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Editorial

Introduction

It is with great pleasure that we present on behalf of the NALSAR Law Review (NLR) this special issue to commemorate NALSAR University's Silver Jubilee Year. We would like to express our deep appreciation to our contributors who so willingly devoted their time and energies towards academic writing for our Journal.

It is appropriate that we should begin the issue with the account of the aim and objective of the journal. The articles published in NLR are peer-reviewed and represent the latest thinking on various legal topics. This helps to keep the legal community up-to-date with the latest developments in the field and facilitates the exchange of ideas and knowledge. NLR serves as a vital mechanism for the dissemination of legal knowledge and intellectual discourse.

As the NLR Editorial Board, it is our duty to ensure that Nalsar law Review remains at the forefront of legal discourse, reflecting the latest developments and trends in the field of Legal education and legal thought.

The Nineth Volume of the University's flagship Journal *Nalsar Law Review* is being published on the eve of *Twentieth Annual Convocation*, 2023. This gives us immense pleasure to present our scholarship in this issue.

Authors Contributions

This issue contains diverse topics that will keep the reader engaged. The subject matter is arranged so as to give importance to emerging intersectionality of law and technology followed by issues pertaining to human rights law by virtue of its age and universality and then the interconnection of natural phenomena and the necessity of interdisciplinary solutions through the writings on Environmental law, Criminal law, IPR law, Labour Law, Corporate Law and International law.

Contributors are well established in their area of scholarship. This issue has articles written on very significant topics that highlight the necessity

of interdisciplinary approach such as *An Assessment of Emerging Forms of Technological Innovations in Justice Delivery Mechanism,* by Justice Anupama Chakravarthy, Judge, Telangana High Court; *Automation And Artificial Intelligence in Administration of Justice*, by M Radha Krishna Chahavan, Senior Civil Judge, Sanga Reddy and Research Scholar, Telangana University; *Protection of Neighbouring Copyrights– A Comparative Study of Law at India, USA and EU,* Prof. (Dr.) P. Sree Sudha, Vice Chancellor (Officiating), DSNLU, Visakhapatnam: *Can we ever take A 'Middle Course' In India? Contextualising the Comparative Aspects of a National Judicial Appointment Commission and the Diversity Debate*, by Dr. Uday Shankar, Rajiv Gandhi School Of Intellectual Property Law, Indian Institute Of Technology (IIT) Kharagpur; *Legal Reforms in The Age of Digitalization: Setting Realistic Goals*, by Abhishek Sharma Padmanabhan, Assistant Professor of Law, Christ University, Bangalore; *Russian Invasion of Ukraine: Illusion of Humanitarian Intervention,* by Dr. Vaibhav Goel Bhartiya, Dean, Faculty of Law, Subharti University; *Displacement Of People: An Adverse Repercussion of Climate Change*, by Rishabh Bhandari, Assistant Professor at Ramaiah College of Law, Bengaluru; *The Rights of Stray Community Dogs: Judicial and Legislative Perceptions*, Varun Dhond, Law Clerk-cum-Research Associate to Justice A. S. Oka, Supreme Court of India and many more.

The breadth of coverage highlights the legal scholarship in these articles We believe readers will find the present issue interesting and thought provoking. We hope our readers will enjoy reading the Review as much as we did putting it together for you.

Editorial Committee

AN ASSESSMENT OF EMERGING FORMS OF TECHNOLOGICAL INNOVATIONS IN JUSTICE DELIVERY MECHANISM

Gunnu Anupama Chakravarthy [*]

Abstract

This article aims to examine how technological progress and implementation have affected and been affected by the legal system. Technology has the potential to transform the justice system, increase access to justice, and de-mystify legal institutions all while assisting citizens with legal work. Opportunities for innovation in the field of justice generate a number of challenges, particularly those associated with the so-called "digital divide." Among these include worries about privacy, security, and secrecy, as well as problems with accessibility and the ethical dilemmas posed by the dehumanisation of judicial processes. During the COVID-19 pandemic, a number of courts around the globe responded by supporting remote hearings and online case management approaches. Judicial responses to COVID-19 have been partly dependent on the court system readiness to adopt or adapt technologies. Some courts successfully transitioned judicial activities to support remote access arrangements, largely because the basic infrastructure existed to enable the transition. Despite some reservations around replacement and disruptive technologies, supportive technologies have potential to pave the way for positive developments in the justice sector.

The article aims to explore, the different forms of Justice Innovation that are supportive, replacement and disruptive technologies. It also analyses the shifts during COVID-19 that included a rapid uptake in supportive and replacement technology to support remote access

[*] Judge, Telangana High Court

arrangements. Justice applications, or mobile and web-based programmes, are analysed for their function in helping people with legal chores, reshaping the justice system, increasing access to justice, and reducing the mystique surrounding the legal system.

Key Words: Artificial Intelligence, Justice, Rights, Constitution, Rule of Law

1. Introduction

The term "artificial intelligence" (AI) is used to describe the application of scientific and technological methods to the task of decision making. With the use of machine learning techniques, it may be possible to make better decisions based on more extensive datasets than humans can currently handle. As additional data is fed into a machine learning algorithm, it "learns" how to update its calculations and improve its predictive abilities.

To help citizens navigate the legal system and interact with courts and other justice providers online, the justice sector is increasingly making use of enabling technology (for example, mediators). Disputes can be referred to humans (lawyers, mediators, and experts) with the help of replacement technology, and individuals who may be involved in the court system can receive more personalised guidance and support. Cases can be prioritised for resolution using applications that make use of complementary and alternative technology. Disruptive technologies that depend on more advanced types of AI can enable matters to be algorithmically appraised based on important indicators or earlier jurisprudence, possibly before being sorted for human scrutiny, to determine the likely outcome of the case. This degree of automation has the potential to enhance the efficiency of the judicial system. However, there are a few issues that come up when replacing or disrupting human decision making with technology. Among these are concerns about fundamental rights, algorithmic bias, the effects on individuals, privacy and secrecy, and methods for ensuring fairness and transparency. Concerns around data privacy and the accessibility of relevant data are also important for application of AI

in legal process. A court's ability to rapidly adopt new methods of operation depends on several factors, including the amount to which it has embraced technological change, the availability of resources, and the enthusiasm of its judges. The position of judges in a democratic society also raises a number of ethical questions.

2. Technological innovations in Justice Delivery Mechanism

The concept of justice has multiple philosophical underpinnings that must be taken into account. In the context of broadening people's access to and knowledge of fundamental values and principles, enabling technologies like phone and web-based justice apps may be helpful. Technology replacements that facilitate online dispute resolution (ODR) can promote justice in both its procedural and substantive forms[1]. There is some debate about whether or not innovative technology can effectively integrate ideas of fairness. Using AI to decide on questions of civil culpability and criminal consequences, such as jail time, has proven to be troublesome. Decision-making transparency, algorithmic bias, and enforceability are all sources of worry[2].

Videoconferencing and other ancillary technologies may help judges save time and reach out to more people in their areas. Despite perceived benefits, there are costs associated with video-conferencing including set up, maintenance and support costs, making it difficult to determine how video conferencing can provide a more cost effective alternative to face-to-face legal assistance. Further, there are significant concerns around privacy and confidentiality, particularly when clients have access to video conferencing technology in potentially non-confidential locations. In addition, concerns around technological literacy and bandwidth capacity raises questions around access to justice[3].

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1 Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution*, DUKE L. & TECH. REV., Feb. 18, 2003, at 7–9

2 Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 554-55 (2015)

3 Richard Michael Victorio, *Internet Dispute Resolution (IDR): Bringing ADR Into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279, 287–88 (2001)

During the COVID-19 pandemic, a number of courts, as a result of on-going digitisation reform strategies, utilised online filing and document exchange. Online and telephone access to registry services, electronic filing of documents with the Court, and the provisional acceptance of electronic signatures on Court documents were all made possible. There is variation amongst judges in terms of how they perceive the capacity of technology to support and enhance the judicial function, which is linked to a consideration of how responsive judges are in relation to cultural and societal changes. New methods of online dispute resolution (ODR) are changing the face of some judicial processes and, by expanding the range of available dispute settlement mechanisms and facilitating faster resolution, expanding access to justice. These systems do more than just provide facts; they participate in the resolution of conflicts. Support for disruptive technology, such as the use of AI in verdicts, is less guaranteed than support for supportive and replacement technologies, according to judicial observers[4].

Machine learning algorithms have the ability to generate more informed judgments than humans can based on massive amounts of data. It's important to remember that, for the time being, most applications of this technology serve solely as a tool to aid in conflict resolution rather than a fully autonomous system capable of processing, adjudicating, or settling disputes on its own. Most courts have only employed technology to automate routine tasks, rather than rethinking their organisational structures and procedures[5].

3. Evolution of Application (App) based services for Justice Dispensation

Historically, efforts to expand access to justice have concentrated on two main areas: streamlining the judicial system and expanding legal aid services. In recent years, a number of researchers have explored the benefits associated with incorporating

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4 Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J. L. & TECH. 51, 55 (2002)

5 Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 U. TOL. L. REV. 163, 178 (2006).

technology into dispute resolution, with substantial claims made about the capacity of AI and automated systems to improve access to justice. Despite access being the primary objective, some applications (apps) are focused on returning profit to commercial developers. Justice apps have potential to improve access to justice through flexible access that is cost and time efficient. This is especially crucial for those who live in rural locations and have limited access to adequate in-person legal information and services[6]. Justice apps have traditionally been used to provide information on selected topic areas, as opposed to specific advice on an individual case. Justice apps can mitigate: (i) Financial barriers (ii) Psychological and informational barriers and (iii) Physical barriers. By providing easy access to relevant legal information and counsel, enabling technologies can level the playing field for parties at a disadvantage to participate in dispute resolution processes. There is hope that justice apps will help level the playing field and lead to more equitable outcomes in legal disputes. Those who live in outlying areas and have trouble getting their hands on adequate legal information and services in person might benefit greatly from the convenience of justice apps. To "fulfil a range of law-related demands not currently addressed by the standard legal services market," justice apps can offer "more holistic or client-centred help." Apps are also a great way to reach the younger generations that rely on their smartphones as their primary source of information[7].

The key objective of the Justice Apps is to increase access to justice for low and moderate-income consumers and to address their legal issues, both independent of, and with professional assistance, and to assist legal firms in handling a larger volume of low-income clients. Thus, improving access to justice and reducing cost and delays. Whilst perceptions of justice can be linked to cost and time savings, there is some concern that this focus can result in the system becoming less 'just,' especially where justice processes are 'dehumanised.' Also, some people worry that justice applications

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[6] Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 119 (2019)

[7] Gabriel Nicholas, *Explaining Algorithmic Decisions, 4* GEO. L. TECH. REV. 711, 717, 726-27, 729-30 (2020)

would distort the discussion about equal access to justice. There is an ongoing need to improve the price and accessibility of real-time legal and judicial services, but there is a risk that justice applications marketed as cheaper and easier substitutes for full-service legal representation could detract from this need. Which is significant since money is a crucial element in whether or not people can exercise their rights and bring suit.

Justice apps can be categorised according to the nature of what they do, as well as the audience they engage with. Increasingly in Australia, justice apps are being used to do more than provide general information on a topic. There are two main audiences for Canadian justice apps: legal professionals and the general public. When it comes to lawyers, justice applications can help facilitate more streamlined legal service delivery and legal research. There are four distinct types of apps that alter how people interact with the judicial system: (Apps that provide broad, topical legal knowledge; (Apps that facilitate the drafting of legal documents; (Apps that simplify the performance of commonplace legal tasks; and (Apps that aid in conducting legal research[8]. There are a growing number of uses for apps in the legal industry, from case "triage" to the replacement of paralegals and the interpretation of financial documents[9]. There are a wide range of problems and constraints within each subfield.

