5	0	10	50	23,165.40	3,047.30	44,769.46	0.02	21.87
Tech Mahindra	2018	4	0	10	50	23,661.20	3,999.30	62,536.41	0.01	24.27
Tech Mahindra	2019	6	0	9	55.55	347,421	42888	659784	0	27.7
HCL	2015	5	1	10	70	17,153.44	6,345.95	1,29,497.64	0.02	42.01

HCL	2016	5	1	10	70	13,434.64	4,719.08	1,14,826.19	0.00	36.98
HCL	2017	6	1	11	72.72	19,318	6,873	1,24,565.30	0	34.31
HCL	2018	4	1	11	72.72	22,073	7,362	1,34,978.30	0	33.5
HCL	2019	6	1	11	63.63	44,710	7,722.80	1,27,321.91	0.14	20.1
Wipro	2015	4	1	10	70	41,210	8,193.10	1,55,006.52	0.17	29
Wipro	2016	4	1	11	63.63	44,680.80	8,200.50	1,39,187.20	0.17	24.67
Wipro	2017	5	1	10	70	46,047.80	8,161.70	1,25,276.46	0.15	21.52
Wipro	2018	5	1	10	70	44,710	7,722.80	1,27,321.91	0.14	20.1
Wipro	2019	5	1	11	63.63	585,845	90,179	1275377	0.1	20.7
TCS	2014	7	0	11	54.55	64,676.08	18,474.92	4,16,860.34	0	60.13
TCS	2015	7	0	11	54.55	73,582.15	19,256.96	4,98,890.69	0.00	53.73
TCS	2016	8	0	11	54.55	85,864	23,075	4,95,769.53	0	52.25
TCS	2017	9	0	11	54.55	92,693	23,650	4,79,030.75	0	41.71
TCS	2018	6	0	10	60	97,356	25,241	5,45,437.94	0	41.19
TCS	2019	6	0	11	63.6	1,23,170	30,065	7,50,627.06	0	52.14

Source- Annual reports of Infosys, Tech Mahindra, HCL, Wipro, TCS.

Source- Annual reports of Infosys, Tech Mahindra, HCL, Wipro, TCS.

B. Research Methodology

Sample Selection- For the purpose of our study we have selected 5 IT companies on the basis of their market share, turnover and goodwill in the Indian market.

Time Period- For this study we have considered 5 years from 2014-15 to 2018-19 to see the effect of 2013 Act on the corporate governance and financial performance of the companies.

Statistical tools and techniques- We have used the statistical tools of descriptive statistics, correlation and regression over the data of 5 years to analyse the data.

V. DATA ANALYSIS AND FINDINGS

A. Statistical Analysis and Findings

Table 1

Descriptive Statistics

Variable	Obs	Mean	Std. Dev.	Min	Max
roce	26	33.48654	11.30239	20.1	60.13
board_size	26	10.23077	.7103629	9	11
board_ind	26	63.645	9.536766	50	80
board_meet	26	6.307692	2.168303	4	12
ceo_dual	26	.3846154	.4961389	0	1
lnfm_siz	26	10.37092	1.411424	4.126183	11.72132

Source: Author's own calculation

From Table 1, it is seen that the mean value of ROCE is 33.48 and standard deviation is 11.30. The value of Board Size ranges from 9 to 11 and corresponding SD is 0.71. Board independence of the 5 companies is ranging in between 50 to 80% with the mean of 63.645 and the SD is 9.5. It is found that a minimum of 4 board meetings have been held in a year and the maximum is 12. CEO duality ranges between 0 and 1 i.e 0 for places where there is no CEO duality and 1 for where there is CEO Duality. The mean value of CEO duality is 0.38 and SD is 0.49. The firm size of the selected 5 companies ranges between minimum 4.12 to 11.72.

Table 2

Correlation Matrix

	roce	board_~e	board_~d	board_~t	ceo_dual	lnfm_siz
roce	1.0000					
board_size	0.3566 0.0738	1.0000				
board_ind	-0.1143 0.5783	-0.1794 0.3806	1.0000			
board_meet	0.3018 0.1340	-0.3336 0.0958	0.2034 0.3189	1.0000		
ceo_dual	-0.3648 0.0669	0.3056 0.1290	0.4217* 0.0319	-0.5234* 0.0061	1.0000	
lnfm_siz	0.2466 0.2246	0.4117* 0.0367	-0.0503 0.8072	-0.1809 0.3765	-0.0195 0.9248	1.0000

Source: Author's own calculation

It is seen from Table 2 that board size, board meetings and firm size are positively correlated to ROCE while board independence and CEO duality

are negatively related to ROCE. So an increase in board size, an increase in the number of board meetings or increment in the firm size all have a positive impact on ROCE and it is likely to increase.

Table 3

Regression Analysis

Source	SS	df	MS
Model	1437.8154	5	287.56308
Residual	1755.78624	20	87.7893121
Total	3193.60164	25	127.744066

Number of obs	= 26
F(5, 20)	= 3.28
Prob > F	= 0.0254
R-squared	= 0.4502
Adj R-squared	= 0.3128
Root MSE	= 9.3696

roce	Coef.	Std. Err.	t	P>|t|	[95% Conf.	Interval]
board_size	9.467463	3.341597	2.83	0.010	2.497013	16.43791
board_ind	.1963491	.2797924	0.70	0.491	-.3872877	.7799859
board_meet	1.085208	1.255378	0.86	0.398	-1.533464	3.703881
ceo_dual	-11.54386	6.365489	-1.81	0.085	-24.82203	1.734319
lnfirmsiz	.3024229	1.541689	0.20	0.846	-2.913483	3.518329
_cons	-81.41114	37.35166	-2.18	0.041	-159.3253	-3.49694

Source: Author's own calculation

From Table 3, it is exhibited that Board size has significant positive impact on ROCE as p-value is less than 0.05 at 5% level of significance. Further, Board independence, board meeting and Firm size have positive relations with ROCE but are not significant. CEO duality has negative insignificant relation with the ROCE.

Table 4

Descriptive Statistics

Variable	Obs	Mean	Std. Dev.	Min	Max
ln_mkt_cap	26	12.15871	.815718	10.70928	13.52866
board_size	26	10.23077	.7103629	9	11
board_ind	26	63.645	9.536766	50	80
board_meet	26	6.307692	2.168303	4	12
ceo_dual	26	.3846154	.4961389	0	1
lnfm_siz	26	10.37092	1.411424	4.126183	11.72132

Source: Author's own calculation

From table 4, it is seen that the market capital of the 5 selected companies ranges between minimum 10.71 to maximum 13.53 with mean 12.15 and Standard Deviation value 0.815. The board consists of minimum 9 to maximum 11 directors with 50 to 80 percent independence. The mean value of director's independence in each of the companies is 63.645%.The minimum number of board meetings held during a year is 4 and the maximum is 12 . Its mean value is 6.3 and Standard deviation value is 2.17. And the firm size ranges between 4.12 to 11.72 with mean value of 10.37 and Standard deviation value of 1.41

Table 5

Correlation Matrix

	ln_mkt~p	board_~e	board_~d	board_~t	ceo_dual	lnfm_siz
ln_mkt_cap	1.0000					
board_size	0.0475 0.8178	1.0000				
board_ind	0.1021 0.6198	-0.1794 0.3806	1.0000			
board_meet	0.5535* 0.0034	-0.3336 0.0958	0.2034 0.3189	1.0000		
ceo_dual	-0.3769 0.0577	0.3056 0.1290	0.4217* 0.0319	-0.5234* 0.0061	1.0000	
lnfm_siz	0.2589 0.2015	0.4117* 0.0367	-0.0503 0.8072	-0.1809 0.3765	-0.0195 0.9248	1.0000

Source: Author's own calculation

In table 5 it is seen that there is a positive correlation between board size, board meetings, board independence and firm size and market capital. With regard to the positive relationship between board meetings and market capital, the relationship is significant. CEO Duality is negatively related to market capital as per the table.

Table 6

Regression Analysis

Source	SS	df	MS
Model	7.79231437	5	1.55846287
Residual	8.84258149	20	.442129075
Total	16.6348959	25	.665395835

Number of obs	= 26
F(5, 20)	= 3.52
Prob > F	= 0.0190
R-squared	= 0.4684
Adj R-squared	= 0.3355
Root MSE	= .66493

ln_mkt_cap	Coef.	Std. Err.	t	P>|t|	[95% Conf.	Interval]
board_size	.2283917	.2371416	0.96	0.347	-.2662771	.7230605
board_ind	.0111491	.0198559	0.56	0.581	-.0302696	.0525678
board_meet	.2011618	.0890898	2.26	0.035	.0153236	.3869999
ceo_dual	-.341041	.4517368	-0.75	0.459	-1.283347	.6012655
lnfm_siz	.1596822	.1094083	1.46	0.160	-.0685396	.3879039
_cons	6.318757	2.650719	2.38	0.027	.7894551	11.84806

Source: Author's own calculation

Table 6 shows the regression analysis of board size, board independence, board meetings, CEO Duality and firm size with market capital. It shows that there is a positive relationship of board size, board independence and board meetings and firm size with market capital. But there is a negative relationship between CEO duality and market capital.

B. Description of the Variables with analysis

1. **Board Size** -The board of directors of any company consists of - executive, non-executive and independent directors. Having an appropriate number of directors in the board (executive and non-executive directors) is a concern of prime importance. There are many views on board size. In case of a large board, it is believed that all required competencies are present in the board but then some argue

that a larger board size just increases the cost of the company by adding their remuneration and thus affects the shareholders inversely. As per the Indian Companies Act of 2013, section149[11] prescribes that for every private company it is required to have minimum 2 directors and every public company is required to have minimum 3 directors. The maximum number of directors that a company can have in its board is 15. But more than 15 directors can even be appointed after passing a special resolution. On an average it is seen that the board size of the 5 IT companies of our study ranges in between 9 to 11 directors with more than 50% independent directors. TCS leads it by having 11 directors in 4 years out of 5 years. And accordingly we find that it has the maximum amount of sales and profit after tax within the 5 companies. The Board Size ranges from 9 to 11 and corresponding SD is 0.71 as per table 1 and table 4. And a positive relationship with regard to the Board size and ROCE is established in table 2 from the correlation analysis and table 3 from regression analysis. From table 5 and 6 it is seen that board size is positively related to market capitalization. Thus from our study a positive relationship is established with regard to board size and market capitalization and sales and profit earning.

2. **Composition of Board** -The board consists of mainly two types of directors- dependent and independent. From prior study it is found that size of board is irrelevant until it doesn't account for board independency. The board is required to maintain its independence by

[11] The Companies Act, 2013 (Act 18 of 2013) s.149.

bringing outside directors (independent directors). Independent directors are inserted to monitor the acts of executive (inside) directors and other key personnel for the protection of all the stakeholders' interest. They keep a check on executive directors. Therefore the composition of the board requires the right proportion of dependent and independent directors so as to facilitate effective board management. Section 149 of the Indian Companies Act[12] provides for the composition of board of directors in a company- minimum, maximum, independent, woman and the like. SEBI LODR Regulations provide that the Board of Directors shall have an optimum combination of executive and non-executive directors with at least 1 woman director and not less than fifty percent of the board of directors shall comprise non-executive directors. Where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors shall comprise independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise independent directors.[13] The board of the 5 companies adequately comprises more than 50% of independent directors. Board independence of the 5 companies is ranging in between 50 to 80% with mean of 63.645 and the SD is 9.5. Where there is CEO Duality in case of HCL and Wipro we can infer from the table that these two companies have adequately maintained the percentage of required independent directors. And as for the provision with respect to having the minimum requirement of 1

[12] Id.see footnote 11

[13] Narendra Kumar, Composition of Board of Directors Companies Act 2013, available at: https://enterslice.com/learning/composition-board-of-directors-companies-act/ (last visited on Nov 01, 2021)

woman director in the board, all the 5 companies have maintained it by having more than the minimum number.

3. **Board Independence**- As per section 149(6) of the Companies Act, 2013[14] an independent director is a director who is not a managing or whole time or nominee director .This section further enlists quantitative threshold for evaluation of significance of the relationship and considers all pecuniary relationship including both material and immaterial. Section 4 of the Act provides that every listed public company is mandatorily required to have at least one-third of the total number of directors as independent directors. From the table it is seen that Infosys heads in the percentile score of having more number of independent directors with debt equity ratio 0. But then we also see to the contrary that TCS has relatively less number of independent directors with an average of 57.8 % but still its debt equity ratio is 0 and ROCE is the highest. It is only because of the strategies and management techniques that it has adopted. But no doubt board independence is also one of the factors underlying the financial success of the companies and this can be very well inferred from this table. Board independence of the 5 companies is ranging in between 50 to 80% with mean of 63.645 and the SD is 9.5 from tables 1 and 3. Board Independence is negatively related with ROCE as per the correlation matrix from table 2 and positively related with ROCE as per the regression analysis from table 3. As per table 5 board independence is positively related to market capital from the

[14] .Id. see footnote 12

correlation matrix of table 5. From table 6's regression analysis also we deduce that board independence is positively related to market capital.