There is a potential for social inequality and digital exclusion due to the use of apps. In the context of the recent COVID-19 epidemic, this was brought to light as, shifting justice services online potentially left vulnerable groups in disadvantaged positions. Such difficulties may relate to; digital literacy, ability to access high bandwidth services and capacity to purchase or access a device when required. Some of these relate to global inequalities and others relate to inequalities within countries. Further considerations include cultural issues and language barriers and the risk that information gathered by applications could be misused by

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8 Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1278-300 (2008)

9 Darryl Mountain, *Could New Technologies Cause Great Law Firms to Fail?* 52 SYRACUSE L. REV. 1065 (2002)

unscrupulous individuals.[10] Creating evaluation criteria that can be used to apply to justice apps is important as well as building proper verification and audit mechanisms alongside human review. Such mechanisms can enhance the credibility of an app and can also ensure that outcomes that are reached are perceived to be 'just.'

Despite perceived limitations, there are significant advantages that well-designed justice apps may offer in terms of cost and convenience as well as opportunities to support access to justice and produce outcomes that meet procedural justice requirements. It is important to adopt measures that address user privacy and security concerns, so as to not discourage app innovation that would otherwise be in the public interest. A clear approach in evaluating apps will support further developments in the area. In evaluating justice apps, four factors ought to be considered. Each with a number of variables that could be more or less relevant depending on the app characteristics:

- Ease of use – to what extent are users involved in the design of the app and to what extent does the app support access to justice?
- Effectiveness – the app promotes justice, supports the dignified treatment of people engaged in the justice system and ensures that human review is available and supported.
- Privacy and Security Considerations – how data is stored as well as other factors that are linked to security.
- Interoperability – the app functions holistically and can be linked effectively to other systems and works on a range of devices with a range of software supports.[11]

4. Role of Judges in embracing Technological innovations in Justice Delivery Mechanism

Establishing and upholding the rule of law depends on the independence of the judiciary. The future of judges will be

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[10] Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 369 (2004)

[11] Regulating by Robot: *Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1156–60 (2017)

drastically altered by semi-automated procedures. It's unclear how much "independence" will be supported by the use of AI Based technology in judicial process, especially if government agencies are involved in its development. It is likely to be an evolutionary process, following the initial development of supportive AI technology in Judicial process.[12] Such developments could effectively mimic human intelligence and may even perform more effectively than a human when making a decision. The fact that human engagement might be sacrificed in AI based technology processes, suggests that supportive AI Technology - where levels of human interactions are retained, is likely to be more palatable in the shorter term.[13]

The adoption of automated systems challenges traditional understandings of fairness and justice. The application of AI based technology in Judicial process , has potential to result in cost and time reduction and may result in more credible and less biased outcomes than human judges. In contrast to human decision makers, AI does not have a 'self' and its decisions are not influenced by mundane impacts. In light of these considerations, algorithms may prove useful in avoiding "embarrassingly disproportionate and often arbitrary" judicial rulings[14]. It's possible that judicial discretion, judicial dissent, and judicial activism may suffer if such venues were used to regulate judicial prejudice. When used to the administration of justice, AI has the potential to improve fairness before the law by lessening arbitrary decisions, eliminating bias, and doing away with corruption. In theory, with proper design, automated decision-making systems can offer full transparency throughout the whole decision-making procedure. Through illuminating the process by which an algorithm arrives at its suggestions or decisions, onlookers can better spot any inherent biases or mistakes. Despite potential benefits, there are considerable concerns around the introduction of AI in legal process. These concerns include, the capacity for legal

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[12] David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 669–702 (2017)

[13] Jonathan Lippman, *Equal Justice at Risk: Confronting the Crisis in Civil Legal Services,* 15 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 248 (2012)

[14] Henry H. Perritt, Jr. & Ronald W. Staudt, *The Changing Culture: The 1% Solution: American Judges Must Enter the Internet Age*, 2 J. APP. PRAC. & PROCESS 463, 471-72 (2000)

problems to be translated into code. Further, there is a risk of overgeneralisation, which can arise when a machine-learning algorithm is too attuned to the idiosyncrasies or biases in the training set, and is therefore inadequate for the task of predicting future novel scenarios, and dealing with the diversity of future cases. This is especially significant in common law systems, because judges play an active role in shaping the law through the discovery and establishment of new precedents. Neural-network and deep-learning approaches can be incredibly difficult for humans to grasp, including the programmers who designed them, whereas other machine learning techniques can yield results that are easy to understand and inspect. Also, if the automated tool used to help judges is protected by intellectual property rules, it could compromise judicial independence because no one would be able to figure out how the tool arrived at its conclusions.[15] Thus, systems that are said to result in algorithmic bias can be the result of either biased data that is drawn from a human system, or the introduction of a system with little focus on design or ethical requirements, or with no human or 'in the loop' capacity. Issues of algorithmic bias, in respect of the general administration of justice outside of the courtroom can impact on the most vulnerable members of society.[16]

Many administrative decisions in modern countries relate to social security benefits, citizenship matters and other entitlements. By streaming such matters into an automated system, there is arguably a risk of bias against the more vulnerable members of society. Further, hybrid systems raise 'teaming' risks, there is a risk of 'automation bias,' if the human being 'over trusts' the system and endorses the algorithm's conclusion despite contradictory evidence or a clearly unfair result. The opposite risk, 'under trust' could also be true, if the human decision maker is unwilling to accept the algorithm's recommendations, in which case society would have overinvested in useless infrastructure. As a result, decisions may be

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[15] Cary Coglianese & David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1, 2 n.2 (2019)

[16] Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 101 (2009).

less predictable than they would be if made by a single human.[17] Nonetheless, one might counter that coding problems could be met by including lawyers and policymakers in the creation and updating of these computer programs. Whilst this may be labour intensive and costly, the process is front-loaded. Where Judges are replaced, further concerns relate to the loss of the 'human element.' Judging is often seen as a very human endeavour which reflects on a variation of experiences including; perspective, humanity, common sense and understanding. Human decision-making should be preserved, it is said, so that vital ethical questions can continue to be settled by humans. Where there are already problem-solving, therapeutic, and restorative court programmes in place, this may be even more crucial. Concerns have also been raised about application of AI technology in Judicial process with regard to the ability to understand the societal moral framework. Since software is rational but not necessarily reasonable, and legal decisions sometimes require both qualities in equal measure, these worries are connected to issues of social legitimacy and judicial discretion. People's irrationality makes it difficult for "systems which require specific outputs to foresee or answer human problems accurately." It's possible to feel uneasy about the government "reducing persons to data points that are then put into an algorithm," even if doing so would lead to greater accuracy and efficiency. While automation has the potential to increase reliability and uniformity, it also raises some concerns with regard to these qualities. For example, when a rule's application in an automated decision-making setting violates constitutional or legislative norms. As a final point, it has been made clear that not all administrative choices are of a type that can be appropriately or fairly made by automated systems.

5. Bridging the Digital Divide to reap the Digital Dividends

To avoid making the access to justice gap even wider than it already is, technological instruments developed with this goal in mind must be carefully tailored to meet the specific needs of those who will be using them. For justice technology to be effectively

[17] Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 96 (2014)

implemented, many obstacles and ethical concerns must be taken into account. Problems with accessibility; ethical concerns about the dehumanisation of legal processes; and different privacy, security, and confidentiality threats are just a few of the obstacles that stand in the way of justice innovation prospects.[18] The primary goal of technical advancement in the justice sector is to advance justice. Despite this, the digital divide may impact the delivery of 'justice,' thus it's important to think about. Broadband problems, language obstacles, disabilities, and low income are only some of the other significant impediments to digital access.[19]

Concerns were raised about the potential exclusion of vulnerable persons from the legal system or their inability to use technology due to the use of remote hearings during COVID-19. What's more, the data used to train unsophisticated algorithms might reinforce existing biases in society. Concerns about openness are also warranted. Challenges with validating and authenticating information and maintaining data security. Increasing the reliability of the networks that power the e-justice system is one way to make sure sensitive information stays that way. Despite worries, an AI that can dole out "AI equity" could help with datafication by being more responsive to the nuanced facts of a case and shifting social norms than human judges. More than 1.5 billion people worldwide lacked access to a functioning justice system in 2019, according to recent estimates; individuals without legal recourse are disproportionately among the world's most vulnerable populations. Whether or whether more advanced justice technologies have a positive effect depends on the specific technologies used, how they are used, and how thoroughly they have been evaluated. By lowering the hurdles that keep underprivileged people from participating in dispute resolution, justice innovation has the potential to increase access to justice.[20]

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[18] Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 680–87 (2016)

[19] Cf. Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2026–28 (2019)

[20] Jessica Davis, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REGUL. 800, 849–53 (2020)

6. Regulation of Justice Apps – The Way ahead

Development and usage of applications for Legal process could have positive and negative effects in relation to the citizen's right to have access to justice. This article has laid the groundwork for future research on the social, political, and legal implications of legal apps by surveying data on legal app producers, users in India, and features and identifying some of the most critical advantages and disadvantages of using such technology.[21] Two main hypotheses emerge from the current research. As a first and foremost conclusion, greater study of legal apps in India is required. Without thorough statistics or academic study on legal applications, it is impossible to tell whether they genuinely contribute to greater access to justice results for the citizens. Before we can have a complete understanding of where these technologies are and what they can do, there are still many unresolved questions that need to be answered. What do app developers do, and what motivates them? Who here is now using legal downloads of software? Could the use of apps streamline the process of seeking redress? What proportion of consumers don't get their legal needs met by these apps? What, if any, reasons would there be for people to worry about their personal information when using legal apps? When it comes to genuine app stores, how should they be regulated? How will the use of mobile apps change the attorney-client dynamic and the way law is practised? Second, it's obvious that citizens will keep using legal apps even if better data and analysis isn't readily available.[22] Regulators and legislators must move quickly to limit the risks which are discovered from these apps to the general public and the legal profession. An important first step would be the widespread adoption of best practise guidelines tailored to legal apps. Guidelines on best practises in app development, American guidelines on legal apps, and Canadian guidelines on health care

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[21] Jenna Burrell, *How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms*, 3 BIG DATA & SOC'Y 1, 1–2 (2016)

[22] Marek Laskowsk, *Algorithmic Regulation: A Critical Interrogation*, 12 REGUL. & GOVERNANCE 505, 517 (2018)

apps, which are similar to one another, may serve as a starting point for the promulgation of comparable standards in the legal context.[23]

7. Conclusion

This article looks at the ways in which technological advancements are already influencing the administration of justice. There are now three major technological trends that are influencing the legal system. They are "supportive technology," which refers to tools that help people stay informed, supported, and advised in their pursuit of justice; "replacement technology," which refers to tools that can take over tasks traditionally performed by humans; and "disruptive technology," which refers to tools that can provide for alternative types of justice, especially in cases where established procedures are radically altered. The progress made in the first two spheres has paved the way for justice innovation, which has the potential to increase people's access to justice by, among other things, lowering the barriers to entry for legal services, helping people better understand their options, and encouraging them to take an active role in their own self-help. In the wake of the COVID-19 outbreak, technological advancements have made it possible for the judicial system to respond with the necessary flexibility, due to the tools like video conferencing and justice applications. Concerns about the validity of decisions made by AI based technology, the difficulty of translating law into code, the exercise of discretionary judgments, and algorithmic prejudice are all exacerbated by the introduction of more disruptive technology into the court system. Concerns have been raised regarding the judicial system's innovation readiness at each of these three stages of technological transformation, as have concerns about the readiness of individual courts, judges, and legal practitioners to embrace change. Concerns persist, too, about whether the justice system, courts, and judges should adapt to developments that could affect the way they do their jobs and the public's view of them.

The expansion of justice innovation processes hasn't solved all the problems connected to the application of technology in the

[23] Jaihyun Park & Neal Feigenson, *Effects of a Visual Technology on Mock Juror Decision Making*, 27 APPLIED COGNITIVE PSYCH. 235, 235 (2012)

justice system. Among these is a general unwillingness to try new things, which is especially prevalent in the field of private legal practise. This is unfortunate, as justice innovation show considerable promise in terms of improving the justice sector. In addition to technology reducing cost and delay, it is also capable of mitigating psychological, informational and physical barriers. At the same time, there are challenges with embracing all justice innovation processes, particularly those that may result in the dehumanisation. Other relevant concerns include; the translation of law into code, accessibility and various justice, privacy, security, and confidentially considerations. To ensure that innovation supports justice, the creation of new regulatory frameworks is likely to be required. In addition, justice innovation requires human expert planning input, trials, and evaluation using appropriate frameworks.

AUTOMATION AND ARTIFICIAL INTELLIGENCE IN ADMINISTRATION OF JUSTICE

M Radha Krishna Chahavan [*]

Abstract

The world is advancing towards technology and the people around the globe are behind the technology. Most of the fields and the industries have started using the advanced technology available. Justice delivery system is not an exception to this. However, one must admit that the judiciary is not moving with heap and bounds in using the technology. The System has to adopt the technology to reap the maximum outcome by way of optimum utilization of the available resources. There are many laws relating to Technology which are the guiding lights in implementing the technology. Speedy Justice is one which is always requirement of every individual but it could not happen in our country yet and the long pending cases are the hurdles to perceive speedy or instant justice. People yet need to wait for prolonged time to get the justice. Usage of Technological advancements can only help the system to cope up with such huge pending cases and also to see the speedy justice in reality. The public at large can be benefited only when the optimum utilization of technology is adopted by all the stake holders which will enhance the transparency, accountability and disposal rate which are prime hick-ups in the justice delivery system. Introduction of Artificial Intelligence in Judicial administration will enhance the outcome as well as having accuracy.

Key Words: Judicial Process, Artificial Intelligence, Rule of Law, Rights, Public Welfare

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1. Introduction

An effective administration of justice ensures that all citizens have equal access to the judicial system, as required by the rule of law. Some historians argue that the requirement for a Judicial Administration to settle disagreements within a society gave rise to the concept of Governance as humans developed and began living in civilized civilizations. The administration of justice is one major wing, which the society at large is part and it is such an essential limb of the society which affects their social life. The last resort to a victim is the Judiciary as there is immense confidence on the system that they would get justice by knocking its doors[1]. The Justice delivery system has various stake holders in its functioning. Few of the stake holders in the system have started using the technology and few are still lagging. In this regard, Artificial Intelligence offers opportunities for automation of few tasks which are currently time consuming as they are being done manually.

The Artificial intelligence can be introduced in various wings of administration of justice viz.,

I. Case Management/ Judicial Analytics
II. Human Resource Management
III. Budget Estimations
IV. Public Relations
V. Record Management

2. Case Management

Many a times, courts fix a date for witness examination and the date is communicated to both the parties. But for one reason or another, the witness may not turn up for the trial, but the accused has to be present on that day otherwise a non-bailable warrant will be issued on his name. Similarly, in Civil Cases for document verification, if the party/advocate does not turn up on the day of hearing, the other party/advocate might be present for no reason at

[1] Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 532 (2013)

all.[2] Here, with simple use of Artificial Intelligence and automation process, all the hassle can be handled. An SMS can be sent to other party and advocate or the public prosecutor/concerned Station House Officer, with a question whether they are going to present their witness/document on the day of hearing or not, and the answer can be recorded in simple format like Y/N or 1/2 where Y(or)1 symbolizes 'Yes' and N(or)2 symbolizes 'No'. In case of Yes, the trial/hearing will proceed according to the rules of practice and if the answer from the Advocate/party is "No", then a flag can be raised in the cause list and a notification can be sent to the Judge adjudicating the matter. Further, tools of Artificial Intelligence can be used to analyze the repeated absentees, who does not turn up for the trial/hearing to delay the process or to harass the other party. There are many cases where the parties file their cases with malicious intentions. By tracking their activity, on the hearing dates, the repeated offenders can be identified and notified, so that these kinds of delays can be dealt with. Judges could be forewarned by Judicial Analytics of the likelihood of a witness turning hostile on the basis of particular factors or of a delay in getting police evidence in a murder prosecution.[3] To achieve this goal, the system needs to be supplied a massive quantity of data, including details about the case's parties and the appropriate procedure, at each level. Artificial intelligence (AI) will then analyses these facts and statistics to arrive at the systematic analysis, such as at which stage delays can happen for different types of cases, and the system will advise the Judge so that, measures can be done well in advance to combat the delays.

The courts routinely get numerous instances with strikingly similar facts. The judges need to know what to expect at each level of the process for instances like this so that they can take appropriate action. By drawing on data from similar instances in the past, AI can help judges make important decisions about pending litigation. Case details recorded in the daily orders and the final judgement can be used for this analysis. These details include the number of accused, the date the charge sheet was filed, the number of witnesses

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2 Jonathan Lippman, *The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569 (2014)

3 Maximilian A. Bulinski & J.J. *Prescott, Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 227 (2016)

questioned during the evidence stage, whether or not a witness turned hostile, the reasons for adjournments, the specifics of the First Information Report (FIR), any compensation awarded, etc. So that judges may better manage their outstanding cases and deal with delays at each level proactively, AI algorithms can assess these past cases and project numerous reasons that lead to delays at each stage[4].

The evidence phase is where AI can really shine. The majority of the court's time is spent on the evidence stage of the trial. Events and Information During the evidence phase, attorneys frequently ask for and receive adjournments for a variety of reasons. The Investigating Officer's schedule and the availability of witnesses also contribute to delays. Predicting the likelihood of hostile witnesses in a given case type, or the Investigating officer needing more time to investigate a given case type, etc., are examples of situations where artificial intelligence tools could be useful[5]. In cases where delays are likely, such as when witnesses become hostile or need police protection, the judge can take preventative measures by issuing appropriate instructions to those involved.

A Judge can use AI to compare cases, analyses similarities and differences found in different reportable Judgements dealing with similar subjects, and access the reportable Judgements from the Supreme Court and other High Courts in the Country in a variety of ways. Defendants' propensity to abscond or commit new crimes while they await trial is something that can be quantified using artificial intelligence. In order to better analyses potential risk factors in future cases, Artificial Intelligence algorithms can be trained using data collected on offenders from the many cases currently pending in various courts[6].

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4 Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 755–56 (2017

5 Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 332–33 (2016

6 James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 259–60 (2012

3. Automation in Human Resource Relations

The date on which an employee joins the service, his retirement is fixed and other relevant issues pertaining to the service of an employee passes through various phases. Starting from the Probation declaration, promotions, increments, Assured Career Progressions, Transfers, Leaves (Earned, Medical, Casual etc.), Suspensions, Enquiries, Punishments etc., are to be maintained manually by the officers in registers. For instance, where an employee completes the probation period and his probation has to be declared automatically and also to be communicated, but in some cases, this does not happen until unless the employee repeatedly requests with the concerned authority.

With AI Algorithms, the process can be automated. For AI to function as efficiently, all the necessary data along with all the parameters that the employee needs to fulfil for probation declaration has to be fed to the system, viz, whether the employee has worked for the prescribed period without any breaks, whether the employee has availed any long leaves, whether there are any enquiries pending on the employee etc[7]. Further with AI Algorithms, calculations such as Earned Leave credit, Annual Increments etc., can be automated with all the relevant information for each employee.

AI Algorithms can further help in arriving at the vacancy positions for the current year. There are three ways in which vacancies can arise in the District Courts. i. Regular Vacancies where the employees retire ii. Extraordinary cases, where the employee dies or has resigned to his post, and iii. Due to increase of number of sanctioned posts/courts in the District. Regular vacancies can be easily predicted, but with additional information of the increase in sanction of posts/courts or the number of employee is deceased/resigned in each category, AI can adjust the total sanctioned posts in each category, then with an analysis of working strength, will arrive at the total vacancies available in the entire District in each category. This might sound simple and easy thing

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[7] Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1130 (2009)

to calculate manually, but in practice the District Administration has to consider lots of aspects before concluding, and in that process manual errors creep in, especially when, there are huge number of vacancies to be filled in in various cadres having reservations in various categories. With AI Algorithms, manual work will be limited to entering information relating to exceptional cases and setting up the data base initially and updating it when additional posts or courts are sanctioned.

4. Preparation of Budget Estimations

Artificial Intelligence Tools can be used in estimating the budget for the financial year. Generally, there are two types of budgets i. Planned and ii. Non planned. Planned budget is reserved for the productive activities or programs that are proposed for the period such as development of infrastructure, establishments of courts etc., which are pre-planned and according to the activity a budget is set. The non-planned budget is reserved for salaries of employees, stationery etc. For planned budget, the estimations are mostly carried out beforehand. With respect to the non-planned budget, most of the times a simple method of incremental in certain percentage is followed to arrive at the budget estimations. But this does not take into consideration many factors such as increase/decrease in number of employees, inflation etc. To arrive at more accurate budget estimations, AI algorithms can be utilized, with information such as the current details of employees, and the details of increments they are entitled etc. again, this can be fetched from the Employee Service Records that we have discussed above, so this information will be automatically picked up from the HRM section of the database and used here[8]. Further, previous data can be picked up from last three/five years to analyze the estimated budget versus actual expenditure in each Head to arrive at the actual requirement which is also adjusted to inflation. This will project near perfect budget estimations.

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[8] Roger C. Cramton, *The Future of the Legal Profession: Delivery of Legal Services to Ordinary Americans,* 44 CASE W. RES. 531, 596 (1994)

5. Public Relations

Public Relations play a crucial role on the outlook of any organization, with regards to courts, general public are either uninformed or misinformed. A little blame has to be borne by the Judiciary as well, as there have not been many attempts from the Judiciary to address this issue. Slowly but surely steps are being taken to reach more people and make the open information accessible to the general/litigant public. Kiosks have been a great initiative in this regard. AI tools and algorithms can make the exchange of information more intuitive, interactive and personalized. With use of AI based Chatbots that can understand the user, either in text chat or voice chat, and provide them information that they request, it can be a simple query regarding their Case information such as next hearing data, case status etc. or address of court complex and ways to reach it, or court details where one has to file his petition and details of jurisdiction, further the details of legal Services contact details so that the user can approach for legal aid etc. AI based Chatbots will bring the next chapter in public relations as far as courts are concerned.

6. Record Management

Apart from digitization of records which is need of the hour, AI algorithms can be used in Record and Record Room Management. Starting from indexing of records and consignment to Record Room, the whole process can be automated. The starting point will be to create a database of records duly indexed according to their type, this will open up lots of possibilities in maintaining that record during its lifespan. A central database with user access provided to each section in the Court where they enter the details of the record with details of each document where the algorithm will sort them according to their type, before consignment of the record to the record room. When the record reaches the record room, the details of the rack where this record will be stored will be entered into the database. When there is an appeal if filed in the higher court and the file has to be presented before the appellate court, a flag will be generated at the appellate court with the details of required file. At the District court record room, the concerned official will be

notified with those details further the AI informing them where the file is physically stored so that they can easily fetch the file. At Present it is hell of time for the people to find old records as they are not properly stored and in fact, the staff is also not trained, which is also creating this situation. Further, AI can greatly help in destruction of old records. As the files are sorted according to their type AI algorithms can determine after what period those can be destructed[9]. At the same time, AI algorithms will consider the pending appeals in the higher courts in respect of each file on record to determine whether it can be destructed after completion of specified period, according rules[10]. There are two things to be considered in all cases, the first is that, the AI algorithms are as good as the data that is fed to them is while the second thing is that, the AI can never be a replacement to human mind, but it's there to help the personnel to arrive at conclusions efficiently and in speedy manner.