4. **CEO's Duality**- It is the practice of one person serving as both the CEO and chairperson of the board of directors. As per the Agency Theory, CEO duality binds decision management and decision control. And at times CEO Duality is negatively related to the performance of a company. From the above table we find that only HCL and Wipro are having CEO'S Duality positive. As for the other 3 companies, they do not have CEO's Duality. It is seen that as for TCS, the company having maximum ROCE and maximum sales and net profit it does not have the policy of having CEO Duality. Herein the CEO and the Chairman of the board of directors are different. There is no chance of dominance by the CEO and therefore due to independence of opinion the strategies and policies framed by the board are judicious and rightly implemented. From tables 2(Correlation matrix) and table 3(Regression Analysis) it is seen that CEO duality is negatively related to ROCE. Similarly, from table 5(Correlation matrix) and table 6(Regression Analysis) also it is seen that CEO duality is negatively related with market capital.

5. **Board Meetings** –Board meeting is an organized set up arranged to assemble directors on the board to discuss and address relevant issues relating to their prior experiences, current predicament, and forward-looking matters as it relates to the company survival (going concern). Every resolution passed during this exercise is legal and becomes operational in the company. Board meeting frequency can be

ascertained by the number of meetings held during a year by top level managers. In board meetings the Board of directors discuss over the agendas relating to the company's operation and performance including its financial performance. As per section 173 of the Indian Companies Act, 2013[15] the board is required to meet at-least 4 times a year with a maximum gap of 120 days in between. The quorum should not be more than 1/3rd of the total number of directors. Out of the 5 companies all have complied with the minimum requirement of holding 4 meetings in a year. Companies including Infosys and TCS have a good score of having 9 to 10 meetings in a year recorded in the data. Their sales, profit after tax, market capital and ROCE are relatively and in fact much higher than the other companies. From tables 1 and 4 it is found that a minimum of 4 board meetings have been held in a year and the maximum is 12. From tables 2(Correlation Matrix) and table 3(Regression Analysis) it is seen that Board meetings and ROCE are positively related. This reveals that more the number of meetings, more discussions, more strategies ultimately good sign of corporate governance lead towards high returns for all the stakeholders of the company satisfying their needs. And so there is a positive impact of board meetings over the financial performance of a company. And from table 5(Correlation Matrix) and table 6(Regression Analysis) it is seen that board meetings are positively related to market capital. So, market capitalization is dependent positively on the number of board meetings held by a company during a year.

[15] The Companies Act,2013 (Act 18 of 2013) s.173

VI. CONCLUSION

Corporate Governance is all about a set of systems (or rather a mechanism) within the corporate structure for being managed to ensure accountability, transparency and fairness in transactions undertaken by the company to continue its business. The aim of corporate governance is meeting the stakeholders' beneficial interest without hurting the societal expectations. Good governance practices comprise a dynamic culture and positive mind set of the organisation. It is reflected by higher shareholder's returns, high credit rating, awards & recognitions, standard exemplary governance processes and an entrepreneurial performance focused work environment. This is all because financial position acts as the barometer of corporate performance. Thus corporate finance of a company reflects how its corporate governance works. The data analysis and findings of the study in chapter 5 substantiate and establish the positive integration between good corporate governance and corporate finance.

Corporate Governance tries to promote and maintain integrity (both internal and external), transparency and accountability of the organization. From our study it is found out that the 5 companies selected have the practice of maintaining optimum combination of executive and non-executive directors with greater degree of independent directors. The Board of Directors of a company is the apex body of decision making (strategic decision). They are appointed by selection of the shareholders (part owners) for overseeing the company's overall functioning. They provide and evaluate the company's strategic direction, management policies, changes required and long-term interests. This is done through board meetings wherein the directors meet, discuss, review and set the

policies and then check whether they are implemented. As per statutory requirement under section 173 of the Companies Act, 2013 the board of directors of a company are required to compulsorily meet minimum 4 times in a year(with not more than a gap of 120 days between two consecutive meets).The board reviews and monitors the financial performance and even takes strategic financial decisions during the meetings. They also evaluate the internal financial control and risk management system during such meets. And thus the regular holding of board meetings is an essential part of corporate governance showing positive impact on the financial performance of the companies.

And now it is clear that the number of board meetings held, board size of the board, board independence and CEO duality are some of the underlying factors behind the financial performance of the companies that are indicated by the amount of yearly sales, profit after tax, market capital and ROCE. From our statistical analysis we have found out that there is a significant positive relationship between board-size, board meetings and firm size are positively correlated to ROCE while board independence and CEO duality are negatively related to ROCE. So an increase in board size, an increase in the number of board meetings or increment in firm size all have a positive impact on ROCE and it is likely to increase as per our correlation analysis. As per the Regression analysis, it is exhibited that Board size has significant positive impact on ROCE as p-value is less than 0.05 at 5% level of significance. Further, Board independence, board meeting and Firm size have positive relations with ROCE but are not significant. CEO duality has negative insignificant relation with the ROCE.

With regard to the relationship between market capitalization and the variables, it is seen from the correlation analysis that there is positive correlation between board size, board meetings, board independence and firm size and market capital. CEO Duality is negatively related to market capital, the regression analysis of board size, board independence, board meetings, CEO Duality and firm size with market capital. It shows that there is a positive relationship of board size, board independence and board meetings and firm size with market capital. But there is a negative relationship between CEO duality and market capital.

In India wherein the society (prospective shareholders and investors) measures development mostly in the terms of financial - performance and so here only those companies can strive and compete who have a positive relationship between their corporate finance and corporate governance. This is all because in the new era no company can focus on only earning profits (for benefitting the shareholders) but they have to go for an all-round development (for the benefit of all the stakeholders). This development is for the betterment of the society and all other stakeholders other than the shareholders and statutory as well as voluntary compliance with regard to independence in board, woman directors, frequency of board meetings, CSR and the like post 2010 is playing an eminent role. And as for the IT sector, this is an emerging field requiring more trust and goodwill and from our analysis and data we have confirmed and deduced that this sector requires a positive nexus between corporate governance and corporate finance to sustain in the Indian market.

OVERSHOOTING THE MARK: *HARSHITA CHAWLA v. WHATSAPP*

Kaushitaki Sharma and Rishika Rishab[*1]

ABSTRACT

Abuse of dominant position is one of the most prominent anti-competitive practices that competition law and the competition authority in India seek to prevent and penalise. Out of the several ways in which dominant position can be abused, tying and bundling of products is a practice that entities frequently undertake. In *Harshita Chawla v. WhatsApp*, the Competition Commission of India had the opportunity to evaluate whether WhatsApp has abused its dominant position by tying or bundling its digital payment service, WhatsApp Pay with its messenger app, WhatsApp Messenger. The present article seeks to analyse this order of the Commission, with a special focus on how the concepts of coercion and market foreclosure need to be evaluated in the context of fintech markets. The concepts and tests of abuse of dominance are compared with European and American counterparts to critically assess whether the CCI's stance is sound for the present and the future. Both competition law and fintech markets are in their nascent stages in India, which is

*[*1] Authors are 4th Year students at University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, Delhi.*

why there needs to be foresight on the part of the Indian competition regulatory authority if it wants to ensure that both can thrive. This is why there is also an attempt that has been made to propose an alternative to the approach taken in *Harshita Chawla*.

Keywords: Tie-in arrangements, fintech markets, coercion, market foreclosure.

I. INTRODUCTION

The Competition Commission of India ("CCI" or "Commission"), in its order dated August 18, 2020, in *Harshita Chawla v. WhatsApp*,[2] allowed WhatsApp to launch its payment service, WhatsApp Pay, as an integrated service in its messenger app. This was much-awaited by WhatsApp Inc., which has been trying to enter the UPI-enabled digital payments market for some time now. The present article seeks to analyse the jurisprudence surrounding the tying-in of products in the fintech market in India, by comparing and contrasting the principles laid down in the *Harshita Chawla* case with certain landmark judgments, both Indian and foreign. First, there is a summary of what has been held in the *Harshita Chawla* case that warrants scrutiny, followed by the relevant statutory provisions in India, their application in the present matter, and the conditions that have been established to prove abuse of dominant position in tying or bundling arrangements. After establishing the current stance of adjudicating abuse of dominant position concerning tie-in arrangements,

[2] Harshita Chawla v. WhatsApp Inc. and Facebook Inc., CCI Case No. 15 of 2020.

the article critically analyses the elements of coercion and market foreclosure, especially with reference to what was held in the *Harshita Chawla* case. This section employs the comparison of these two elements, particularly in light of how tying or bundling of fintech market products may differ from that of traditional products. This culminates in the concluding paragraphs that offer a summarisation of the authors' main argument, what might have gone wrong with the CCI's order in the *Harshita Chawla* case, and what could be taken into account in the future.

II. BRIEF SUMMARY

The Informant alleged that WhatsApp is leveraging its dominant position in one market (*i.e.*, the market of Over-The-Top messaging apps through smartphones) to enter a different market (*i.e.*, the Unified Payments Interface-enabled digital market) by pre-installing WhatsApp Pay on WhatsApp Messenger, and thus, bundling the two together. Relying on these grounds, the Informant argued that WhatsApp is abusing its dominant position under §§ 4(2)(d) and 4(2)(e) of the Competition Act, 2002. However, the CCI did not adjudicate in favour of the Informant and did not hold WhatsApp or Facebook to be in contravention of the provisions of § 4 of the Act, directing closure under § 26(2).

III. RELEVANT STATUTORY PROVISIONS AND THEIR APPLICATION IN HARSHITA CHAWLA

The Act classifies tie-in arrangements as vertical anti-competitive agreements. Though not illegal *ab initio*, a tie-in arrangement under the Act becomes illegal if it has an appreciable adverse effect on competition

("AAEC"). Vertical agreements are so-called because they deal with agreements between business entities operating at different levels of the market chain. There is no explicit categorisation of agreements as horizontal or vertical in the Act. However, the language used in §§ 3(3) and 3(4) clarifies that the former refers to horizontal agreements whereas the latter refers to vertical agreements. Vertical agreements relating to activities referred to under § 3(4) of the Act are prescribed if it can be shown that such agreements are likely to cause an AAEC in India, and thereby have to be analysed per the rule of reason analysis under the Competition Act.

Four essential conditions, the prerequisites for any tying case to be made out, can be derived from the decisions by antitrust authorities and other economic literature. These conditions are:

a. The tying and tied products shall be distinct entities and will be considered separate products;

b. The concerned entity must be dominating the market for tying products;

c. The consumer must not be left with a choice but to buy both the products: tying and tied; and

d. The tying will have the capability of causing restriction/foreclosure in the market.[3]

[3] Abir Roy and Jayant Kumar, Competition Law In India: A Practical Guide 180 (Eastern Law House, 2nd edn., 2018).

In the Harshita Chawla case, the CCI observed that the first two conditions were met: firstly, WhatsApp Messenger and WhatsApp Pay are two distinct services; and secondly, WhatsApp Messenger is dominant in the market of OTT messaging applications. The Commission's decision that the integration of WhatsApp Pay with WhatsApp Messenger did not constitute tying, was, therefore, based on two grounds: firstly, that the element of coercion was absent and secondly, that this integration was not capable of foreclosing competition in the digital payments market.

IV. COERCION

The third element to fulfil the requirements of the abuse of dominant position by any entity is that the said entity must coerce consumers in a manner that they have no say in using the tying or tied products. The contentious products or services must be so intrinsically connected that the consumer cannot, realistically, use one without using the other as well.

A. Contentions in Harshita Chawla

The Informant claimed that post-integration of the two services, one cannot access WhatsApp Messenger without also acquiring WhatsApp Pay; that the two services were tied together and could not be accessed independently. The Opposing Parties argued that WhatsApp Pay is not a distinct product, and should be viewed as an additional feature of WhatsApp Messenger itself. This claim of the OPs, however, was disregarded by the CCI when it ruled that both services are separate products, functioning in the two separate markets as clarified by the Commission: the market for OTT messaging apps through smartphones

(for WhatsApp Messenger) and the market for UPI-enabled digital payments apps (for WhatsApp Pay).

B. View of the CCI

Being of the view that the first two conditions were qualified, the Commission moved on to hold that the condition of coercion was not met because WhatsApp Messengers' users did not have to compulsorily use WhatsApp Pay and, that it did not restrict the users from using any other service for UPI based payments. The CCI agreed with the OPs' argument that the users are provided with a choice and there is no automatic or mandatory usage of the alleged tied product. They claimed that since WhatsApp Pay has its terms of service, separate from those of WhatsApp Messenger, and requires a user to register and sign up separately from the Messenger, the user has full discretion to not opt for WhatsApp Pay services.

C. Analysis

The authors maintain that this interpretation of coercion has failed to consider the way tying varies in digital markets and environments. WhatsApp Pay utilises WhatsApp Messenger's platform as it is embedded in the Messenger; resulting in coercion under the meaning of competition law.