7. Conclusion

Setting up the perfect platform for these Artificial Intelligence algorithms to work properly is also a great challenge. The Machine Learning and Deep Learning algorithms need huge data to work with, and that data needs to be properly structured and needs to be in non-text format. Furthermore, a small human error while feeding this data to the algorithms, impacts the whole system in a big way. These algorithms also need a huge network to communicate, although setting up a network will not be as big a task as preparing the structured data. There is every need to have intervention of Artificial Intelligence in Administration of Justice to handle present pendency of cases in Judiciary and also to cater the needs of ever-increasing population and cases along with it. The companies, institutions and also authorities, need to have a good research on the issue of introduction of Artificial Intelligence in judiciary to the optimum and all the stake holders have to go, hand in hand, to achieve it. Judiciary is the last resort of a common man

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[9] Richard Michael Victorio, *Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279, 292–94 (2001)

[10] Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?,* 23 OHIO ST. J. ON DISP. RESOL. 301, 337–38 (2008

for getting justice and it must be first to get the benefit of technology to cater needs of common man in speedy manner but unfortunately it is all most the last to get the optimum benefit of the technology available.

PROTECTION OF NEIGHBOURING COPYRIGHTS – A COMPARATIVE STUDY OF LAW AT INDIA, USA AND EU

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Abstract

Copyright Law requires a work to be original and creative in order to avail of its protection, however varying the degree of originality is in the different works protected under Copyright. The primary justification for protection of neighbouring rights is that in the case of a performer, his creativity is indispensable to make the work enjoyable by the public. The possibility of fixation of performances and its commercial exploitation by technology is another ground to accord copyright protection to such works. In the case of sound recordings and broadcasts, due credit must be accorded for the conversion of works into signals and transmitting the same. The possibility of theft of signals and their simultaneous transmission causing economic loss to the broadcasting organisations also adds to the justification for protection of neighbouring rights. This article is divided into three sections. First, it offers an overview, from a Indian perspective, the United States', and European neighbouring rights law as it stands today, including the statutory establishment of copyright societies and administrative tribunals for the certification of neighbouring rights tariffs. Second, it examines instances of each jurisdiction's differentiation from established international norms by analyzing discrepancies between the legal frameworks of the three respective jurisdictions, and critically examines the effect of the law on localised music economies. Finally, it briefly proposes modest reforms to the Indian

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Copyright Act. By examining the ongoing evolution and economic effects of neighbouring rights law abroad, the article argues that both the possibilities and limitations of neighbouring rights.

Key Words: Copyright, neighbouring rights, legal regime, copyright societies, trade perspective.

Introduction

Neighbouring rights were established in order to ensure that individuals auxiliary to the creation or production of musical content could have similar control over their creative endeavours to that which is granted to composers of musical works through copyright.[1] Such auxiliary persons include artists, performers, music producers, non-featured instrumentalists or vocalists, and those otherwise in control of the phonographic "masters" embodying those individuals' performances, including record companies. While those individuals hereinafter referred to as "music makers"[2] may be considered merely auxiliary to the creation of musical works by law, their role in the production of music is vital to the consumption and enjoyment of music by the general public, and is thus vital to the health of the music industry generally. Sound recording performance rights represent the bulk of all neighbouring rights collected worldwide, and they are a continuously growing source of global revenue for music makers.[3] While treaties like the Rome Convention and the WIPO Performances and Phonograms Treaty protect music makers' rights internationally, there is no single recognized definition of neighbouring rights to inform the legislative application of neighbouring rights law within specific

1 Gordon Brown, *Review of the Canadian Music Industry*: *Report of the Standing Committee on Canadian Heritage* (House of Commons 2014) <https://www.ourcommons.ca/Content/Committee/412/CHPC/Reports/RP6661036/chpcrp05/chpcrp05-e.pdf> accessed 5 May 2023

2 The term "music maker" is used herein to refer to the conglomerate of performers, producers, record labels, and any other proprietor of the neighbouring right in sound recordings, in contrast with the employment of the term "music maker" used in some instances to refer solely to record labels.

3 Owen Morgan, *International Protection of Performers Rights* (Hart Publishing 2002); Towse, 'Copyright and Economics' in Frith and Marshall (eds), *Music and Copyright*, (2nd edn, Edinburgh University Press 2004).

jurisdictions.[4] Neighbouring rights therefore tend to vary more widely in scope between different countries than do the relatively entrenched notions of authors' rights or copyright.[5]

The increasing popularity of music streaming services by Spotify, Apple Music, Google Play, which has expanded so substantially in large part due to the increase in Internet connected smart phone usage and the growth of high-quality, wide-ranging, and competitive subscription-based services, has contributed to an increase in revenue flowing to music makers through their neighbouring rights, and has thus helped the recorded music industry to grow. Today, the Indian music industry is valued at Rs. 850 Cr., whereas the industries that use music are valued at Rs. 25000 Cr. For example, there is a radio company that earns around Rs. 300 Cr. annually, but pays only Rs. 6 Cr. to the music industry. The Radio industry is worth Rs. 3500 Cr., but pays only about Rs. 70 Cr.[6] A neighbouring rights framework that meets the standards of other large music markets is crucial for the success of the Indian music industry. This article is divided into three sections. First, it offers an overview, from a Indian perspective, the United States', and European neighbouring rights law as it stands today, including the statutory establishment of copyright collectives and administrative tribunals for the certification of neighbouring rights tariffs. Second, it examines instances of each jurisdiction's differentiation from established international norms by analyzing discrepancies between the legal frameworks of the three respective jurisdictions, and critically examines the effect of the law on localised music economies. Finally, it briefly proposes modest reforms to the Indian Copyright Act ahead of its legislative review in 2012. By examining the ongoing evolution and economic effects of neighbouring rights law abroad, the article argues that both the possibilities and limits of neighbouring rights may be better

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4 Ginsburg, J.C. 'Copyright and Control over new Technologies of Dissemination' (2001) 101 Columbia LR 1613, 1634

5 Bently L and Sherman, *Intellectual Property Law* (OUP, 2004)

6 Why Music Streaming Platforms are Finding it Difficult to Gain Subscribers in Indian Market <https://cmrindia.com/why-music-streaming-platforms-are-finding-it-difficult-to-gain-subscribers-in-indian-market//> accessed 26 January 2023)

understood. It also throws some light on judicial approaches in protection of neighbouring rights from Indian point of view.

What is Neighbouring Right?

The concept of 'Neighbouring Rights' has evolved to confer protection to persons or organisations that make the work available to the public through their enterprise and effort. It encompasses the following categories of rights:

- Rights of Performer.[7]
- Rights of Producers of Phonograms (or Sound Recordings). [8]
- Rights of Broadcasting Organisations. [9]

The WIPO Statement[10] demarcates between copyright and neighbouring rights in the following way: "Whereas the rights provided by copyright apply to authors, 'related rights,' also known as 'neighbouring rights' concern other categories of owners of rights, namely, performers, the producers of phonograms and broadcasting organizations. Related rights are the rights that belong to the performers, the producers of phonograms and broadcasting organizations in relation to their performances, phonograms and broadcasts respectively. Related rights differ from copyright in that they belong to owners regarded as intermediaries in the production, recording or diffusion of works. The link with copyright is due to the fact that the three categories of related rights owners are subservient in the intellectual creation process since they lend their assistance to authors in the communication of the latter's works to the public. A musician performs a musical work written by the composer; an actor performs a role in a play written by a playwright;

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7 Indian Copyright Act 1957, sec 2(qq) states, "performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance."

8 Rome Convention, Art. 3(b) defines a ''phonogram'' as ''any exclusively aural fixation of sounds of a performance or of other sounds''; according to Art. 3(c)) a ''producer of phonograms'' is ''the person who, or the legal entity which, first fixes the sounds of a performance or other sounds''.

9 Cohen Jehoram, 'The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations' 144 RIDA 80

10 WIPO, 'Copyright' <http://www.wipo.int/copyright/en/> accessed 26 January 2023

producers of phonograms, more commonly "the record industry," record and produce songs and music written by authors and composers, played by musicians or sung by performers; broadcasting organizations broadcast works and phonograms on their stations."

(a) Sound Recording: The development of sound recording as a means of spreading the work to general public at large took place at the end of the 19th century and it had a major impact on the whole field of exploitation of author's work. By the end of century, the sound recording was flowering in many countries, singers were heard on records and silent movies were being shown. Soon, the common query that arose in consensus was what rights did authors had in respect of use of their work in new devices? The international law in a very short span of time realised that the authors should be accorded with the exclusive right to authorize the use of their original work in sound recordings and films. Also, the other question that struck to everyone was whether the sound recording should be protected separately from the protection of author's work.[11] And this question was answered in affirmation and in the year 1961 through Rome Convention the development with respect to sound recording took place. Thus a new area of financial importance of author's right in relation to benefits to publishers, performers and record came into existence.[12]

(b) Growth of Piracy: Unauthorized reproduction of copyrighted work has become a common phenomenon now days. The problem of piracy has arisen with the advancement of technology. The emergence of new technologies and techniques in printing or fixation of broadcasting have made things easier for the pirates to carry on their illegal activities which

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11 Morgan (n 3); and Towsen (n 3).

12 WIPO, 'Understanding Copyright And Related Rights' (2016) <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf> accessed 26 January 2023

eventually causes a huge amount of loss to the creators and innovators.[13]

(c)The Advent of Satellite Communication: Entertainment and information services are these days available in increasing volumes[14] on an international assisted by new technologies of wireless broadcasting and cable transmission. Broadcasters used copyright material extensively in their programmes and again the question arose whether the authors had the right to control the new use.

(d)The Advent of Internet: "Worldwide computer linking of electronic databases permits access to and copying of protected material on a massive scale. Digital music attracts music pirates. Digital copying creates high quality sound; unlike analogue tape recordings which degrade rapidly form the first generation. Music pirates can transfer huge music files easily and quickly over the internet with newly developed file compression techniques. The most popular technique is MPEG- Audio Layer-3 (commonly known as MP3).[15]

Development of Neighbouring Rights Relating to Copyright

Twentieth-century developments in music copyright can be organized into three different periods, each one associated with a different international agreement. First was a period in which the rights of composers were formally recognized, unified, and mandated through the Berne Convention for the Protection of Literary and Artistic Works, to which 172 countries have become

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[13] Mengna Liang, 'Copyright Issues Related to Reproduction Rights Arising from Streaming", The Journal of World Intellectual Property Rights' (2020) 23 J World Intellectual Property 798 <https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12175> accessed 26 January 2023

[14] WIPO, 'Summary of the Brussels Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite (1974)' < https://www.wipo.int/treaties/en/ip/brussels/summary_brussels.html> accessed 26 January 2023

[15] Raman Mittal, 'P2P Networks: Online Piracy of Music, Films And Computer Software' (2004) 9 J Intellectual Property Rights 440.

party.[16] During the latter half of the century, a stronger focus was put on the commercial significance of cultural industries as a matter of trade policy, which culminated in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPs Agreement") administered by the World Trade Organization.[17] In between the two was an era of increasing emphasis on the rights of "performers, producers of phonograms, and broadcasting organizations," which reached an apex with the signing of the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations ("the Rome Convention") in 1961.[18] This article will focus on the bundle of rights encompassed by the Rome Convention, a legal mechanism referred to as "neighbouring rights" for its position tangential to the copyright granted to original musical works.[19] While copyright subsists in musical compositions, neighbouring rights establish a right of exclusivity in the recordings of such compositions. That is to say, neighbouring rights protect the performances of musical compositions embodied within phonographic recordings commonly transmitted to the public through radio or other such broadcasting services. The owner of the neighbouring right has the exclusive right to cause the sound recording to be heard in public, to cause the recording to be broadcasted, and to make secondary phonographs embodying the recording or any part of it. The owner of the neighbouring right has the exclusive right to cause the sound recording to be heard in public, to cause the recording to be broadcasted, and to make secondary phonographs embodying the recording or any part of it. Practically speaking, neighbouring rights tend to be collectively administered in order to allow rights holders

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[16] WIPO, 'Berne Convention' <http:// www.wipo.int/treaties/en/ ShowResults.jsp?lang=EN&treaty_id=15> accessed 26 January 2023

[17] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

[18] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter WIPO Rome Convention].

[19] George Howard, 'Neighbouring Rights: What They Are & Why They Matter' (Tunecore Blog, 19 July 2020) <http://www.tunecore.com/blog/2012/07/neighbor ing-rights-what-they-are-why-they-matter.html> accessed 26 January 2023

the ability to monitor and control uses of their works[20] that would be otherwise unmanageable due to the large number of users worldwide. Although the Rome Convention sets an international standard for the protection of music makers' neighbouring rights, performers from different countries or jurisdictions are afforded differing compensatory schemes for the public performance of their sound recordings. After all, while infringement of copyright is actionable by the copyright owner as an infringement of a property right, an infringement of music makers' rights is actionable by the person entitled to the right as a breach of statutory duty.[21]

The structures and modes of organization behind the delivery of neighbouring rights monetization pose barriers for performers or for collective rights administration organizations by introducing inefficiencies,[22] increasing costs, and minimizing net funds payable from music users to performers through unequal negotiation of applicable tariffs or inadequate licensing of music-using businesses, a more unified system of neighbouring rights could compensate for, or at least isolate, variables inherent to a non-integrated international system of collective rights administration. Fragmented international neighbouring rights frameworks impact the fairness afforded both to performers, whose music may be compensated differently dependent on the territory of the use, and music users, who may be required to pay neighbouring rights collective's different rates of compensation than their business colleagues in other jurisdictions. The challenge facing Canadian copyright reformers, and the challenge motivating this article,

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[20] There are around sixty collecting societies around the world focused on sound recording performance royalties. Globally, sound recording performance rights are administered by music licensing companies or collecting societies. These organisations are responsible for negotiating rates and terms with users of sound recordings (e.g., broadcasters, public establishments, digital service providers) collecting royalties and distributing those royalties to performers and sound recording copyright owners. See, e.g., Annabelle Gauberti, 'Neighbouring Rights in the Digital Era: How the Music Industry Can Cash In' < https://crefovi.com/articles/neighbouring-rights-in-the-digital-era/> accessed 26 January 2023; Re: Sound Music Licensing Company <http://www.resound.ca> accessed 26 January 2023

[21] Infringement of copyright is treated as an infringement of property right actionable by the copyright owner. An infringement of performers' rights and of the rights of a person having recording rights is actionable by the person entitled to the right as a breach of statutory duty.

[22] Morgan (n 3); Schechner, *Performance Theory* (Routledge 1988)

therefore, is to identify areas of legal disparity, to suggest suitable approaches to institutional change, and to therefore attempt to balance international differences to create a more coherent cross-border neighbouring rights framework. That challenge is a reflection of broader trends in the shifting context of modern governance, including those of globalization and resulting modernization of the administration and organization of government.[23]

International Legal Regime

Rome Convention, 1961

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961, (the 'Rome Convention'), administered by WIPO, is the first landmark convention protecting neighbouring rights as the title itself indicates.[24] The minimum term of protection under the Convention is a period of twenty years, to be computed from the end of the year in which the fixation was made, as far as phonograms and performances incorporated therein are concerned, or the performance took place, as regards performances not incorporated in phonograms, or the broadcast took place, for broadcasts.[25]

Agreement on Trade Related Aspects of Intellectual Property (TRIPS), 1994.

The TRIPS agreement, concluded in the1994 as a part of the Uruguay Round of negotiations under the WTO contains provisions on the protection of neighbouring rights. Under the Agreement, related rights are provided to the performers, producers of phonograms and broadcasting organizations. The convening point of the TRIPS provisions on copyright is that all the members must comply with the substantive provisions[26] of the Berne Convention,

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[23] Andrew Gamble & Robert Thomas, The Changing Context of Governance: Implications for Administration and Justice in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing 2010) 6

[24] WIPO 'Guide to the Rome Convention and the Phonogram Convention' (1981) 12

[25] Rome Convention 1961, art. 14

[26] Article 1 to 12 of Berne Convention deals with Substantive Provisions.

other than the provisions of the moral rights. By contrast, in sphere of neighbouring rights there is no equivalent incorporation of Rome Convention or the Phonograms Convention; instead the TRIPS Agreement has its own code of obligations relating to performers,[27] sound recording producers and broadcasting organisations.[28] Under TRIPS, performers were given rights against fixation of their unfixed performances in phonograms but not in audio-visual fixation.[29] In the post TRIPS period, new issues had arisen out of the advancement of digital technologies. Performers were equally vulnerable to the misappropriation of their rights due to communication or reproduction through the internet. Negotiations were held and a treaty concluded that is, WIPO Performances and Phonograms Treaty (WPPT) 1996. This treaty replaces the Rome Convention, 1961 in respect of the performers' rights.

WIPO Performances and Phonograms Treaty (WPPT), 1996

This treaty was adopted at a Diplomatic Conference in Geneva in December 1996. As the title indicates, the WPPT in general deals with intellectual property rights of two kinds of beneficiaries: a) performers and b) producers of phonograms.[30] The definition clause of this treaty also defines 'fixation' and 'communication to the public' which is not defined in the Rome Convention. This treaty provides for improved protection for performers, producers of phonograms; however, an area of major concern is that its general application to audio visual performances

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[27] Article 14 deals with the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: a) the fixation of their unfixed performance b) the reproduction of such fixation c) broadcasting by wireless means d) communication to the public of live performance. Producers of Phonograms are entitled to authorise or prohibit the direct or indirect reproduction of their phonograms.

[28] Rajnish Kumar Singh, 'The Status of Phonogram Producers under Indian Copyright Law' (2010), 5 J Intellectual Property Law & Practice, 429

[29] Besen, Stanley M., and Kirby Sheila, 'Private Copying, Appropriability, and Optimal Copying Royalties' (1989), *32* J L & Economics 255

[30] Marshall A. Leaffer, *Understanding Copyright Law* (5th edn, Carolina Academic Press, 2011) 585

is excluded.[31] The term of protection for performers is 50 years from the end of the year in which the performance was fixed in a phonogram and moral rights must last at least until the expiry of performers' economic rights.[32]

The Beijing Treaty on Audio visual Performances, 2012

The diplomatic conference to finalize a new treaty for audio visual performers was successfully concluded on June 26, 2012 as negotiators from WIPO's member states signed the Beijing Treaty on Audio visual Performances. The new treaty brings audio visual performers into the fold of the international copyright framework in a comprehensive way, for the first time. The treaty is yet to come into force but is important as it will strengthen the precarious position of performers in the audio visual industry by providing a clearer international legal framework for their protection. For the first time it will provide performers with protection in the digital environment. The treaty will also contribute to safeguarding the rights of performers[33] against the unauthorized use of their performances in audio visual media, such as television, film and video.

India

The Indian law on Copyright on neighbouring rights in included in the Copyright Act, 1957. The act keeps phonogram in the same chapter along with the authorial works and thus treats it as a copyrighted work and not as an entrepreneurial work. The definition of the author of phonogram[34] also suggests that since the

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[31] Govt. of India, 'Cabinet approves accession to WIPO Copyright Treaty,1996 and WIPO Performers and Phonograms Treaty, 1996' (Press Information Bureau, 4 July 2018) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=180389> accessed 10 January 2023.

[32] Understanding Copyright and Related Rights (2016) WIPO, 27-28.

[33] A performer is given clearer rights under Articles 6 to 11 of the treaty, which are: (i) The right to fix his unfixed performance, right of reproduction, (ii) right of distribution, right of rental, right of making available of this fixed performance. Broadcast or communicate to the public his unfixed performance. (iii) Broadcast or communicate to the public his fixed performance.

[34] The Copyright Act 1957, sec. 2(d)(v)

producer is an author, phonogram is not considered as a subject matter of related rights category.

Copyright Act 1957 of India has been significantly amended in the year 2012. This amendment brought Indian copyright law into compliance with the World Intellectual Property Organization "Internet Treaties."[35] This was the 6th amendment done to the copyright Act 1957, before this amendment in the year 1983, 1984, 1992, 1994 and 1999 amendment has been done to the copyright Act to meet with the national and international requirements.[36] The 2012 amendments make Indian Copyright Law compliant with the Internet Treaties the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).[37] The major significance of this amendment is that this also brings technological protection measures; the amended law ensures that fair use survives in the digital era by providing special fair use provisions. The amendments have made many author-friendly changes, special provisions for disabled, amendments facilitating access to works and other amendments to streamline copyright administration.[38]

This amendment brought good fortune to all the singers as can be read in sections 38 and 39 of the Act.[39] The creativity in a song is now well recognized and the singers' can avail royalties from the exploitation of their performances commercially according to section 38-A. The Act provides for further economic rights of performers and such performers' rights subsist for 50 years from the date of the performance. It also brought about a number of changes in respect of rights of composers, lyricists and performers. Section

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[35] Development in Indian IP Law: The Copyright (Amendment) Act 2012 (Intellectual Property Watch, 2013) <https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-thecopyright-amendment-act-2012/> accessed 26 January 2023)

[36] Zakir Thomas, 'Overview of Changes To The Indian Copyright Law' (2012), 17 J Intellectual Property Rights 324

[37] 'The Impact of the 2012 Amendments On The 1957 Copyright Act' (In Content Law, 2017) <http://copyright.lawmatters.in/2012/06/impact-of-2012-amendments-to-copyright.html> accessed 26 January 2023

[38] Pranesh Prakash, 'Analysis of The Copyright (Amendment) Bill 2012' (The Centre for Internet and Society, 23 May 2017) <https://cisindia.org/a2k/blogs/analysis-copyright-amendment-bill-2012> accessed 26 January, 2023

[39] Indian Copyright Act 1957, sec. 39 A (inserted by Copyright (Amendment) Act 2012, Clause 28

39 of the Act identifies those instances when an act shall not amount to infringement of neighboring rights (Broadcasters' and Performers' rights). Section 39A,[40] that came in force on 10.05.1995 by amendment Act of 1994 makes applicable other specific provisions of the Copyright Act, 1957 which is as follows. Before this, it could be pertinently noted that Section 53A has not been made available to those holding neighboring rights, which creates a presumption that in cases of neighboring rights either there is no possibility of resale or such works have no economic value so that owners could get something during resale. The ownership of copyright in a given song or piece of music involves several aspects.[41] The lyrics of the song can be protected as literary work and the owner of the copyright is the lyricist. The music of the song can be protected as a musical work and the owner of the copyright is the composer. The song together with music and lyrics which is recorded can be protected as a sound recording and the owner of the copyright will be the producer of the sound recording (the record label).[42] However, with the amendment, performers' rights have been recognized and these rights shall run parallel with the rights of the Composers/Songwriters & Producers/Music Companies.

United States

The United States Copyright Act of 1976 establishes the exclusive rights[43] in a work afforded to copyright owners. In contrast to other forms of copyright subject matter, music makers' sound recordings are not, within the Copyright Act of 1976, granted a general public performance right which would allow owners to collect royalties when their works are performed publicly; that is to say, the Copyright Act of 1976 does not establish a generalist bundle

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[40] Other provisions applying to broadcast reproduction right and performer's right: Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work: PROVIDED that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, no licence to reproduce such broadcast, shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them.

[41] Parliamentary Debates on the Copyright Amendment Bill 2010, LP/6:30/4d, 29-30

[42] Arnold R, *Performers Rights* (4th ed. Sweet and Maxwell 2008) 1.03.