Coercion arises if the dominant company denies customers the realistic choice of buying the tying product without the tied product. Such coercion may manifest itself in different forms. It may consist of a contractual

clause (if the requirement to buy product B is imposed as a condition for the sale of product A), a *de facto* refusal to supply the tying product separately, technical commingling (preventing the user from using the dominant product without the tied product), financial tying (a package discount that makes it commercially meaningless to buy the tied product separately),[4] eliminating guarantees,[5] or combinations of these practices.

In *Eurofix-Bauco v. Hilti*, the European Commission was of the view that the consumer being deprived of the choice to buy the tied products from distinct suppliers amounted to abusive exploitation in itself: "*These policies leave the consumer with no choice over the source of his nails and as such abusively exploit him.*"[6]

It is well established that coercion may take many forms. One of these forms—technical coercion—is key in technical tie-in arrangements as recognised under both European Commission law and US law. In technical tying, the tied product is physically integrated into the tying product, so it is impossible to obtain one product without the other. This is best illustrated by a duo of *Microsoft* cases, in which the integration of Microsoft's Windows Media Player[7] and Internet Explorer[8] into the Windows operating system was subject to judicial review. In these cases, the European Courts have held that product integration may be tantamount to tying and thus, such a practice might be deemed an abuse of market

[4] European Commission, XXVIIth Report on Competition Policy (1997).
[5] European Commission, XXVIth Report on Competition Policy (1996).
[6] Case T-30/89 Hilti v. Commission [1990] II ECR 163.
[7] Case T-201/04 Microsoft [2007] ECLI:EU 289.
[8] Case T. 39.530 Microsoft (Tying) [2009] OJ C 242 20–1.

dominance. The reasoning is persuasive for software since it is fairly easy to combine applications by commingling their codes.[9]

The Court of First Instance of the European Union in *Microsoft v. Commission* has held that in cases involving tying in digital markets, "*coercion exists when a dominant undertaking deprives its customers of the realistic choice of buying the tying product without the tied product.*"[10] This signifies that in digital tying, one must ideally assess coercion at the time of the sale rather than deriving the concept from the effects it has on consumer behaviour post-purchasing the tied product. The *Microsoft* case holds special significance in this situation because the factual matrix closely resembles the present case.

In recent matters, a major question that has arisen is whether a bias that consumers tend to choose the most prominently displayed products may trigger a transfer of market power and should thus be prohibited. In the digital environment, this concern was raised in the merger between Microsoft and LinkedIn, as Microsoft not only planned to pre-install the LinkedIn application but also wanted LinkedIn to be prominently integrated as a tile and an icon on the Windows 10 Start Menu and the desktop, respectively.[11] The European Commission weighed that LinkedIn membership and user activity might see a significant increase due to the pre-installation of the LinkedIn application, which may result in the foreclosure of competing providers of similar services. Ergo,

[9] Qiang Yu, "Technically Tying Applications to a Dominant Platform in the Software Market and Competition Law" 36(4) Eur Compet Law Rev 160 (2015).
[10] Supra note 514.
[11] Case M.8124 *Microsoft/LinkedIn* at recital 315.

Microsoft had to effectuate non-integration of the LinkedIn application with the Windows Operating System.[12] Integrating WhatsApp Pay in such a manner that it is prominently displayed on the messenger app interface may have an effect similar to the one which the European Commission found itself wary of in the LinkedIn case.

The recent OECD Report on Abuse of Dominance also suggests that in digital markets, coercion should not be construed in its traditional sense. It states that the effect of even a nudge (such as pre-installation) can be equally conceptualised as an equivalent of coercion.[13] Software integration clearly provides greater efficiency for the computer and software industry.[14] The aim is that functions on a computer that were previously unintegrated suddenly become easier to use and a more common part of daily computer use. It is indisputable that such integration will eventually lead to an increased usage of the software by consumers merely for ease of access. Hence, when tying has to be assessed in digital markets which are often not influenced by price characteristics, the threshold of the 'coercion' requisite should be kept low and be treated as a subjective standard in accordance with the rule of reason to ensure fair competition in the market.

V. MARKET FORECLOSURE

[12] Id. at recital 438.
[13] Organisation for Economic Co-operation and Development, Abuse of dominance in digital markets, available at: www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf (last visited July 14, 2021).
[14] J. Gregory Sidak, "An Antitrust Rule for Software Integration" 18 Yale J on Reg 29-31 (2001).

The final element that needs to be evaluated by the competition authority to conclude a matter of tying when it comes to abuse of dominance by an entity is whether the tying is capable of restricting/foreclosing competition in the market. What the competition authority needs to decide is whether there is any *actual or likely* impact of installation on competition in the market for the tied product.

A. View of the CCI

In *Harshita Chawla*, the CCI answered this criterion in the negative, stating that WhatsApp Pay's launch in the market is not going to have any actual or likely market foreclosure, for the simple reason that there are already several competitors established in this market, that are "backed by big companies/investors".[15] Therefore, WhatsApp Pay's tying-in with WhatsApp, *i.e.*, its pre-installation in the app, is not bound to cause any significant market share being automatically directed from the established players (like Google Pay, PayTM, etc.) to the tied-in product. Interestingly, the Commission has also stated that a beta version of WhatsApp Pay being offered to less than one per cent of the user base means there has not been the manifestation of any actual conduct, making the present allegations "premature".[16]

B. Analysis

Compared to international jurisprudence on the aspect of market foreclosure or harm inflicted to competitors, the CCI's stance seems to be

[15] Supra note 508 at 97.
[16] Ibid.

quite rudimentary. For instance, jurisprudence emanating from Europe has established, once in 1994[17] and once in 1996,[18] that total market foreclosure is not necessary for tied-in products to lead to abuse of dominant position. The Court of Justice of the European Union has held that even if the competitors are left disadvantaged, which is considered to have occurred when demand for their products is reduced, the aspect of market foreclosure is accounted for and can be used to adjudge the issue of abuse of dominant position.

Even Indian jurisprudence is not completely unfamiliar with this concept. The Report of the High Level Committee on Competition Law, which preceded the Competition Act, opined that to fulfil the criterion of market foreclosure, it would suffice that the competitors are in a disadvantaged position and this further results in them competing less aggressively.[19] The CCI itself is well aware of the kind of impact pre-installation of an app may have on the market, regardless of the dominant position of other apps. In the matter of *Vinod Kumar Gupta v. WhatsApp Inc.*,[20] the Commission stated quite clearly that in case there is a pre-existing application on a phone, even assuming that this app holds a dominant position in a market, it is quite easy for users to switch to a new alternative application once the latter gets installed. Since WhatsApp Messenger has an existing user base of five hundred million users, there would be next to no inconvenience caused to a very large share of consumers to simply switch from another pre-existing UPI service to WhatsApp Pay.

[17] Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755.
[18] Case C-333/94 P *Tetra Pak v. Commission* [1996] ECR I-5951.
[19] Supra note 510 at 220.
[20] CCI Case No. 99 of 2016.

Additionally, it is the basic tenet of competition law jurisprudence that the use of tying and bundling techniques by entities that impose the sale of two distinct products upon consumers may make it harder for competitors with standalone products to compete in the same market,[21] something which is to be decided by the facts and circumstances of each case. However, when the entity undertaking the tying and/or bundling has market power or a dominant position over at least one of these tied/bundled products, there is a clear possibility of harm for both, competition and consumer.[22] Experts have also proposed the implication of the "network effects" in such situations. A network effect is a phenomenon that occurs when the value of goods or services is directly proportionate to the increase in the number of users. Further, "data-driven network effects" relate to entities leveraging their position of dominance in one market to enter another market, taking advantage of the network effects that manifest from their large user base in the primary market.[23] In the case of WhatsApp Messenger, which has already been adjudged to exercise a dominant position in the OTT messaging market by the CCI, the possibility of market foreclosure becomes all the more realistic.

When all of this is taken into consideration, the idea that there is absolutely no likelihood of market foreclosure—especially when foreclosure does not necessarily have to mean "actual total foreclosure"—does not hold

[21] LexisNexis, Abusing a dominant position — Overview, available at: www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MK1-F187-53G2-00000-00/Abusing_a_dominant_position_overview (last visited 14 July 2021).
[22] Supra note 520.
[23] Marc Bourreau & Alexandre de Streel, Digital Conglomerates and EU Competition Policy, available at: www.crid.be/pdf/public/8377.pdf (last visited 15 July 2021).

much ground. On a macro level, the Commission's basic understanding of the kind of foreclosure that needs to be proven in such cases seems to be lacking in and of itself. It is not in line with the jurisprudence that has been evolved by the Commission's European counterparts. Furthermore, there are differences in how market foreclosure takes place in the case of traditional brick-and-mortar entities and products, and how market foreclosure occurs in fintech markets, which need to be accounted for by the CCI.

Coming to the case of WhatsApp and WhatsApp Pay specifically, there is more than enough *likelihood* of market foreclosure, with WhatsApp essentially offering a product that would appear in the user's pre-installed messenger application as a distinct service. WhatsApp, which has been proven dominant in one market, is leveraging its dominant position to weasel its way into another market. This tying of products has now been made available to the user base of five hundred million users, which is bound to lead to other standalone UPI-based payment applications such as PayTM, Google Pay, and Amazon Pay, being at a disadvantaged position simply by the virtue of them needing to be downloaded to be used.

What the Commission seems to have relied upon in the present case is the effects-based approach, which requires that concrete or substantial evidence of the implications or effects on competition be proven for it to hold that an entity has, in fact, abused its dominant position. While this is not a doctrine that the CCI has outrightly endorsed as the only one that needs to be relied upon in cases of abuse of dominant position, this is reflected in some recent matters. Cases such as *Matrimony.com v.*

Google[24] and *CUTS v. Google*,[25] have evidenced the Commission's emphasis on the need for greater economic evidence and its implications for competition and consumers to consider alleged conduct as abusive.

However, an evolving approach in competition law is the dynamic analysis approach, which seeks to establish a relationship between current competitive activities and the future market conditions.[26] This approach has been used in a certain manner in the United States, by focusing on dynamic considerations to determine whether the entity will be able to earn monopoly profits in the future.[27] It can be argued that this particular approach is an added layer to the effects approach, insofar as it offers a predictive layer of the implications of a particular competitive practice for the future, based on the variables that can be evaluated in the present. This is the reasonable next step of the effects-based approach since it tries to deal with situations exactly like the *Harshita Chawla* matter, where the competition authority deemed the allegations premature.[28]

If prematurity of allegations is the issue when it comes to deciding the condition of market foreclosure, it could be argued that the dynamic analysis approach could be undertaken in cases like WhatsApp Pay's, since several details could help in at least understanding, if not adjudicating, what could be the implications of this tying-in arrangement. It is already clear that WhatsApp's current user base is tremendously

[24] Matrimony.com Limited v. Google LLC, CCI Case No. 07 of 2012.
[25] Consumer Unity & Trust Society (CUTS) v. Google LLC, CCI Case No. 30 of 2012.
[26] Douglas H. Ginsburg & Joshua D. Wright, "Dynamic Analysis and the Limits of Antitrust Institutions" 78 Antitrust L. J. 2 (2012).
[27] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp. 509 US 209, 224 (1993).
[28] Supra note 508 at 97.

large, to the extent that it exercises dominance in its current sphere. Its parent company Facebook Inc. also supplements and complements the functioning of WhatsApp Messenger, therefore proving that "big company" backs WhatsApp Pay, the same as its main competitors. In this situation, with all the present variables staying constant, the dynamic analysis approach could better facilitate adjudication of whether WhatsApp Pay would lead to market foreclosure in the future.

VI. CONCLUSION

Taking all this into account, it can be said that had the CCI's analysis been more nuanced in terms of the evolving practices and approaches to matters of entities abusing their dominant positions, we might have had an Order better suited to the competition dynamics in India now. All major competitors of WhatsApp Pay, as identified by the Commission, are standalone payment applications that require active installation in phones to work. A pre-installed tied-in product in an instant messaging platform with the largest number of active users in the country is bound to shift the tide in favour of WhatsApp Pay, to the disadvantage of all other established and new competitors. Smaller players in the market might be pushed out completely, with no international companies backing them, nor the advantage of pre-installation in a potential user's smartphone, ready to use.

While the CCI itself has hinted at how WhatsApp may once again be dragged to its forum, calling the allegations premature as opposed to completely unfounded or invalid, it would have been in the interest of facilitating healthy competition in India's nascent fintech market to deal

with these "premature allegations" by using apt evaluative approaches. It can only be hoped that the matter is dealt with in a more nuanced manner in the future, as it has already reached the appellate stage at the National Company Law Appellate Tribunal.[29]

[29] *Harshita Chawla v. WhatsApp Inc. and Facebook Inc.*, Competition Appeal No. 22 of 2020, National Company Law Appellate Tribunal.