[43] United States Copyright Act 1976, sec. 106

of neighbouring rights in sound recordings.[44] Rather, the public performance right in sound recordings is recognized solely with respect to digital transmissions as established within the 1995 Digital Performance Right in Sound Recordings Act ("DPRA") and modified within the 1998 Digital Millennium Copyright Act ("DMCA").[45] The DPRA grants owners of copyright in sound recordings the exclusive right to the digital public performance of their works, and the DMCA responds to a number of copyright issues raised by the then-newly overwhelming impact of the Internet on all types of copyright subject matter.[46] Ostensibly in recognition of the impossibility of policing endless content, the DMCA removed liability for Internet service providers whose servers transfer potentially infringing data. Therefore, with any Internet transmission, the only parties to which the owners of sound recordings may look are those who broadcast or otherwise make material available on the Internet, and, to a lesser extent, those who access it. All of this is to say that the United States does not recognize the public performance right when sound recordings are broadcasted over AM and FM radio, and accordingly, American

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44 9 17 U.S.C. § 106 (2012)

45 Marc Jacobson and Greenberg Traurig, 'Digital Performing Rights in Sound Recordings: The U.S. Experience' (Marc Jacobson PC, July 2002) <https://www.marcjacobson.com/uncategorized/digital-performing-rights-in-sound-recordings-the-u-s-experience> accessed 27 January 2023

46 See, Digital Millennium Copyright Act, 1998. The specific features of this Act are as follows: this Act makes acts a crime that circumvent anti-piracy measures built into most commercial software; Outlaws the manufacture, sale, or distribution of code-cracking devices used to illegally copy software; Does permit the cracking of copyright protection devices, however, to conduct encryption research, assess product interoperability, and test computer security systems but US courts have opined otherwise as well; Provides exemptions from anti-circumvention provisions for non-profit libraries, archives, and educational institutions under certain circumstances; In general, limits Internet service providers from copyright infringement liability for simply transmitting information over the Internet; Service providers, however, are expected to remove material from users' web sites that appears to constitute copyright infringement; Limits liability of non-profit institutions of higher education -- when they serve as online service providers and under certain circumstances -- for copyright infringement by faculty members or graduate students; Requires that "webcasters" pay licensing fees to record companies; Requires that the Register of Copyrights, after consultation with relevant parties, submit to Congress recommendations regarding how to promote distance education through digital technologies while "maintaining an appropriate balance between the rights of copyright owners and the needs of users;" States explicitly that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use..."

recording artists do not receive royalties when their songs are played over terrestrial radio. The Copyright Royalty Board sets American digital performance royalties, which differ in their conditions and rates for different uses, including satellite radio, music streaming, and Internet broadcasts of terrestrial radio, but not "interactive" streaming services wherein the user selects his or her choice of music on demand.[47] Forty five per cent of performance royalties are paid directly to the featured performer or performers on the recording, 50% of royalties are allocated to the copyright holder, which is usually the performers' record label, and the remaining 5% of royalties are allocated to funds for non-featured musicians and vocalists (i.e., backup musicians, background vocalists, and session players).[48]

Europe

In Europe, a key feature of the current copyright framework is the European Union, which has introduced several directives covering most aspects of the substantive law of copyright and related rights.[49] A directive, in the European Union context, is a legal act of the European Union requiring Member States to achieve a particular legal result without dictating the specific means of achieving that result.[50] European Union law making in the copyright and neighbouring rights field, through the legal and socio-political regime enabling directives of the European Union, takes place within an established international legal framework that individual institutions of European Union Member States are collectively mandated to recognize and strive to implement. Key aspects of that

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[47] Copyright Royalty Board, Rate Proceedings <https://www.loc.gov/crb/rate> accessed 26 January 2023. Interactive music streaming services' royalties are privately negotiated, but because the medium is new and each service's success is entirely reliant on the quality of its catalogue, music makers have been able to negotiate favourable royalty rates from those services. Spotify, for example, pays 70% of its earnings to record labels and publishers. See Micah Singleton, 'This Was Sony Music's Contract with Spotify' (The Verge 19 May 2015) <http://www .theverge.com/2015/5/19/8621581/sony-music-spotify-contract> accessed 26 January 2023

[48] Nimmer, David, 'On the Absurd Complexity of the Digital Audio Transmission Right' (2000), 7 UCLA Entertainment LR 189

[49] Justine Pila and Paul Torremans, *European Intellectual Property Law* (OUP 2016) 243

[50] European Union Directives, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14527> accessed 26 January 2023

legal situation with respect to copyright law are the TRIPs Agreement and WIPO Treaties, each of which the European Union has ratified. Two further international legal instruments to which the European Union has committed, and which underpin its law and policymaking in the neighbouring rights field, are the Rome and Berne Conventions.[51] These conventions have been acceded to by all Member States, and are the explicit bases of the WIPO Treaties and several of the European Union's copyright and related rights directives. Three directives have been instrumental in developing a harmonized legal framework throughout the European Union with regard to neighbouring rights: first is Council Directive 93/83EEC of 27 September1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, and second is Council Directive 93/98/EEC of 29 October 1993 later replaced by Directive no. 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights.[52] Third is Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("Information Society Directive 2001"), which contains a basic legislative code governing the recognition and protection of copyright and related rights throughout the European territory. Its provisions, and the referring obligation of Member States' courts under Article 267 of the Treaty on the Functioning of the European Union, have led the Court of Justice of the European Union ("CJEU") to assume a central role in European copyright law. Information Society Directive 2001 is especially important as it represents the closest proximity to a complete European copyright and related rights code, mandating that Member States provide music makers with the exclusive right to prohibit direct or indirect, or temporary or permanent reproduction of their sound recordings by any means and

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[51] WIPO-Administered Treaties: Contracting Parties, Rome Convention <http://www.wipo.int/treaties/en/Show Results.jsp?lang=EN&treaty_id=17> accessed 26 January 2023).

[52] European Comm'n, Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances 19 (2015) (SMART 2015/0093)

in any form.[53] Member States, under Information Society Directive 2001, are required, therefore, to grant wholesale rights to music makers over their sound recordings. Each of the legal instruments referenced above are binding on European Union Member States,[54] not citizens, meaning they cannot be invoked directly by individuals as a source of legal rights or obligations in legal proceedings. And furthermore, they are only binding on states as to their effects, not to the form and method of their implementation.[55] But the practical realities of European Union law making are such that Member States' discretion when implementing directives is substantially limited. The limitations imposed on European Union Member States are particularly evident within the domestic trial and appellate courts, which are obligated to give substantial deference to European Union directives and CJEU interpretation of legal issues present therein.

An Overview of Copyright Societies in India which are working for Protection of Neighbouring Rights:

Over the past one decade there are numerous cases are filed by copyright societies in relation to payment of royalties.[56] Following are the major copyright societies which holds lion share of music labels. They are:

(i) Phonographic Performance Limited (PPL):

It is an 80 years old establishment popularly known as PPL India,[57] it is a music licensing company that control/ owns on

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[53] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P 0010-0019 at Article 2

[54] The European Union member states in the top ten neighbouring rights revenue generating countries — the United Kingdom, France, Germany, the Netherlands, and Norway

[55] European Union Directives, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14527> accessed 26 January 2023

[56] S. Chakraborty, A Tussle Between Copyright Societies and Judiciary, https://ipbulletin.in/copyright-societies-and-judiciary/, accessed 20 March 2023

[57] Saba A Critique on Copyright Societies under the Copyright Act 1957 https://www.scconline.com/blog/post/2018/03/14/a-critique-of-the-provisions-on-copyright-societies-under-the-copyright-act-1957/, accessed 20 March 2023

ground performance rights of more than 350 music labels controlling over 4 million domestic and international sound recordings in several languages like Hindi, English, Punjabi, Tamil, Telugu, Kannada, Haryanvi, Bhojpuri, etc. It controls rights for on ground usage of recorded songs of some of the biggest record labels, such as Aditya Music, Ananda Audio, Divo, Diljit Dosanjh, Lahari Music, Saregama, Sony Music, Sonotek, T-Series, Times Music, Universal Music, Warner Music, and many more.

(ii) Indian Performing Right Society Limited (IPRS):

The IPRS came into existence on 23rd August 1969. The IPRS is a representative body of Owners of Music, viz. Composers, Lyricists (or Authors) and the Publishers of Music and is also the sole authorized body to issue Licences for usage of Musical Works & Literary Music within India.[58] IPRS is to legitimize use of copyrighted Music by Music users by issuing them Licences and collect Royalties from Music Users, for and on behalf of IPRS members i.e., Authors, Composers and Publishers of Music. Royalty thus collected is distributed amongst members after deducting IPRS's administrative costs. Composers are those who are better known as Music Directors, Authors are better known as Lyricists, Publishers of Music are the Music Companies, or those who hold Publishing Rights of the Musical & Literary Works. [59]Authors and Composers are sometimes referred to as Writers which can mean any or both of them. The Company has its Registered and Corporate Office at Mumbai with branch offices at Delhi, Chennai and Kolkata through which, the Society carries on its licensing activities.

(iii) Indian Reprographic Rights Organisation (IRRO) :

It is a copyright society authorised by the Ministry of Commerce and Industries, Government of India, to work towards the protection of published literary works. It represents the rights of authors and publishers of literary works, and has global affiliations

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[58] https://iprs.org/about-iprs/, accessed 27 January 2023

[59] Mathew P. George, Formation of a New Copyright Society in Cinematographic Films, https://spicyip.com/tag/copyright-societies, accessed 20 April 2023

with international organisations like IFRRO. Registered by the Ministry of Commerce and Industries, Government of India, IRRO is exclusively permitted to commence and carry on the copyright business of "reprographic rights in the field of literary works" in India. [60] It is the sole licensing authority to issue licenses to users of copyrighted works of its members, collect royalties on the behalf of rights owners and distribute them. This includes magazines, books, and journals supplied by a licensed third party. The licenses provide a cost-effective way to manage the risk associated with using and reproducing copyright materials. IRRO issues blanket licenses to organisations – the licenses are issued on an annual basis, subject to an annual fee, and includes an indemnity from IRRO for all copying done within the terms and conditions of the license. Thus, IRRO provides users a one window for giving licenses for photocopying thereby avoiding the need for the users to run from pillar to post to get such licenses to copy on an individual basis. IRRO also collects data from various surveys or other data collecting technique and then prepares a distribution scheme based on collected data.[61]

IRRO has already signed bilateral agreements with 22 major Reprographic Rights Organisation (RROS) of the world including UK, New Zealand, Russia, Italy, Japan, Spain, Switzerland, Denmark, Norway, Argentina, South Africa and others. IRRO is also in the process of signing bilateral agreements with many more RROs.

(iv) Indian Singers Rights Association (ISRA):

The Copyright Act, 1957 was amended last in 2012 and came into effect from 21st June, 2012. The amendments were historic in a way that they amended the provision regarding "Performers" to protect

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[60] Sirat Kaur, Battle Between Indian Copyright Societies Sparks Question: How many Copyright Societies Does a Country Need?, https://asiaiplaw.com/article/battle-between-indian-copyright-societies-sparks-question-how-many-copyright-societies-does-a-country-need, accessed 15 March 2023

[61] Akshat Agrawal, 'Interpreting "Performers Rights" in The Indian Copyright Act to Appropriately Provide for Singers Rights' (2021) 26 J Intellectual Property Rights 5, https://pure.jgu.edu.in/id/eprint/368/1/JIPR2021.pdf, accessed 15 March 2023

their interests in line with India's international commitments.[62] It strengthened the "Performer's Right" in India which now are in harmony with Article 14 of the TRIPS Agreement as also is compatible with Articles 5 to 10 of the WPPT. The Performers' Rights subsist for 50 years from the date of performance. Their Creativity in a Song is now recognized and they have now started getting Royalties from the Exploitation of their Performances. The entire fraternity of Singers thanks the Government of India for meting out the long sought for copyright justice to the Singers of India.

Section 38A was introduced and provides for Economic Rights to Performers such that without prejudice to the rights conferred on Authors, the Performer's Right have an exclusive right.[63] The "Performers Right" is a newly born Right. However, Composers/Songwriters, Producers & Music Companies need not have to worry because Rights of both Composers/Songwriters & Producers/Music Companies and the Performers will run parallel as both are entitled for economic benefits from the commercial use of the performance.

It has also been expressly provided that once a Performer has by written agreement consented to the incorporation of his performance in a Film, the Performer cannot object to the enjoyment by the Producer of the Film of the Performers' Rights in the same film, unless there is a contract to the contrary.

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[62] Role of Copyright Societies in IPR Protection: An Appraisal, https://www.lawordo.com/role-of-copyright-societies-in-ipr-protection-an-appraisil/, accessed 20 April 2023

[63] Section 38A of the Act confers an exclusive right upon performers to do or authorize the doing of any of the following acts in respect of the performance or any substantial part thereof:

- to make a sound recording or a visual recording of the performance;
- to reproduce the performance in any material form including the storing of it in any medium by electronic or any other means;
- to issue copies of the performance to the public not being copies already in circulation;
- to communicate the performance to the public;
- to sell or give the performance on commercial rental or offer for sale or for commercial rental any copy of the recording and;
- to broadcast or communicate the performance to the public except where the performance is already a broadcast.

Further, Section 38 B gives Moral Rights to Performers. The Performer will have the right to claim to be identified as the Performer of his performance except where omission is dictated by the manner of the use of the performance.[64] He will also have the right to restrain or claim damages in respect of any distortion, mutilation or other modifications of his performance that would be prejudicial to his reputation. However, the law clarifies that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the reputation of the Performer.[65]

Thus, the Performers are now entitled to receive Royalties in case of making of the performances for commercial use, where the performance is utilized in any form other than for the communication to the public of the performance along with the Film in a cinema hall.

Thus, after the Amendments, the Performers got together and as required by the Act, started the process of forming a Copyright Society which could collect and distribute their Royalties to them. ISRA (Indian Singers' Rights Association) was incorporated as a Company Limited by Guarantee under the Companies Act, 1956 on 3rd May, 2013.[66] Thereafter, ISRA (Indian Singers' Rights Association) filed for Registration as a Copyright Society as per Section 33 of the Copyright Act and received its Certificate of Registration from the Central Government on 14th June, 2013 for 5 years. Thereafter, the registration was renewed for a further period of 5 years. ISRA has also taken several initiatives

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[64] The Performer will have the right to claim to be identified as the Performer of his performance except where omission is dictated by the manner of the use of the performance. He will also have the right to restrain or claim damages in respect of any distortion, mutilation or other modifications of his performance that would be prejudicial to his reputation. However, the law clarifies that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the reputation of the Performer.

[65] Jain Sankalp, 'Copyright (Amendment) Act, 2012- A Shot in the Arm for the Performers' (July 16, 2020) <https://ssrn.com/abstract=3654022> accessed 27 January 2023

[66] https://www.isracopyright.com/about_us, accessed 20 January 2023

for protecting rights of its members. It has issued nearly 750 claim letters since its creation in 2012 to restaurants, hotels, production houses, radio stations, TV channels, mobile operators, web sites, DJ events, and sporting events. The aim so far has been to educate and then collect royalties for singers, as the performer's right is a fairly new right.[67]

(v) M/S Recorded Music Performance Limited (RMPL):

Recorded Music Performance Limited (RMPL) is a Registered Copyright Society for Sound Recordings works in India by DPIIT, Ministry of Commerce & Industry, Govt. of India.[68] We are authorized by our members (i.e., copyright holders) to issue non-exclusive licenses for the Radio Broadcasting, Telecasting and Public Performance of our members' sound recordings. The collected amount is distributed to member music labels, after adjusting or meeting costs, expenses and other outgoings. For this purpose, RMPL is entitled to defer adjustments of some of the costs to next year, if the benefit of such costs would continue to accrue in next year also. Copyright royalties collected from music users are distributed to copyright owners/members of a Society. Ensuring that the distribution is carried out in an equitable manner is RMPL's obligation to those who have entrusted the administration of their copyrights to RMPL, as well as its duty to music users who pay the royalties. In general, royalties are distributed according to music usage reports submitted by music users. In categories such as performances by means of phonograms at bars and nightclubs, a large number of musical works are continuously used every day and it is difficult to receive program returns for all the works used. For such categories, distribution is based on data gathered through statistically reliable random sample surveys carried out under the supervision of expert statisticians. To make the distributions more accurate, music usage reports are also gathered directly from facilities which performances changes on a day-to-day basis, such as clubs, Lounges etc.

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[67] Copyright Act 1957, sec. 38B(b) explanation

[68] On June 18 2021, the Registrar of Copyrights has granted due registration to RMPL as a Copyright Society under sub-section (3) of Section 33 of the Copyright Act, 1957 with the Registration No. CS/03/SOUNDRECORDING/18.

A Conceptual Analysis of Judicial Interpretation on Neighbouring Copyrights – Indian Perspective:

The judiciary has also been proactive in enforcing the performer's rights. The Courts held that playing songs in the restaurant for two hours without obtaining the Clearance Certificate or without paying royalty constituted infringement of the Copyright Law. In ***Indian Performing Rights Society v Eastern India Motion Pictures Association,***[69] where he remarked "In a musical work copyright is not the soulful tune, the super singing, the glorious voice or the wonderful rendering. It is the melody or harmony reduced to printing, writing or graphic form. Author as defined in section 2(d) in relation to a musical work is only the composer and section 16 confines copyright to these works which are recognized by the Act. This means that the composer alone has copyright in a musical work. The singer has none, although the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician."[70] This case law is very prominent in the development of status of performers' as the Supreme Court of India emphasised on providing protection to the works of the creative artists like singers other than the traditional protected entities. Though this case to an extent dealt with the rights of musicians like lyricist and music composers but also pointed out the way other recognised individuals under the protection of copyright law are treated in the entertainment or bolly wood industry and as a result of consequence such other individuals that also should be endowed with a similar protection under the copyright law in future.

In ***Neha Bhasin Vs. Anand Raj Anand &Anr.***,[71] wherein it was held that the object of Copyright law is to is to protect and reward the creativity and efforts of author and delimiting the scope of the definition would leave numerous Performers un-credited for their creations, elucidated that *every performance in the first instance necessarily has to be live and whether it is in a studio or before an audience is immaterial,* thereby including studio

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69 AIR 1977 SC 1443 at 1453

70 *Ibid*

71 2006 (32) PTC 779 (DEL)

recordings under the ambit of Section 2(q). At the perusal of this notion evolved by the Judiciary, The Copyright Rules, 2013 elucidated the term 'Performance' under Rule 68, Explanation 3 as to include *recording of visual or acoustic presentation of a performer in the sound and visual records in the studio*. Hence, the expression 'made live' was interpreted to encompass visual and acoustic performances, both live and recorded in studios.

Suresh Jindal v. Rizsoli Corriere Della Sera Prodzioni T.V., S.P.A,[72] where the Supreme Court had found that the appellant was entitled to due acknowledgement being given to him as the appellant did "play some part in making the film possible" whether there was a concluded contract between them or not. It was also held that suitable compensation instead of granting the interim injunction would not be an adequate remedy.

Delhi High Court established in ***Super Cassettes Industries v. Bathla Cassette Industries***[73] that performers' rights were essentially different from copyright and held that rerecording of a song without permission from the original performer constituted an infringement of performers' rights, thereby taking a large leap towards performer protection jurisprudence in India. The 2012 amendment has brought about drastic changes in the rights of performers. It has inserted sub- section 38A to accommodate the advancement in technology with respect to performer's rights.

Music Broadcast Private Limited* V. *Indian Performing Right Society Limited [74] has held that the owner of copyright in relation to lyrical and musical works are not entitled to receive royalty/license fee for broadcasting of sound recording embodying such underlying (i.e., lyrical and musical) works.

The Plaintiff carries on the business of, *inter alia*, establishing, operating and maintaining FM radio broadcasting stations in various cities in India. The Plaintiff and some of the other operators have mooted the stand that payment of royalty to PPL for

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72 AIR1991SC2092
73 107 (2003) DLT 91
74 Suit no. 2401 of 2006

broadcasting the sound recordings is sufficient and no separate royalty should be paid to IPRS for broadcasting of the underlying works i.e., the lyrical and musical works as a part of the sound recordings. In a welcome relief to such parties especially the FM radio operators and similar licensees of the repertoire of the two copyright societies, the Bombay High Court has upheld this legal proposition in the present case thereby settling the debate that had inundated the industry for years and which had majorly affected the revenues and profitability of the FM radio stations. The Bombay High Court opined that copyrights under the Act can only be claimed and protected to the extent provided for in the Act. It held that the Act recognizes sound recording (created by incorporating the Underlying Works) *as an independent class of copyrightable work.* There is no need for the owner of a sound recording to obtain a license and pay royalty or license fees to the owners of the Underlying Works prior to communicating such recordings to the public in exercise of the rights under Section 14(1)(a)(iii) of the Act. Therefore, IPRS is not entitled to claim any Fees from the Plaintiff for broadcasting sound recordings via FM radio stations.

As explained by the Delhi High Court recently in ***Akuate Internet Services v. Star India Pvt. Ltd.***,[75] it was in the wake of 'livelihood threatening technological changes' that the law intervened in 1994 to recognise performer's rights and broadcast reproduction rights. Dismissing Star's contention that the language of Section 16 ('… copyright or any similar right in any work') itself recognises the existence of rights akin to copyright, the court held that the expression 'similar rights' referred to performers and broad casters rights, which are specifically provided under Chapter VIII of the Copyright Act. The court was also not convinced with Star's further argument that the pre-emption under Section 16 does not apply to broadcast and neighbouring rights and observed that Chapter VIII was introduced in order to give limited protection to broadcast rights which are akin to copyright (since its absence meant that those rights were precluded by Section 16). Thus, as a natural consequence, all those limitations that apply to copyrights would

[75] MIPR 2013 (3) 1

apply in the case of copyrighted works which are also the subject of broadcast rights.

Phonographic performance India limited v. Union of India case (2022)[76]- Issue in the case was whether the Registrar of Copyrights has the power to grant licences over and above those directed by the Copyright Board. The Delhi High Court did not decide this issue as it observed that the petitioners had challenged the very decision of the Copyright Board before the Madras High Court and therefore deciding this issue, in the present case is a debatable issue. The petitioner being a copyright society was assigned copyright in various sound recordings for communication to public in the areas of public performance and broadcast. The Petitioner owned and/or controlled the public performance rights of 350+ music companies, with more than 3 million international and domestic sound recordings; being an oldest and the largest copyright society in the country. The petitioner represented about 80-90% of sound recordings ever created in the country. The Petitioner served a useful public utility of acting as a "single window" to various parties seeking license for authorised use of sound recordings and bring together the copyright owners and users across various parts of India for better convenience and better administration. The Delhi High Court on Wednesday set aside an order of the Central government rejecting re-registration application of Phonographic Performance Limited (PPL) as a Copyright Society thereby directing the government to reconsider the application in a 'reasonable time.'

In the case of ***Indian Singer's Rights Association "ISRA" vs. Night fever club and lounge,***[77] The ISRA, the plaintiff in the suit is a company limited by guarantee and registered under Section 25 of the Companies Act 1956. The plaintiff filed for Registration as a Copyright Society as per Section 33 of the Copyright Act and received its Certificate of Registration from the Central Government. It was in fact one of the 1st Copyright Societies to be registered by the Central Government after the 2012 amendments to

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[76] 03 DEL CK 0034

[77] CS (OS) No. 3958 of 2014

the Copyright Act.[78] The members of the Plaintiff society are reputed singers and owners of the performers' rights in the songs performed by them. Besides exclusive Performer's right, each singer also has the inalienable Right to Receive Royalty (the R3) under section 38A of the Act for the commercial exploitation of their performance as a Singer. [79]Each member of the Plaintiff society has a Deed of Exclusive Authorization (DEA) authorizing the Plaintiff in respect of their R3 under Section 38A of the Act. The Plaintiff is, therefore, the exclusive owner of the performance rights for its members.