AN ACT FOR ALL: CONSTITUTIONAL IMPLICATIONS OF MANDATORY NATIONAL ENTRANCE EXAMS FOR POST-SECONDARY MEDICAL EDUCATION IN INDIA

Anushree Modi and Noyonika Kar[1]*

Christian Medical College, Vellore & Others v. Union of India & Others, (2014) 2 SCC 305

ABSTRACT

The Supreme Court, in the case of Christian Medical College, Vellore & Others v. Union of India & Others, held that making a common entrance exam (known as "National Eligibility cum Entrance Test" or "NEET") mandatory for admissions into all medical colleges (including unaided minority colleges) would be an infringement of their autonomy and result in violation of their right their fundamental rights. However, this decision of the Hon'ble Court was subsequently challenged in future cases. This article evaluates the constitutional soundness of the very first decision of the Supreme Court on the matter of mandatory common medical entrance exams in India, as well as the landmark judgments that followed it, and discusses the

*[1] *Authors are 4th Year law students pursuing B.A. LL.B (Hons.) and B.Sc LL.B (Hons.) respectively from Gujarat National Law University, Gandhinagar.*

constitutional validity of making exceptions to established rules of law in the interest of national welfare.

Keywords: National Eligibility cum Entrance Test, medical colleges, triple test

I. LEGAL CONTEXT

In the past, there have always been active discussions amongst legal scholars regarding the extent of State control over minority educational institutions, due to the inherent conflict between security and freedom'. The former aims to ensure regulation of opposite objectives. This stems from the age-old debate of 'security versus freedom', as the objective of the former is to ensure regulation of public order (i.e. security of the right of the students of getting a shot at fair exams), while that of the latter is to ensure protection of rights of minorities (i.e. their right of freedom to run their institutions in whichever manner they deem fit). Whereas in case of aided institutions, the State had always been free to lay down any standards for maintenance of excellence[2], the same did not hold true in case of unaided institutes. For a long time, the State did not have any rights when it came to unaided institutions, be it minority, or non-minority.[3] This changed with the case of *St. Stephen's College v. University of Delhi*[4], which gave the State the right to insist upon the admission of a certain percentage of students in aided minority institutions, who do not belong

[2] T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481.
[3] P. A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537.
[4] AIR 1992 SC 1630.

to said minority communities. With this, the only institutions left completely beyond the ambit of State control were the unaided minority institutions. The situation was eventually amended when the Supreme Court allowed the State the prerogative to lay down guidelines for maintenance of standard and quality of unaided minority institutes. However, this privilege did not extend to the admission process itself[5]. The minority institutions, both aided and unaided, had the exclusive rights to conduct the admission procedures of their own institutions in whichever way they wanted. This right of the minority institutions was challenged in the case of *Christian Medical College, Vellore v. Union of India*[6], the topic of the present article, and the significance of the same has been discussed in depth hereinafter.

II. FACTUAL BACKGROUND OF THE CAST

Medical Council of India (hereinafter "MCI") and Dental Council of India (hereinafter "DCI") issued four notifications. MCI published "Regulation on Graduate Medical Education (Amendment) 2010, (Part II)" to amend the Regulations on Graduate Medical Education, 1997. Whereas another notification described as "Postgraduate Medical Education (Amendment) Regulation, 2010 (Part II)" to amend Postgraduate Medical Educations, 2000 was issued by the said council. In the Official Gazette the notification came into force[7], simultaneously. The other two notifications were regarding admission in BDS and MDS courses by the DCI.

[5] Kerala Education Bill, 1957, In re, AIR 1958 SC 956.
[6] (2014) 2 SCC 305.
[7] Medical Council of India Notification, 2010, F.No.MC1-31(1)/2010-Mea/6205, dtd. Dec. 12, 2010.

The disputed notification was to introduce one National Eligibility-cum-Entrance Test (hereinafter "NEET") as common all-India entrance test for all medical/dental colleges of the country including unaided non-minority as well as minority colleges. Resulting in replacement of all individual entrance examinations of medical/dental colleges conducted by State Govt. and private medical colleges by NEET.

III. ISSUES OF CASE

A. Whether MCI and DCI are entitled in laying down minimumF standard of medical education under Section 19-A of the 1956 Act and under Schedule VII List I Entry 66 of the Indian Constitution to regulate the process of admission into the medical colleges and institutions run by State Govt., private institutions (aided or unaided), religious and linguistic minorities institution?

B. Whether the Fundamental Rights under Article 19(1)(g), 25, 26(a) and 30 are violated by adoption of NEET as one common entrance test for private institutions (aided and unaided), religious, charitable and linguistic minorities institution by not letting them adopt their own admission procedure?

C. Whether any difference is made due to exclusion of Entry 11 from State List and the introduction of Entry 25[8] in the Concurrent List by the Constitution 42nd (Amendment) Act, 1976 on the Regulations framed by the MCI under Section 33 of the 1956 Act and framed by DCI under Section 20 of the Dentists Act, 1948 and whether such Regulations would have primacy over the State regulations on the same subject?

[8] The Constitution of India, Schl. VII, List I, Entry 25, amended by The Constitution (Forty-Second Amendment) Act, 1976.

D. Whether the above-mentioned issues have been adequately answered in *T.M.A. Pai Foundation* v. *State of Karnataka*[9], subsequently in *Islamic Academy of Education* v. *State of Karnataka*[10], *P.A. Inamdar* v. *State of Maharashtra*[11] and *Indian Medical Assn*. v. *Union of India*[12]?

E. Whether the views expressed by the Constitution Bench comprised of 5 Judges in *Preeti Srivastava* v. *State of M.P.*[13] influence the issues raised in this batch of matters?

F. Whether the NEET process was troublesome for poor and rural students and would also adversely affect the medical service to the poor and downtrodden because State govt. and minority institution play an important role in selection of student willing to serve in rural and tribal areas and due to regional disparities is NEET is really not based on merits?

IV. ARGUMENT ON BEHALF OF THE PETITIONER

The counsel on behalf of the Petitioner contended that the impugned notifications passed by the DCI and MCI were in violation of the rights of unaided minority institutions to "establish and administer educational institutes of their own"[14]. This is a fundamental right provided to such unaided minority educational institutions under Article 30, read with Article 25 and 26 of the Indian Constitution, and was upheld by the Supreme Court in the case of *T.M.A. Pai Foundation*[15].

[9] Supra note 2 at 1.
[10] Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697.
[11] Supra note 3.
[12] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179.
[13] Preeti Srivastava v. State of M.P., (1999) 7 SCC 120.
[14] Supra note 2.
[15] Ibid.

The second contention of the Petitioner was that the State was exceeding its power by mandating unaided minority private institutions such as themselves to conduct an all-India entrance examination like NEET as that does not fall within the ambit of "reasonable restrictions"[16]. As long as they abide by the rules of the Triple Test[17] of conducting free, fair, and non-exploitative exams for entrance, they should not be compelled to conduct NEET. The issues raised in *T.M.A. Pai Foundation* case were in subsequent judgment *Islamic Academy of Education* v. *State of Karnataka*[18] and then in *P.A. Inamdar* v. *State of Maharashtra*[19]. This court in all these cases reiterated the views expressed in *T.M.A. Pai Foundation* that in private unaided institutions there cannot be reservation and have their own right to decide upon admission procedure, if they are fair, transparent, non-exploitative and based on merit.

They also argued that the notifications issued by the MCI were beyond the powers granted to them by Section 33 of the Indian Medical Council Act, 1956 (hereinafter referred to as "the 1956 Act"), which renders the notifications invalid and ultra-vires[20].

Further, they stressed upon how this amendment would not allow university-wise distribution of seats[21], and that would result in inconvenience for students from rural backgrounds, as each State has different streams, syllabus, curriculum, language of instruction etc. Hence

[16] Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1.
[17] Supra note 2.
[18] Supra note 9.
[19] Supra note 3.
[20] Ibid.
[21] Pradip Jain v. Union of India, (1984) 3 SCC 654.

it is unreasonable to expect that a single examination would do justice to all of them.

Lastly, it was put forth by the Petitioner that though the State is within its rights to fix the guidelines to follow regarding the threshold of merit, they cannot restrict an institute from fixing other additional criteria of merit as well[22]. Doing so would result in a breach of the "test of proportionality"[23].

V. ARGUMENTS ON BEHALF OF THE RESPONDENT

The counsel on behalf of the Respondent denied the allegations of impingement of the fundamental rights of the unaided minority educational institutes. According to them, the State was well within their rights in making the addition of Section 10 D into the 1956 Act, and the mandate of conducting a common national entrance exam was a reasonable restriction, and hence, constitutionally valid. The State is allowed to lay down guidelines and provide regulatory mechanisms in the "interest of student welfare and to prevent commercializing of higher education".[24]

They also humbly submitted that the common entrance exam proposed by them (i.e. NEET) would be conducted not just in English, but also in various different vernacular languages, and its syllabus would be based upon the NCERT syllabus, along with feedback from various different State boards. Hence, it is misleading to claim that it would be an

[22] Om Prakash v. State of U.P., (2004) 3 SCC 402.
[23] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[24] Yashpal v. State of Chhattisgarh, AIR 2005 SC 2026.

inconvenience for students coming from vernacular and rural backgrounds.

As far as the question of the competence of the MCI and DCI in issuing the impugned notifications was concerned, the Respondent responded to that by relying upon a previous judgment of the Supreme Court where they laid down that any step taken by a statutory authority in pursuance of their primary objective or principle is valid.[25]

The counsel on behalf of the Respondent also clarified that this amendment would not take away the rights of the minority institutions of admitting students of their own community in any way. All it would do is provide more transparency to the process.

VI. PER MAJORITY [MAJORITY OPINION BY CHIEF JUSTICE ALATMAS KABIR AND JUSTICE VIKRAMAJIT SEN]

A. Finding of Court

The four questioned notification marked it clearly that all the admissions to MBBS and BDS and their respective post-graduate courses were to be given solely based on the result of NEET resulting in state, private-run institutions and their authorities from conducting their own separate examination for the student admission for the courses enclosed by them. Under Article 19(6)[26] of Constitution the power of 'reasonable restriction' cannot be exercised, here for the rights guaranteed under Article 19(1)(g)

[25] Supra note 11.
[26] The Constitution of India, art. 19, cl. 6.

instead that results in interference of rights guaranteed under Article 19(1)(g) along with Article 30[27] which as well is not subject to any restrictions. Unless there is no maladministration or failure to maintain higher educational standards, the State cannot intervene under the purview of 'reasonable restriction'.[28]

This court also found that the essential facet of the right of private medical colleges is admission of students particularly for minority institutions which are unaided, non-capitation fee educational institutions as long as the admission procedure is transparent and based on merits.[29] Aided minority institutions would have the right to admit the students belonging to their community but an adequate number of seats need to be reserved for non-minority students to balance the "***sprinkling effect***".[30]

Under Section 10-A of the Act 1956 MCI power is merely recommendatory for the purpose to grant permission to establish a new medical college or to introduce a new course of study, by the Central Govt. Under Section 19-A of the 1956 Act[31] states the council propose "*min. standards of medical education by universities or medical institutions for granting acknowledged medical qualification even postgraduate medical qualification*". Though, Section 33 of the 1956 Act empowers MCI to make regulations related to professional examinations. As per the court the power to frame regulations is very different from the power to hold or

[27] Id, art. 30.
[28] Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717.
[29] Supra note 2.
[30] Supra note 4.
[31] The Indian Medical Council, 1956 (Act 102 of 1956), s. 19A.

conduct such an examination which needs to be adhered to by all the institutions.

B. Reasoning of Court

MCI and DCI were not complied with as per the draft regulation of State Govt. and the powers under Section 19-A(2) of the 1956 Act and Section 20 of the Dentists Act, 1948[32], respectively. Resulting in invalidating the impugned regulations and the legislation amendment. Though under Section 33 of the 1956 Act and Section 20 of the Dentists Act, 1948 provides the council power to frame regulations for carrying out the purpose of their respective acts and to maintain the standards of medical education in India at par. However, these rights cannot be encompassed to control all the admissions for MBBS or BDS and subsequent post graduate courses by various institutions in India.

The impugned notification by MCI and DCI was curbing the Right to admit student as per the procedure prescribed by the individual college itself as long as they are transparent, fair and based on merits crystallised in various judgments. This right is protected under Article 19(1)(g) and Article 30 of the Constitution. The power of MCI and DCI is limited which cannot be extended to control all the medical colleges admission procedure. So, the MCI and DCI have the right to frame regulation under Schedule VII List I Entry 66 cannot be exercised as freedoms and Fundamental Rights guaranteed under Article 19(1)(g), 25, 26, 29(1), 30 of the Constitution cannot be subjugated by statutory authority framed regulation. Hence, the views expressed by the Constitution Bench

[32] Dentists Act, 1948 (Act 16 of 1948), s. 20.

comprised of 5 Judges in *Preeti Srivastava* case[33] does not influence the present matter as Fundamental Rights come into picture.

There was no evidence which indicated that there was any indulgence in malpractice on the process of admission or they failed the triple test laid down in *P.A. Inamdar* case[34], by the private institutions. So, the councils have to perform their delegated legislation power adhering to the Constitutional provision and by issuing the notification they have wandered beyond the power vested to them under the Constitution hence, the notification are invalid.

No difference could be made due to exclusion of Entry 11 from State List and the introduction of Entry 25 of the Concurrent List of the Constitution as per the concept of "**rag-bag**" legislation[35] present matter, challenged amendments were made under Schedule VII List I Entry 66. The President has special powers under Article 371-D to make provisions w.r.t Andhra Pradesh even with regard to admission in education institutions.[36] Hence, the state amendments made in A.P. and Tamil Nadu will remain unaffected by the impugned notification of MCI or DCI.

Even though NEET (single test) would help poor students by not giving multiple-tests. With different boards existing all over the country with each state having its own board the education pattern for all the states are different, inclusive of medium of teaching and instruction. Whereas, children in metropolitan areas are more privileged than the children in

[33] Preeti Srivastava, supra note 11 at 2.
[34] Supra note 3.
[35] Ujagar Prints (2) v. Union of India, (1989) 3 SCC 488.
[36] State of A.P. v. Mohd. Ghouse Mohinuddin, (2001) 8 SCC 416.; NTR University of Health Sciences v. G. Babu Rajendra Prasad, (2003) 5 SCC 350.

rural areas so it would be unfair to take a single entrance examination in the name of giving credit to merit. *The practice of single-window competition, the disparity in education standards in different parts of the country cannot ensure a level playing field.*

C. Judgment of court

Hence, the transferred cases and writ petitions were allowed resulting in the questioned notification being quashed. Nevertheless, in the matter order did not invalidate the actions taken up till that time as per the amended Regulations even the admissions given on the basis of NEET conducted by MCI, DCI and other private medical colleges.

VII. PER MINORITY [DISSENTING OPINION BY JUSTICE BY ANIL R. DAVE)

A. Finding of Court

Section 33, 19-A and 20 of the 1956 Act entitles the MCI to frame regulation for the smooth functioning of the medical education system throughout the nation. It is necessary to regulate the examination for well groomed, well-educated and well-trained top-class professionals. The regulations made under the 1956 Act and the Dentist Act, 1948 conferred to MCI and DCI does not violate the Fundamental Rights of the all the institution as the intent of Constitution framers of including "reasonable restriction" was for such a situation only.

The Union along with the State are empowered by Schedule VII List III Entry 25 of the Constitution (introduced by the 42nd Amendment of the Constitution) to legislate on the subject-matter related to the education

system which includes medical as well. Also, Schedule VII List I Entry 66 states the provision for determination of standards to be fulfilled for higher education.[37] Concerning the triple test laid down.[38] Certain definite allegations are found where the private institution charges huge donation amounts or capitation fees for granting the admission.

The apex profession authority has the power to make regulation to maintain the standards of medical education system assuring that the students with high calibre are allotted higher educational institutions therefore, they are permitted to conduct examination in the form of NEET hence, it is valid. It was also found regarding the common test the regulatory council is open to conduct a common all-India test for the veterinary surgeons.[39]

B. Reasoning of Court

To effectively maintain "standards" of medical education, different regulations require various stages i.e. (1) Admission; (2) Determination of the syllabus and manner of imparting education, and (3) Examination which should be strictly regulated. The framers of the Constitution intended to impose "reasonable restriction" on the Fundamental Rights under Article 19(1)(g) so that not anybody could profess without having proper training, capability and competence. Hence, the Article 19(6) permits the State (here Council) to impose reasonable restrictions on the

[37] Supra note 11.
[38] Supra note 3.
[39] Veterinary Council of India v. India Council of Agriculture Research, (2000) 1 SCC 750.

rights guaranteed to State, private, linguistic minority and religious minority-based institutions under Article 19(1)(g) and Article 30.

Under Section 19A and 33 of the 1956 Act the MCI and under Section 20 of the Dentist Act, 1948 The DCI are regulatory bodies and as per the *Veterinary Council of India* case[40] It was open for the regulatory Council to conduct a common all-Indian test for the admissions to MBBS and BDS and their respective post-graduate courses in all the medical institutions all over the nation.

The autonomy of the medical institution would not curb due to NEET as the council will neither hinder them in performing any administration function nor they would interfere in their discretion while the selection of students (for private institutions or linguistic or religious, minority-based institutions). As long as they adhere to regulation for reserved seats for non-minority students it is upto them to give weight to the religion, caste or student etc. Hence, fulfilling the purpose of the rights which are guaranteed under Article 25, 26, 29 and 30 of the Indian Constitution. Thus, they would also be respected and implemented. Therefore, all the petitions against the dismissal of the four-notification issued by the MCI and DCI should be quashed and NEET regulation should be implemented.

It would also be a relief to them for not conducting their own examination. Also, with the introduction NEET more transparency and fairness would be insured fulfilling the triple test laid down[41] for all the institutions. Instead it would be a hassle for students to appear for each different test for a particular institution which may also be situated in a different state.

[40] Ibid.
[41] Supra note 3.

This state would help poor and unprivileged students also uplifting them based on their calibre.

C. Judgment of Court

Hence, the dissenting opinion stated the dicta was that the petitioners were not entitled to any of the liberations prayed for in petition. Therefore, the notifications were legal in the eyes of law as well as a bonus for medical students aspiring to join the medical/dentist line. So, all the petitions were dismissed.

VIII. Analysis of Case with Subsequent and Landmark Decision

The present case went on for almost a decade and remained to be the definitive position of law with regard to the extent of State control over unaided minority institutions for several years. However, in the year 2020, the same was overturned by a subsequent case. Before that case though, the holding of the present case was both relied upon and challenged in various other landmark cases. Some of the cases which reiterated the holding of the present case are: *Medical Council of India v. Christian Medical College, Vellore*[42], *CBSE v. T.K. Rangarajan*[43], *Ashish Ranjan v. Union of India*[44] etc. In all these cases, the majority opinion was that unaided minority institutes must be allowed to conduct their own entrance

[42] (2014) 2 SCC 392.
[43] (2019) 12 SCC 674.
[44] Ashish Ranjan v. Union of India, (2016) 11 SCC 225.

procedures, and as long as they do not engage in malpractice or maladministration, there exists no reason for interference from the State or curtailment of their fundamental rights.

On the other hand, there also exist some cases in which the judges countered the decision of the present case and held that the principle of law upheld in this case required reconsideration. Some such cases are: *Sankalp Charitable Trust v. Union of India*[45], *Anitta Job and Others v. State of Kerala and Others*[46], *Rishabh Choudhary v. Union of India*[47], etc. In these cases, the Supreme Court unambiguously concurred that State mandated common entrance procedures are the definitive rule of law, and must be adhered to in order to avoid inconveniences or injustice towards students. The judges in these cases were unanimously of the opinion that no other form of entrance exams must be permitted other than the ones permitted by the State.

However, all such ambiguities regarding the rule of law in relation to State control over admission procedures in unaided minority institutes were finally cleared out in the case of *Christian Medical College Vellore Association v. Union of India*[48], which overturned the decision passed in the present case, and made NEET mandatory for all institutes (government and private combined). It was found that framing regulations within national interest are not violative of Rights under Article 30(1) and the Central Government have the power to make such regulations which are within reasonable restrictions. Therefore, Article 19(1) (g) and Article 30

[45] (2019) 12 SCC 681.
[46] (2018) 16 SCC 792.
[47] AIR 2017 SC 609.
[48] 2020 SCC Online SC 423.

read with Article 25, 26 and 29(1) of the Indian Constitution are not infringed by mandating NEET for admission to graduates and postgraduates professionals' programmes in medical and dental science.

With the help of NEET Examination, the system becomes more transparent, fair and student friendly. As this Uniform Entrance Test provides selection based on merits of the student regardless of their caste, religion, sex, race, age etc. making it indiscriminatory and impartial system. The Test in no way curbs the rights under Article 19 (1) (g) for the religious or linguistic community rather promotes the interest of the student community by curtailing malpractices and maladministration where selection is based on merits and excellence of the student, bringing it with the "***realm of charity***".[49] The NEET Examination fulfills the triple test criteria of fairness, transparency and non-exploitation process, which blocks the existing malpractices, student exploitation, commercialization of private entrance test and profiteering.

With only one system existing it becomes easy for students as they only need to focus on one test rather than several entrance tests of different universities or colleges. This not only clip down multiplicity of tests but also smooths the system as with only one system existing throughout the country it'll be easy to track problems/challenges and to resolve them by prompt solutions. Though it cannot be denied that many students from the

[49] Ibid.

vernacular medium face issues while giving the test, this issue can be resolved through hiring professional translators and providing free coaching services by the State Government in affiliation with the Central Government for students with financial issues.

NEET also paves the way for students from rural backgrounds and poor students as they will have to appear for only one exam which opens the door of universities across the country for them. The students by giving a Uniform Entrance Test avail the opportunity to apply for admission at various universities/colleges in that year itself without losing a year, if in case they couldn't pass for the applied universities. Whereas, in case of private entrance tests they lose the chance to apply for other universities other than those for which they have given tests. While weighing down the pros and cons of NEET, the pros definitely outrun the cons.

Well, the battle for the constitutionality of the Uniform Entrance Test is still going on. Recently, the Tamil Nadu Government has introduced a bill that aims to 'dispense' and 'scrape down' the need for applicants to qualify in NEET in the state for the admissions in government and private institutions. The committee led by Justice A.K. Ranjan proposed the "***Tamil Nadu Admission to Undergraduate Medical Degree Courses Bill, 2021***" which attempts to give admission to medical programmes on the basis of marks obtained in the qualifying test (Class XII) using the earlier customary practice i.e., "normalization procedure".[50]

[50] Editorial, "Tamil Nadu assembly passes Bill for Medical Admissions without NEET" Business Standard, Sept 13, 2021.

The Bill was tabled in parliament by Chief Minister M K Stalin, who claimed that admittance to medical courses was controlled by Entry 25, List III, Schedule VII of the Constitution and that the State was "competent to manage" the same for vulnerable socioeconomic groups.[51]

The decision was made in response to the recommendations of the Tamil Nadu government-appointed Justice A.K. Ranjan Committee, which was formed to study the impact of NEET on medical admissions in the state. According to the report, NEET has "seriously impacted" socio-economic representation in MBBS and higher medical education, favouring the wealthiest section of the society disproportionately. [52] But these accusations are made when, even the first batch of the NEET qualified applicants has completed their course. This clearly looks more like a political move rather than an education favouring move.

IX. CONCLUSION

The judgment of the Supreme Court in the present case gave rise to various contentious issues and polarized the public, one part of which questioned the decision, while the other agreed with it. However, all these ambiguities were finally laid to rest in the subsequent case of *Christian Medical College Vellore Association*[53] case, which made NEET compulsory for all medical colleges, regardless of whether they were government-aided, unaided, minority, or non-minority in nature. It clarified that, just like

[51] Ibid.
[52] Pon Vasanth B.A., "New law not necessary to exempt NEET for govt colleges: Justice A.K. Rajan" The Hindu, Sept. 23, 2021.
[53] Supra note 47.

every other fundamental right, the rights of minority institutions under Article 19 (1)(g) was also not unfettered or absolute. Some reasonable restrictions could be levied upon them in the larger interest of welfare of students, to promote fairness and merit, and stave off malpractices. By clarifying that the reasonable restrictions imposed on the minority institutions did not infringe upon their religious freedom, the Court struck a fine balance between upholding fundamental right to freedom of religion and national interest.

THE RAID & DEATH: POLICING IN UP

Swapnil Katiyar and Akhil Kumar Singh[1]*

ABSTRACT

The laws of a democratic country are to ensure that the rights of each and every individual is upheld. One such important right is the right to privacy. But even this right can be curtailed in specific circumstances. One such circumstance is the power of police to 'search and seize'. This power is known as raid in common parlance. In raid, an uniformed officer can enter the premises of a person without authorisation. This could even be done at odd hours. Now, it is imperative to note that every power or right also has a limit. But often we see that the police in our country seem to overlook this limit. The recent case of midnight raid in Gorakhpur hotel is one of many such instances.

The article discusses the concept of 'raid' in detail and the power the Criminal code of Procedure gives to the police and also the limits. The main focus is on the current instance and whether it required the police to 'raid' the premises or not. The article ends with the requirement of the hour which is the need for police reforms and how to create a situation where the police wouldn't overstep their power.

*[1] *Authors are LLM students at Dr. Ram Manohar Lohia National Law University, Lucknow and Rajiv Gandhi National Law University, Patiala, respectively.*

Keywords: Policing, Raid, Sec. 165 of CrPC, police reforms

I. INTRODUCTION

The recent affairs regarding the death of a businessman in Gorakhpur on September 28, 2021 has yet again highlighted the negligence regarding police control and reforms in the state of Uttar Pradesh. The conduct of the raid at odd hours coupled with the negligent attitude of the police has raised questions in minds of many.

The victim, Manish Kumar Gupta, was into real estate business and was sharing the hotel room with two of his friends. The police claimed that the three men were staying in a room on a single id i.e. only one person out of the three people had their details submitted at the hotel and this isn't permissible. Also, information was provided to the police regarding suspicious activity and therefore the raid was conducted. The police officers allege that during the raid, the victim tried to flee, fell down, injured his head and died. The friends of the victim present in the room state otherwise. Thus, an FIR under Section 302[2] of the Indian Penal Code 1860 has been registered against the six policemen that conducted the raid. The outcome of the event remains uncertain but it begs us to determine the power that police holds with respect to conducting raids.

II. LAW & RAID

The term 'raid' is not used in legal parlance; instead, the laws that provide police the authority to conduct a raid are the 'Power to Search' and/or 'Power to Seize.' The term 'raid' has become popular among the general

[2] Indian Penal Code, 1860 (Act 45 of 2000), s.302.

public since a raid entails a uniformed surprise visit by officials, who enter the premises without authorization and examine the premises for evidence. Now, it is true that generally, entering the premises of another unannounced and at odd hours is an encroachment of liberty and privacy of the person. Thus, the Code of Criminal Procedure 1973 by virtue of Section 93 has envisaged the procedure of issuing warrant before any search. This mandates the requirement of getting the permission of a magistrate before the search. Not only the textual code, but also the courts through their judgements dating as back as Queen v. Syed Hossain Ali Chowdhury[3] and Prankhang v Emperor[4] held that the intention of the provisions is to uphold privacy and liberty and thus, the harassment by virtue of the provisions shall not be entertained.

However, in some instances, the urgency of the situation demands the police to search a location right away, or sometimes the delay in getting the magistrate's permission is detrimental to the investigation. In such situations, Section 165[5] and Section 166[6] of the Code of Criminal Procedure comes at the forefront. These provisions enable certain police officers to search or cause a search in a location where there may be a realistic likelihood of finding evidence essential for an investigation without the consent of a magistrate. This gives the police the essential search power in an emergency.

Apart from the Code of Criminal Procedure, there are various State laws and Police Acts that also enumerate the power of the police to search and seize. Section 61 of the Delhi Police Act, Section 65 the Bombay Police

[3] 8 WR 74.
[4] 13 Cr LJ 764.
[5] Code of Criminal Procedure, 1973 (Act 2 of 1974).
[6] *Ibid.*

Act and Section 66 of the Karnataka Police Act all provide for the power to search a place in case it is suspected to harbor narcotic substances. Moreover, Section 17 of the Police Act empowers a Special Police Officer to arrest anyone if they are holding an unlawful assembly in a hotel. This is with the intention of residents' safety and the security of the property where the unlawful assembly occurs.

III. THE CURRENT RAID

If one were to break the current situation into chunks, it won't take long to realise that the policemen were well within its right to conduct the 'raid'. Section 165 of CrPC indeed gives the authority to the police to enter private properties if they have probable cause to believe that any unlawful activity is transpiring at such places. Although the section mentions an investigation of an offence or the gathering of evidence for such an inquiry as a reason for a search, the police might, in all likelihood, investigate the premises first on suspicion of criminal activity and then file a FIR. Thus, the policemen entering the hotel room of the victim without a warrant is lawful as the inhabitancy of three people in one room on one single identification card might have seemed suspicious to them.

Even though the raid was lawful, on perusing Section 165 in detail, one may realise that the way it was conducted was definitely not lawful. Section 165(4) states that the general provisions as to 'search' contained in section 100 of the Code of Criminal Procedure 1973 shall be applicable in case a search is done under Section 165. Section 100 mandates persons in charge of a closed place to allow search. As the victim was residing in a hotel, this section comes into play. Section 100(4) requires that a police officer must call two or more residents of the locality or place of stay to

accompany him as witnesses for the search of the property. This is in addition to the requirement under Section 100(6) which requires that a hotel employee or member of staff join the police officer to the rooms inhabited by guests. The main focus here is not on the locality or hotel attendant but the respectability of the witness. This simply means that the person should not be disreputable in any way. In the case of Panda Inderjit v. Emperor[7], it was held that the legislative intent behind insertion of word "independent" in Section 100(4) of CrPC is that such a person should be free from any prejudice and be disinterested in the result of the search. As far as the case at hand is concerned, neither any of the CCTV footage nor any statement from the SIT shows that any adherence has been given to the requirements of this provision.

We are of the opinion that Article 21 of the Indian Constitution dealing with Right to Privacy cannot be kept away from this matter as the raid infringes upon the right to Privacy. The Preamble, the guiding principle of our constitution as well as the case of Justice KS Puttaswamy v Union of India[8] which upheld the right to privacy to be a fundamental right talk about dignity and integrity. Constructive interpretation of the provision and judgement suggests that any attack on dignity or integrity violates the right to privacy. In the present matter, the alleged assault by the police on the visitors of hotel, at midnight, without a warrant, in absence of witnesses makes up the case for violation of right to privacy.

[7] AIR 1947 All 165.
[8] (2017) 10 SCC 1.

The Fourth Amendment in the United States gives a prohibitory clause. Though we have scattered provisions of such a kind in our Criminal Procedure Code, but the wording of our provisions discussed so far seems a bit general as compared to the those of fourth amendment. It says to secure the right of people and grants protection from unreasonable searches and seizures.[9] Only in the cases where there is a probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized, a warrant for search and seizure shall be issued. Although there is a law and courts have time and again shown concern over privacy matters, the collusion between hotel staff, local police, secret informers, just for the sake of harassing and extracting money, turns out to be very cruel for the person being harassed in the name of search. The lawful act being done very unlawfully by the law enforcement authorities shake the confidence of common people on the authority or such public institution.

IV. NEED OF THE HOUR – POLICE REFORMS

As a result of a Public Interest Litigation filed in 1996, the Supreme Court in its judgment of Prakash Singh v. Union of India[10] directed all the states and union territories to bring police reforms. It said that state must not exercise unwarranted pressure on the police and there should be a separation of the functions of investigation and maintenance of law and order. The most important recommendation was regarding establishment of a Police Complaints Authority in each state to look into and reach a

[9] Fourth Amendment, US Constitution available at: https://www.law.cornell.edu/constitution/fourth_amendment.
[10] (2006) 8 SCC 1.

merit based result in public complaints. The district level authority will look into the complaints of officers up to the rank of Deputy Superintendent of Police in case of serious misconduct. Justice Thomas Committee and Justice J.S. The Verma Committee were constituted post 2006 but no reforms have seen the light of the day.

The basis for the need of reform is not just the rising cases of torture or moulding the laws to their whims and fancies by the police but also the fact that the Colonial mindset law which we are seeing presently was brought by the British to use it as an instrument in order to suppress voice of common man. Even after seven decades of independence, incidents such as one that happened in Gorakhpur and the likewise culture of law enforcement authorities shows the negligible change which our society has witnessed, as compared to pre independence, when it comes to the police-public relations. Therefore, reaffirmation of the rule of law becomes indispensable.

V. CONCLUSION

As far as the case at hand is concerned, the Central Bureau of Investigation (CBI), which is investigating the matter after initial investigation by a SIT, has named six policemen in the chargesheet. They have been alleged of having played a role in the death of Manish Gupta. CBI submitted its chargesheet in the Court of Special Judicial Magistrate, Lucknow. In concluding remark, we would like to say that even though the police has a responsibility for maintain law and order and maintain the safety of public, keep a watch on illegal activities and curb them, the power to search a property or a private place has to be exercised very cautiously keeping in mind the rights and privacy enjoyed by the public of this

country by virtue of constitution. The police are usually seen to act on moral grounds rather than legal grounds. If its stand and lecture of morality anytime infringes our legal right, it is our duty to take a stand on the issue and raise voice because public authorities cannot just pressurize the public without any justified and lawful reasoning.

LIVE-IN RELATIONSHIP AND ITS INTRICACIES

Prachi Dubey[*1]*

"With changing social norms of legitimacy in every society, including ours,what was illegitimate in the past may be legitimate today."
-Honourable justice AK Ganguly

I. INTRODUCTION

Marriage appears to have developed to discipline sexual interactions and secures the validity of offspring and their intellectual and psychological development in a supportive environment.

Human values, particularly those related to husband-and-wife relationships, have experienced significant upheaval since the advent of the industrial revolution and the incline of education, which has opened up paths of economic independence to women. As a result of rapidly shifting societal standards, a particularly ambiguous situation has emerged in the shape of non-marital heterosexual relationships ("live-in" relationships as they are commonly called). Such relationships have emerged among urban, educated, upper-middle-class, and elite young people to keep them away from the 'shackles' that institutionalized marriage. A 'live-in' relationship is a de facto non-marital heterosexual relationship prevalent in the West under various names such as common-law marriages, informal marriages, or marriage by habit. It is a deliberate rejection of the institution of marriage, the stereotypes it fosters, and the

*[*1]Author is a 5th year law student at Amity Law School, Delhi, Guru Gobind Singh Indraprastha University.*

constraints and injustices it has come to represent. It is a type of interpersonal relationship that is legally recognized as a marriage in some countries even though no legally recognized marriage ceremony is held, no civil marriage contract is entered into, and the marriage is not registered in a civil registry.

Individuals choose to have a live-in relationship to test the compatibility of two people before being officially married. It also protects partners from the mess of family drama and lengthy legal proceedings if the couple decides to divorce. Whatever the cause, it is apparent that in a conservative society such as ours, where marriage is perceived as "holy," an increasing percentage of couples choose a live-in relationship, even as a long-term plan, over a wedding. Many legal and social concerns have developed due to these conditions, and they have been the subject of heated discussion. A lot of cases have been recorded and witnessed over time when partners in live-in relationships or children born from such relationships have remained vulnerable for the simple reason that such partnerships have been maintained outside the sphere of the law. Because they have no obligations or responsibilities, partners in live-in relationships have abused the situation.

In India, there is no legislation defining the rights and obligations of participants in a live-in relationship and the status of children born to such couples. There is no legal definition of a live-in relationship. Thus the legal status of such relationships is also unknown. The participants in a live-in relationship have no rights or duties under Indian law. However, through numerous rulings, the Court has defined the idea of a live-in partnership. Though the law is still uncertain regarding the legality of such

partnerships, a few rights have been provided by interpreting and changing existing legislation to prohibit partners from misusing such connections. This article discusses the rights of live-in partners in India and the status of children born from such partnerships.

II. LAW AND LIVE-IN RELATIONSHIPS IN INDIA

A. Criminal Procedure Code, 1973

No legislation explicitly acknowledges a live-in relationship; nonetheless, two legal developments in the recent decade have brought such relationships (i.e. non-marital heterosexual relationships) into sharp attention in India. First, the Maharashtra government's attempt to modify Section 125 of the Criminal Procedure Code (hereafter referred to as the Cr.P.C.) in 2008 brought this issue to the forefront. The amendment attempted to widen the definition of "wife" under Section 125 Cr.P.C.[2] by adding a woman who had been living with a man "like his wife" for an extended length of time.[3] The action was taken in response to the Malimath Committee's recommendations (2003).[4]

Second, the Protection of Women from Domestic Violence Act (hence referred to as PWDVA) of 2005 is regarded as the first legislative Act encompassing relationships "like marriage," granting legal intimacy to relationships other than marriage.[5] The discussion that follows, attempts

[2] s. 125 Cr.P.C. is available to all neglected wives, or discarded or divorced wives, abandoned children and helpless parents belonging to any religion against husband, father or son. No other relation can claim maintenance under this provision.

[3] "Maharashtra to Legalize live-in Relationships", Times of India October 09, 2008.

[4] Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System 189-94 (2003).

[5] See, for details; Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), s. 2(g).

to explore the background and ramifications of the two legislative actions, passed on various forms of non-marital cohabitation.

B. Malimath Committee Report

The Malimath Committee, i.e., the Committee on Reforms of the Criminal Justice System, established under V.S. Malimath, Former Chief Justice of the Karnataka and Kerala High Courts, convened in November 2000, presented its findings in 2003. (Government of India 2003, hereinafter referred to as GOI 2003), made several recommendations under the heading "offences against women,"[6] the first of which was to amend Section 12 of the Indian Penal Code. This Section aims to "avoid hunger and vagrancy by requiring the individual to discharge the duty which he owes in respect of his wife, child, father, or mother who are unable to sustain themselves."[7]

The Committee attempted to broaden the definition of 'wife' under Section 125 Cr.P.C. by proposing that "a woman who was living with the man as his wife for a fairly long period, throughout the first marriage" be included.[8] Therefore, the expanded definition of a wife is situated against the backdrop of secondary partnerships of previously married men and is not intended to recognize what may be seen as an emerging type of non-marital cohabitation.

[6] Supra note 8.
[7] Id. at p. 189
[8] Ibid.

Following the Malimath Committee's recommendations, the Maharashtra government launched an abortive attempt in 2008 to modify Section 125 Cr.P.C., bringing the question of the legal status of 'live-in' relationships into the public eye. The action was interpreted as an attempt to grant legal legitimacy to men's secondary unions andlegitimize'live-in' relationships, in which young men and women opt to engage in "non-marital" heterosexual relationships before joining long-term committed nuptial connections.[9]

The PWDVA and Nature of Live- Relationships PWDVA 2005 was widely heralded as the first law to acknowledge non-marital adult heterosexual relationships.[10] The Act defines an"aggrieved person"as "any woman who is or has been in a domestic relationship with the respondent and asserts that the respondent has subjected her to any act of domestic violence." Furthermore, the Act defines a "domestic relationship" as "a relationship between two persons who live or have resided together in a shared household at any point in time, when they are linked through consanguinity, marriage, or a marriage-like connection, adoption, or are family members living together as a joint family."[11] This does not imply that the Act covers all types of domestic relationships in their entirety. It does not include a male employer's domestic connection with a live-in domestic worker. In addition, there is no mention of adulthood in the Act "Relationships between people of the same gender are referred to as "same-sex".

[9] Supra note 7

[10] Karanjawala, Tahira and Shivani Chugh "The Legal Battle Against Domestic Violence in India: Evolution and Analysis", International Journal of Law, Policy and the Family, pp. 289-308. (2009).

[11] Protection of Women from Domestrà Violence Act, 2005 (Act 43 of 2005), s. 2 (a).

Nonetheless, until the Malimath Committee's proposals, the PWDVA, 2005 has ramifications for a more extensive territory of non-marital interactions because it does not explicitly restrict itself to men's secondary relationships. Having adopted the concept of "partnerships in the form of marriage,""The Act appears to have broadened the scope of legally recognized male-female domestic relationships. While this clause sparked significant debate and criticism, it is crucial to emphasize that it neither rendered an invalid marriage lawful nor granted legal recognition to bigamous marriages. However, unions cause only attempts to condemn domestic abuse in whatever form and are not a moral judgement on the morality of cohabiting outside of marriage.[12]

As a result, it might be said that seeing this Act bestowing legal status on non-marital relationships would be a grave error. What is undeniable is the recognition of reality related to such partnerships, and women's rights in such relationships should be protected from abuse.

C. Domestic Violence Act, 2005

For the first time, the legislature recognized live-in relationships in the Protection of Women from Domestic Violence Act, 2005 (PWDVA), by granting protections and rights to women who are not legally married or engaged but are living with a male adult in a commitment that is similar to, but not identical to, matrimony.[13]

Section 2(f) of the Domestic Violence Act, 2005 defines:

[12] Lawyers Collective and ICRW : Staying Alive: Second Monitoring & Evaluation Report on the Protection of Women from Domestic Violence Act, 2005; 7(2008).

[13] Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), s. 2(f).

"Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship like marriage or are family members living together as a joint family.

Even though the Act doesn't defect a live-in relationship, it is up to the courts to interpret. The requirements of PWDA are now extended to persons who are in live-in relationships. Because the terms "nature of marriage" and live-in relationship bear the same meaning and connotation, courts presume that live-in relationships are within the ambit of the expression. This offers women some fundamental rights to protect themselves against the exploitation of fake marriages and bigamous partnerships.

D. Evidence Act, 1872

The Court may presume the presence of any fact that it believes is likely to have occurred, taking into account the usual course of natural events, human behaviour, and public and private business in connection to the circumstances of the particular case. As a result, if a man and a marriage is presumption woman live together for an extended time, marriage is prone **to Live-in Relationships** [14]

The Justice system has stepped up to fill the gap caused by the absence of legislative action governing live-in relationships. Society may consider it unethical, but it is not considered "illegal" by the law. The goal of the

[14] The Evidence Act, 1872 (Act 1 of 1872), s. 114.

Indian judiciary is to provide justice to partners in live-in relationships who have previously been protected by any legislation when subjected to abuse as a result of such unions. The judiciary is neither explicitly advocating nor banning such relationships. It is, however, only concerned that there be no miscarriage of justice. As a result, when judging various cases, the judiciary considered a variety of issues, including both cultural standards and constitutional principles.

Since the period of the Privy Council, there has been a presumption for couples living together without officially marrying. It is evident in the case of ***Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Blahamy***[15], in which the Privy Council said that "where a man and a woman are proved to have resided respectively as a spouse, the law will believe unless the contrary is made abundantly clear, that they were residing respectively as a result of a lawful wedlock, and not in a condition of sexual servitude."[16]

This was also the case in ***Mohabbat Ali Khan v. Md. Ibrahim Khan***[17], where the Court ruled that the marriage was valid because both partners had lived together as spouses. Later on, in the case of ***Badri Prasad v. Director of Consolidation***[18], the Supreme Court recognized a 50-year live-in partnership as lawful. In the same case, as mentioned above, the Supreme Court said, "The presumption was rebuttable, but the party attempting to deprive the link of legal origin had a heavy burden of showing that no marriage occurred. The law favours legitimacy and

[15] AIR 1927 PC 185.
[16] Id., 187.
[17] AIR 1929 PC 135.
[18] AIR 1978 SC 1557.

frowns on a tyrant."[19] While it may be tempting to infer a marriage-like connection, some unusual conditions may require the Supreme Court to reject such a presumption.[20]

In ***Payal Sharma v. Nari Niketan***[21], the Allahabad High Court, led by Justice M. Katju and Justice R.B. Misra, recognized the notion of a live-in relationship once more "A man and a woman, in our judgement, can live together even though they are not married. Society may consider this as immoral, but it is not criminal. There is a contrast to be drawn between the rule of law and the rule of morality."[22] Following that, in ***Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel***[23], the Court ruled in favour of the plaintiff. TheCourt stated that two individuals in a live-in relationship but are not legally married are not criminal offenders. This decision was later made relevant to several different situations.

In ***Madan Mohan Singh v. Rajni Kant***[24], the Court ruled that a long-term live-in relationship cannot be considered a "walk-in and walk-out" relationship and that the partners are presumed to be married. The Court's approach indicates that the Court regards long-term living partnerships as a marriage rather than creating a new notion such as a live-in relationship.

[19] Ibid.
[20] Gokal Chand v. Parvin Kumari, AIR 1952 SC 231, 333.
[21] 2001 SCC OnLine All 332.
[22] Ibid.
[23] (2006) 8 SCC 726.
[24] (2010) 9 SCC 209.

The Supreme Court ruled in the historical case of ***S. Khushboo v. Kanniammal***[25] that a living connection is protected by life and liberty under Article 21 of the Indian Constitution. The Court also ruled that live-in relationships are legitimate and that two adults living together are not illegal or criminal.

The Delhi High Court ruled ***Alok Kumar v. State***[26] in late 2010, likewise about live-in relationships. The complainant lived with the petitioner, who had not divorced his prior wife and had his kid. The complainant also has her child. As a result, the Delhi High Court classified such a relationship as a walk-in and walk-out partnership with no legal ramifications. It is a living contract "that is renewed daily by the parties and can be cancelled by one without the other party's permission. Those who do not wish to be in such partnerships engage in a marital relationship, which provides a legal connection that neither person can break at will. As a result, those who select "live-in relationships" cannot subsequently complain about adultery or immorality.

The Supreme Court ruled in another landmark case, ***Koppisetti Subbharao v. the State of A.P***.[27], that the categorization “dowry" had no magical enchantment. It pertains to a monetary request in connection with a marital relationship. The Court rejected the defendant's argument that because he was not legally married to the complainant, Section 498 A made no

[25] (2010) 5 SCC 600.
[26] 2010 SCC OnLine Del 2645.
[27] (2009) 12 SCC 331.

difference in protecting the lady from badgering for dowry in a live-in relationship.

The High Court ruled in ***Chanmuniya v. Chanmuniya Kumar Singh Kushwaha***[28] that the appellant wife is not entitled to support since only lawfully married women may seek maintenance under Section 125 CrPC. However, the Supreme Court overturned the High Court's decision and granted support to the wife (appellant), stating that the requirements of Section 125 CrPC must be interpreted in light of Section 26 of the PWDVA, 2005.[29] The Supreme Court ruled that women in live-in relationships are entitled to the same rights and reliefs as lawfully wedded wives.[30]

Under the 2005 Act, a partnership, such as marriage, must agree to some fundamental requirements. It states that the pair must be of legal marriageable age or be qualified to engage in a legal marriage. It was also specified that the couple must have freely cohabited and presented themselves to the world as married for an extended time. The Act of 2005 should not apply to any type of live-in relationship. Spending a week together or having a one-night stand does not constitute a domestic relationship. It went on to say that if a man has a "keeper" whom he financially supports and uses exclusively for sexual purposes or maybe as a slave, it is not considered a marriage-like arrangement.[31]

[28] (2011) 1 SCC 141
[29] Ibid, para 39
[30] (2011) 1 SCC 38, para 38.
[31] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.

Recently, in a historic judgement, the Supreme Court addressed the subject of live-in partnerships in-depth and established the requirements for a live-in relationship to be granted marriage status. In the case of ***Indra Sarma v. V.K.V. Sarma***[32], a two-judge Bench of the Supreme Court comprised of K..P. Radhakrishnan and Pinaki Chandra Ghose, J. held on November 26, 2013, that when a woman is aware that the man with whom she is in a live-in relationship already has a legally wedded wife and two children, she is not entitled to the numerous reliefs given to a legally married wife and likewise to those available to lawfully wedded children. However, in this instance, the Supreme Court felt that denying any protection would be a grave injustice to victims of unlawful partnerships.[33] As a result, the Supreme Court emphasized the importance of expanding Section 2(f) of the PWDVA, 2005; it defines "domestic partnerships" to encompass poor and uneducated victims of unlawful relationships, as well as their children born out of such relationships who have no source of income.

III. CHILDREN BORN FROM A LIVE-IN RELATIONSHIP : A LEGAL STATUS

The Supreme Court held the legitimacy of children born from a live-in relationship for the first time in ***S.PS. Balasubramanyam v. Suruttayan***[34], saying, "If a man and a woman live under the same roof and cohabit for many years, there is Section 114 of the Evidence Act presumes that they

[32] (2013) 15 SCC 755.
[33] Ibid.
[34] AIR 1994 SC 133.

live as husband and wife, and their children are not regarded illegitimate."[35] Furthermore, the Court interpreted the status and rules to be consistent with Article 39 (f) of the Indian Constitution, which establishes the State's obligation to provide suitable possibilities for children's growth and future safety.In a recent decision involving the validity of children born from such partnerships, the Supreme Court ruled in ***Tulsa v. Durghatiya***[36] that a child born from such a connection will no longer be deemed illegitimate.

The critical need for this is that the parents have lived under the same roof and cohabited for an extended time for society to recognize them as husband and wife, and it should not be a "walk-in and walk-out" relationship[37]. In ***Bharatha Matha v. R. Vijaya Renganathan***[38], the Supreme Court ruled that a child born from a live-in relationship may inherit the parents' property (if any) and therefore be accorded legal validity. In the lack of explicit legislation, we have seen that the Indian Court has protected children's rights by broadening the meaning of the law such that no kid is "bastardized" through no fault of their own. In ***Revanasiddappa v. Mallikarjun***[39], a Special Bench of the Supreme Court of India comprised G.S. Singhvi and Ask Kumar Ganguly stated that regardless of the relationship between parents, the child's birth out of such connection must be regarded independently of the relationship of the parents. As Evident as the sunshine beaming out of the sun, a kid born

[35] Ibid.
[36] (2008) 4 SCC 520.
[37] Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.
[38](2010) 11 SCC 483.
[39] (2011) 11 SCC 1.

from such a connection is innocent and entitled to all of the rights and benefits to children born from lawful marriages. This is the essence of the revised Hindu Marriage Act, 1955, Section 16(3).

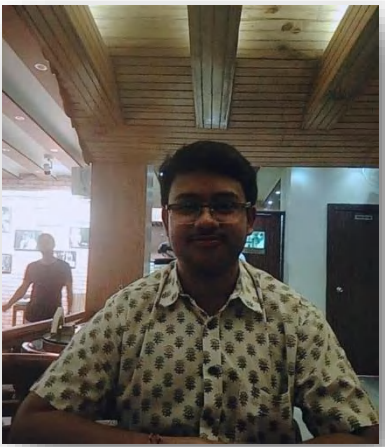
IV. CONCLUSION

The live-in relationship has long been a source of contention since it challenges our fundamental socio economic foundation. It is not regarded as an infraction because no legislation bans this type of connection to the date. The Indian judiciary took a step, issued interpretations, and declared such arrangements legal to provide justice to women victimized by live-in relationships. India has yet to legalize it; legalizing entails enacting specific legislation. There is now no legislation or statute covering succession, maintenance, and guardianship in live-in partnerships. However, the Protection of Women from Domestic Violence Act of 2005 recognized the ability of partners in a live-in relationship to seek protection. It has recognized live-in partnerships through several judgements to safeguard persons in the relationships from harm. At the same time, courts usually refused to take any significant measures toward legalizing such practise by permitting forced agreements between unmarried couples, citing the risk of conflicting with the broader societal approach. It becomes clear that the Indian judiciary is unwilling to recognize all living relationships as equivalent to marriage. Only stable and relatively long-term relationships between couples are granted the benefit of the 2005 Act. It is the judiciary's responsibility to guarantee that the law adapts to the changing social landscape. Though courts sought to acquire a clear picture of the status of live-in partnerships via numerous judgments and case laws, it remains ambiguous in several areas, where

there is an urgent need for distinct sets of rules, regulations, and codification concerning such a relationship.

There should be specific legislation dealing with this present situation to safeguard the rights of living partners, children born from such partnerships, and all others who are likely to be impacted by such relationships. Not all live-in relationships should be legalized, but only those that meet some fundamental conditions. At the same time, live-in couples should be aware of the legal implications of such a living arrangement.

ABOUT THE AUTHORS



Indrasish Majumder is a 4th-year law student pursuing a B.A LL. B (Hons.) from National Law University Odisha. Indrasish is an experienced writer – having been in the position of columnist at several International and National Law Blogs namely: 1) Oxford Business Review 2) Human Rights Pulse 3) International Agora Law Blog (Jindal Global Law School). Indrasish has a keen interest in the intersection of human rights law, Humanitarian Law and Business Law.

Kirti Malik is a fourth year BA LL.B (Hons.) student at National Law University Odisha. She has keen interest in Constitutional Law and Jurisprudence.

Asmita Mishra is a Fourth-Year student of LL.B (Hons) Integrated course at Faculty of Law, University of Lucknow, Lucknow. She has a passion for research, reading, writing, and mooting and have a deep interest in Constitutional laws as well as International laws.

Parantak Yadav is pursuing final year of LL.B (Hons) Integrated course at Faculty of Law, University of Lucknow, Lucknow. He is most interested in International Law, Human Rights and Environmental Laws and has done a number of research works in these fields. He aims to pursue his LLM in Public International Law. He is an avid reader and reads mostly about Law and Society.

Chetan R is a 3rd Year B.A. LL.B. student at the National Law School of India University.

Vareesha Irfan is a fourth-year law student at the Faculty of Law, Jamia Millia Islamia University. She aims to pursue her career in Intellectual Property Laws. She has interned at FICCI and Saikrishna & Associates. She's an avid Mooter and Legal Researcher, and has also won the Best Memorial Award in VI K.K. Luthra Memorial International Moot.

Jasmine Madaan is a penultimate year law student pursuing B.B.A. LL.B (Hons.) from Vivekananda Institute of Professional Studies (GGSIPU). She has a keen interest in Corporate(M&A) and data protection law, and aspires to be a Corporate lawyer. Along with her passion for legal research and writing, she is an avid public speaker having won the title of the best debater of West Delhi by IYC.

Tejas Sateesha Hinder is a penultimate year student of law at the National Law Institute University, Bhopal. An aspiring academician, he has over 50 publications to his name. His areas of interest include Commercial Laws and Alternative Dispute Resolution.

Amritya Singh, a mediation enthusiast, is a penultimate year student of law at the National Law Institute University, Bhopal. Her areas of interest include insolvency laws and alternative dispute resolution.

Parul is a 4th year BA. LL.B student of Banasthali Vidyapith University, Rajasthan. She is interested in Corporate, commercial and Admiralty law. She has done various internships where she got to know that her profound interest is Commercial and Admiralty law. She has even interned at Tier 1 firms like L&L Partners and Vaish Associates. Apart from Law, she is a B1 Level French learner.

Akshit is a 4th year BBA. LL.B student of Bharti Vidyapeeth College, Pune.

Khushal Gurjar is a recent postgraduate in law from National Law University, Delhi with specialisation in Constitutional Law and Human Rights Law. He has completed his bachelor's degree in Law from National Law University and Judicial Academy, Assam with specialisation in International Law and Human Rights Law. His areas of interest include Constitutional Law, International Law, Human Rights and International Humanitarian Law.

Anurag Sharma is currently pursuing LL.M. from the West Bengal National University of Juridical Sciences, Kolkata with specialisation in Criminal and Security Law. He has completed his bachelor's degree in Law from National Law University and Judicial Academy, Assam with specialisation in Criminal Law and Human Rights Law. His areas of interest include Criminal Law, Administrative Law, Animal Rights Law, Human Rights and International Humanitarian Law.

Merin Mathew is pursuing LL.M in Public Health Law from the National University of Advanced Legal Studies, Kochi. She completed B.A L.L.B from ILS Law College, Pune. She is passionate about Criminal Law and Health Law.

Nehal Ahmad is an LLM graduate with specialization in Business Laws from National Law School of India University (NLSIU) Bangalore. (2021). He holds B.A.LL.B (Hons) Degree from Faculty of Law, Aligarh Muslim University, Aligarh. (2020) He is equally interested in litigation and research. He was awarded twice for his best research presentations.

Koninika Bhattacharjee is a third-year undergraduate student currently pursuing her B.A. LL.B. (Hons.) from Christ University, Bangalore. She is skilled in reading, researching and legal writing. Her interest areas include Constitutional and Taxation Laws. She loves volunteering and has started a blog website, called 'Hindic', about India's rich heritage and governance. She has a keenness for learning new concepts and projecting her passion through writing.

Ms. Nibedita Mukhopadhyay is a BBA LL.B (Business Law Hons.) graduate from KIIT School of Law, Bhubaneswar with interest in commercial laws especially related to finance. She has done her schooling from St. Agnes School, Kharagpur. Currently she is pursuing her MBA (Finance) from ICFAI Business School, Hyderabad. She believes in empowerment of society through education. She has a love for research, reading, writing and travelling.

Kaushitaki Sharma is a penultimate-year law student currently pursuing B.A. LL.B. at the University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, Delhi. Kaushitaki is an active mooter and debater, with a strong inclination towards Public International Law, Dispute Resolution, and Data Protection. She has previously written on a variety of topics, including constitutional law, Sustainable Development Goals, and dark patterns. She is currently the Student Coordinator of the USLLS Gender Champions Club, and has previously served as a member of the student team of the Indraprastha Law Review. She is a Core Committee Member of the USLLS Internship & Placement Cell.

Rishika Rishabh is a penultimate-year law student currently pursuing B.A. LL.B. at the University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, Delhi. Rishika has served on the editorial board of her college's technology and law journal (ITLJ) and is interested in Criminal, International and Human Rights law. She is a Core Committee Member of the USLLS Internship & Placement Cell.

Anushree Modi is a IVth Year undergraduate law student pursuing B.A. LL.B (Hons.) from Gujarat National Law University, Gandhinagar. She has a keen interest in legal research and writing on conventional issues. She has profound interest in International Criminal Law, Intelectual Property Law and Dispute Resolution. She has participated in various national moots. Alongside pursuing law she is also an active sportsperson and has won various national level swimming championships.

Noyonika Kar is a IVth Year undergraduate law student pursuing B. Sc. LLB [Hons.] from Gujarat National Law University. She is passionate about researching and writing on all kinds of pertinent issues and developments in the legal world. She has a particularly keen interest in Intellectual Property Rights and Media & Entertainment laws, which she wishes to pursue in her LLM. She has also published research papers on various legal topics and participated in a few national moot court competitions.

Akhil Kumar Singh is pursuing his LLM from Rajiv Gandhi National Law University, Patiala. He did his under-graduation from National Law University, Jodhpur. He has keen interest in Constitution and Criminal Laws. He is also an avid reader and takes part in anything and everything related to the constitution. He is also an active member of the Bar. Alongside this, he also follows the political scenario in the country actively and wishes to make a change in the same.

Swapnil Katiyar is pursuing her LLM from Dr. Ram Manohar Lohia National Law University, Lucknow. She did her under-graduation from National Law University, Jodhpur. She has keen interest towards grasping the intricacies in the areas of Constitution and IPR Laws. She is also an active member of IDIA and helps underprivileged students to reach NLUs.

Prachi Dubey is a 5th year law student at Amity Law School, Delhi. She is interested in pursuing Criminology for her Master degree and wishes to practice in the same field. She has published various articles and research papers and is a regular columnist at The Daily Guardian and Business World. She has participated in various moot including the Willem C Vis Moot, Vienna and Hong Kong. She shares a passion for music, art, cooking, baking, debating and many to name.

ABOUT THE EDITORS

Aparna Gupta

Aparna Gupta is a final year law student at ALSD. Being a member of the esteemed editorial board of Modern School Barakhamba Road, she has developed a muscle for research. Carrying this interest to under graduation, she dabbled with writing and editing articles, research papers on socio-legal and contemporary issues. She has authored eight research papers published in renowned journals and received several national accolades. The multitude of exposure in the research arena has lent her the bandwidth to navigate the labyrinth of data and capture it with a functional understanding of both Indian and International law. She is extremely passionate about law and engages with her audience through her legal publications.

Bhoomika Agarwal

Bhoomika Agarwal is a final year student pursuing B.A. LL.B. (H.) from Amity Law School, Delhi (GGSIPU). She joined the editorial board of ALSD in January 2021. She has participated in and won several national and international moot competitions including the prestigious Willem C. Vis Moot Competition, Vienna. She has, to her name, several publications and paper presentations. She has done internships with several reputed organisations, including Amnesty International and Karanjawala & Co. She has a profound interest in criminal law, competition law and arbitration law

Ragini Kanungo

Ragini Kanungo has been an Editor of ALSD Student Journal since her first year at law school. She has authored several research articles including 'Election Manifestos in India: Beyond Election Campaigns' which was recently published in Indraprastha Law Review alongside contributions from advocates and professors. She also has a penchant for writing poems in English and Odia. She is an avid oralist and has represented our law school at the 27th Willem C. Vis International Commercial Arbitration Moot. She was awarded 'Student of the Year' in 2019 and has a keen interest in the intersection of law and social justice.

Saloni Sharma

Saloni Sharma is a final year student at Amity Law School Delhi. She is a creative and curious person, and never misses an opportunity to learn something new. She is deeply interested in the subjects of Corporate and Insolvency Laws. Throughout her law school she has tried her hands at different subjects and branches of law, which gives her a wide spectrum of experience. She has a special interest in legal research and has written several blogs for iPleaders and Centre for Banking and Finance, Symbiosis Law School Hyderabad. She has also represented ALSD in several Moot Court Competitions, Youth parliaments and Volleyball competitions. Saloni is trained in classical vocal and theatre. She enjoys discovering new music and trying different cuisines in her free time. She is a cheerful and empathetic person and tries her best to help anyone in need.

Sidhant Thukral Arora

Sidhant Thukral Arora is a final year law student in the five-year B.A. LL.B.(I) course who has been associated with the student journal from the beginning of 2021. He is a published author and has represented the institute at national moot court(s) and seminar(s) while also having participated in and adjudicating MUNs and Youth Parliaments. Inclined towards tech law and policy, Sidhant holds a Diploma in Cyber Laws and is also pursuing B.Sc. from the Indian Institute of Technology, Madras to widen his approach against the legal acuity that he possesses. He has also undertaken internships at the Office of Ld. Solicitor General of India and at the Hon'ble Supreme Court of India.

Subha Chugh

Subha Chugh is a final year law student. Her love for writing and editing landed her the position of Editor on the Amity Law School Journal in her first year. She's also worked as a columnist with various publications, is working on the legal team of Polygon Technology and provides legal and strategy advice to startups and upcoming brands and companies. Apart from law, she also dabbles in the field of online and digital content creation and is often found making inappropriate jokes in serious situations. She’s very passionate about women’s rights and healthcare and is also working with several brands and organisations to curate better feminine hygiene products and make them more accessible.

About Amity Law School

The School has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges by India Today (THE INDIA TODAY- NIELSEN SURVEY), the National Magazine, Amity Law School Delhi (ALSD) bagged 4th rank in India in 2017 moving up in ranks from Rank 11 in the same in 2016. In THE WEEK (HANSA RESEARCH SURVEY) ALSD was ranked at 12th in 2016 and 11th in 2015. THE OUTLOOK (OUTLOOK GFK MODE SURVEY), ALSD was ranked 10th in 2016.

The Amity Law School, Delhi (ALSD) has the unique distinction of being the first Law School in Delhi to start a 5-year integrated LL.B (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legal education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School is a great philanthropist and a man of extraordinary vision. This great vision has been translated into practical reality through the establishment of various educational institutions including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. The President RBEF, Dr. Atul Chauhan has been providing dynamic leadership intervention in strengthening the vision of the Founder President. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, (Former Vice-chancellor, GGSIPU) Chairman, Amity Law Schools.

Amity Law School Delhi has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL. B (H) programme and the affiliation has been approved by the Bar Council of India. The programme is designed to incorporate teaching methods for realizing holistic legal education.

The programme offered by Amity Law School Delhi seeks to promote multi-disciplinary analysis of the socio-legal problems by designing/pursuing/giving effect to its course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture, discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

AMITY LAW SCHOOL (DELHI)
(An Institution of Ritnand Balved Education Foundation,
Affiliated to Guru Gobind Singh Indraprastha University, Delhi)
F-I Block, Amity University Campus, Sector-125, Noida-201313 (Uttar Pradesh)
Tel: 0120-4392681 E-mail: alsdelhi@amity.edu Website: www.amity.edu/als