The Defendant, Chapter 25 Bar and Restaurant, through an investigation conducted by the Plaintiff was found to be playing songs containing the performances of singers belonging to the Plaintiffs repertoire in the month of April 2015. Original CDs comprising of the infringing songs were submitted as evidence before the Court and was taken on record as it was in compliance with section 65-B of the Evidence Act, 1882. The Plaintiff addressed a cease-and-desist notice dated April 16, 2015 to the Defendant directing it to obtain a "Performers" Rights Clearance Certificate" from the Plaintiff. However, the Defendant did not comply with such notice.[80] The public performance of the Plaintiffs' repertoire at the Defendants' Bar and Restaurant without permission of the Plaintiff and without payment of royalties is an infringement of the Plaintiffs' Performers' Right and further a violation of the R3.

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[78] Under section 38 A (1) of the Copyright Act 2012, performers' right is an exclusive right which includes the right to make a sound recording or a visual recording of the performance including "communication of it to the public". The proviso to Section 38 (2) of the Act further states that notwithstanding anything contained in the said sub-section "the performer shall be entitled for royalties in case of making of the performances for commercial use." The fourth proviso to Section 18(1) states that "Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void."

[79] Kiran George "Right of Publicity in India – An Unfinished Story" SpicyIP (SpicyIP.com, 2016) https://spicyip.com/2016/01/rightof-publicity-in-india-an-unfinished-story.html accessed 10 May 2023

[80] M. Sai Krupa, 'Personality Rights In Indian Scenario - Intellectual Property - India' (Mondaq.com, 2018) https://www.mondaq.com/india/trademark/677226/personality-rights-in-indian-scenario?signup=true accessed 12 May 2023.

Accordingly, both the Plaintiff and its members were suffering loss of their legitimate dues because of the Defendants' refusal to pay the license fee to the Plaintiff.

Learned Counsel appearing for the Plaintiff, Mr. Pravin Anand directed attention to the Plaintiffs' rights and presented graphical depiction of the rights construed in a performance throwing light on the amendments of the 2012 Act. Furthermore, Explanation 3 of Rule 68 of the Copyright Rules, 2013 enunciates that performance includes recording of visual or acoustic presentation of a performer in the sound and visual records in the studio or otherwise. In lieu of the facts and circumstances of the case, the Court confirmed that the Defendant was infringing the Plaintiffs' and its members' rights. The exploitation of the performances of the members of the Plaintiff society by the Defendant which was playing the plaintiff members' performances in its bar and restaurant without obtaining the Performers' Rights Clearance Certificate and without payment of royalties to the Plaintiff is a violation of the R3 of the performers of the Plaintiff society and thus constitutes an infringement of the R3 of the members of the Plaintiff Society.[81]

Thus, a decree of permanent injunction was issued restraining the Defendant from communicating to the public the Plaintiffs repertoire comprising of performances of all its members without paying royalties to and obtaining a clearance from the Plaintiff Society or doing any other act infringing the Plaintiffs Performers' rights through any medium and violating their Right to Receive Royalties and their Performers' Rights. [82]The Defendant was further required to render to the Plaintiff the accounts of all the monies earned by it from the performance of the Plaintiff members' repertoire. The suit was decreed with costs of Rs. 20,000 to be paid by the Defendant to the Plaintiff within the stipulated time of four weeks.

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[81] Copyright Act 2012, sec. 38A

[82] Gourav Trivedi, Explained: Rights of Performers under Indian Copyright Law, https://lexlife68840978.wordpress.com/2021/06/03/analysis-rights-of-performers-under-indian-copyright-law/accessed 20 March 2023

The neighboring has been given judicial recognition by the Indian Courts. Indian judiciary has also been proactive in enforcing the neighbouring rights. The Delhi High Court held that playing songs in the restaurant for two hours without obtaining the Clearance Certificate or without paying royalty constituted infringement of the Copyright Law. The Courts in leading Judgments clarified that[83] any public performance of a song, even at a public event that did not charge a price of admission, needs a No Objection Certificate (NOC) from the collecting society, and payment of royalties.

In ***Kajal Agarwal v. The Managing Director, V.V.D. & Sons Pvt. Ltd***.[84] in the light of the facts and the relevant provision introduced by the Amendment Act of 2012, it was held by the Hon'ble High Court of Madras that the Appellant consented to incorporate her performance as an actress in the ad film produced by the Respondent and therefore, the latter could not be stopped from enjoying the producer's right in respect of that film. Taking note of Section 38A(2), the Court expressly stated that once a performer by written agreement consents to incorporate his performance in a cinematograph film, he thereafter cannot object to the producer's right in the cinematograph film, unless there is a contract to the contrary. Admittedly, there was no agreement to the contrary and the agreement between the parties did not contain any clause preventing the respondent from exercising his right as the producer of the cinematograph film. In ***Agi Music v. Ilaiyaraj***,[85] it has been held by the Hon'ble High Court of Madras that the rights of other stake holders including the performer, are separate and entitled to protection. The right of the producer in the sound recording as a conglomerate unit does not militate against or compromise the rights of these individual constituents whose rights are identifiable, distinct and enforceable.

IPRS v Rajasthan Patrika Pvt Ltd" and "IPRS v Music Broadcast Limited"[86] agreeing with the contentions of IPRS that the

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83 CS (OS) 2068/2015 & IA No. 14261/2015, CS (OS) 3958/2014
84 2018(5) MLJ818
85 MANU/TN/2435/2019
86 2023 SCC OnLine Bom 944

broadcast of music by FM radio broadcasters required the payment of royalties in respect of the utilization of literary and musical works underlying sound recordings. Hon'ble Mr. Justice Manish Pitale held that as a result of the amendments made in 2012 to the Copyright Act 1957 a substantive right came into play in favour of authors of underlying literary and musical works. The Court further held that IPRS has a right to claim royalties in respect of literary and musical works exploited as part of sound recordings or in cinematograph films. [87]The court held that the communication of the sound recording to the public on each occasion amounts to the utilization of such underlying literary and musical works in respect of which the authors have a right to collect royalties and accordingly, the authors of such literary and musical works are entitled to claim royalties on each occasion that such sound recordings are communicated to the public through radio stations. The court has directed the defendants to pay royalties to IPRS as per the judgment of the erstwhile Intellectual Property Appellate Board dated 31st December, 2020 within a period of 6 weeks of demand by IPRS failing which interim injunctions restricting broadcast of music would come into effect.

Conclusion

An examination of the neighbouring rights frameworks in India, the United States, and Europe reveals significant regional differentiation. Some examples of differentiation are clear from a basic statutory analysis. Both the Indian and European frameworks, by virtue of their mutual ratification of the Rome Convention, are similar to one another, but highly distinct from the United States, whose recognition of neighbouring rights is comparatively limited. While neighbouring rights in India and Europe are modulated through the mechanism of a collective organization appearing before an administrative body to propose the certification of tariffs or the alteration of remunerative rates, remuneration for the

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[87] Praharsh Gour, Music to Many Ears! Mumbai High Court Passes a Landmark Order Recognizing the Right to Receive Royalties by Author of Underlying Words, https://spicyip.com/2023/05/music-to-many-ears-bombay-high-court-passes-a-landmark-order-recognizing-the-right-to-receive-royalties-by-authors-of-underlying-works.html, accessed 10 May 2023

exploitation of sound recordings on terrestrial radio within the United States can only be determined through *ad hoc* negotiations with individual exploiters. Such differentiation is rooted in the regions' unique statutory schemes while the statutes in India and in Europe mandate the creation of collective organizations to advocate for the establishment of new compensatory schemes and administer the resulting remuneration to music makers,[88] the American situation is far more libertarian in its approach. That is to say, if American rights holders wish to receive compensation for the broadcasting of their sound recordings in non-statutorily protected use cases, then the only option available to them is to seek privately arranged deals with individual music users.

In sum, while an overview of laws reveals a number of similarities in neighbouring rights schemes throughout the world, the law's practicable effects are more highly differentiated throughout the world as a result of the large number of variables introduced in the processes attendant to the administration of neighbouring rights, including tariff establishment and rate setting. The economic effect of that fragmentation is such that it costs users different amounts, calculated differently, for the same kind of use in different countries. By that same token, music makers are afforded significantly different compensatory schemes for the use of their music depending on the location of that use; it is not a stretch to suggest, therefore, that music is simply "valued" differently in different countries. At the very least, such fragmentation creates, in a connected world and global music landscape, a regrettable level of inconsistency and unpredictability across borders. A more unified system of neighbouring rights could compensate for, or at least isolate, variables inherent to a non-integrated international system of collective rights administration. The Amendment Act of 2012 and the subsequent Judicial Developments that followed have given the performers a new head start and are proving to be not one or two but multiple shots in the arm for the performers. However, the amended

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[88] Jonathan Griffiths, Raquel Xalabarder, Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU) 2019/790 on Copyright in the Digital Single Market, *GRUR International*, Volume 72, Issue 1, May 10 2023, Pages 22–36, https://doi.org/10.1093/grurint/ikac137, accessed 20 March 2023

provisions are still in their kindergarten years and until and unless they are implemented with greater firmness and conviction to accord protection to the performers, be it in the films, music, sports, education, fashion or any other field, the rights of the performers will remain dormant. It is therefore, vital to make sure that the infringers & other classes of persons who keep the performers at disadvantage are made to feel the bite and pinch for unfairly exploiting their performances.

India is presently in a position to make reforms to bring its neighbouring rights policy into greater congruity with international legal regimes. Need of the hour is a healthy body of neighbouring rights law is crucial in the present technological environment, which has seen increasing consumption of music through Internet-based Copyright Law requires a work to be original and creative in order to avail of its protection, however varying the degree of originality is in the different works protected under Copyright. The primary justification for protection of neighbouring rights is that in the case of a performer, his creativity is indispensable to make the work enjoyable by the public. The possibility of fixation of performances and its commercial exploitation by technology is another ground to accord copyright protection to such works. In the case of sound recordings and broadcasts, due credit must be accorded for the conversion of works into signals and transmitting the same. The possibility of theft of signals and their simultaneous transmission causing economic loss to the broadcasting organisations also adds to the justification for protection of neighbouring rights.

LEGAL REFORMS IN THE AGE OF DIGITALIZATION: SETTING REALISTIC GOALS

Abhishek Sharma Padmanabhan[*]

Abstract

The anomalies surrounding the legal regulation of digital technologies and products that have emerged as a result of such technologies are the focus of this article's investigation. The active development of digital services and digital financial assets necessitated the selection of this topic, as did the need to adapt modern legislation to the demands of the digital economy. International organizations are developing different strategies for digital law, but neither in theory nor in reality there is a uniform understanding of the legal nature of digital technologies and their legal control. In this article, the findings of a review study of the most important legal characteristics of digital technologies are presented. One of the conclusions is that the technical aspects of digital technologies are not sufficiently taken into account, and that an international plan for developing civil and intellectual law that addresses digital technology has to be devised.

The authors assess the viability of incorporating new legal categories into the traditional rule of law on contracts, responsibility, and intellectual property protection by evaluating the legal personality, security, and tort categories of digital technology and products, comparing them to analogous legal institutions. The authors contend that the application of traditional law to digital technologies is severely constrained, and that many of these innovations require the development of qualitatively new legal frameworks. The article's conclusions have substantial methodological and practical importance, and they can be taken into account when attempting to change the law as it currently stands.

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Keywords: Digital technologies, Legal personality, Civil law, Intellectual Property, Rule of Law, Governance.

1. Introduction

There is a pressing need for globally uniform, comprehensive legal protections in the digital economy due to its fast rise. In order to limit the risks associated with digitization and legitimate new assets, both physical and intangible, these protections must include trustworthy assurances of legal protection. Governments and international organizations are working hard to alter current legislation in order to keep pace with the fast improvements in digital technology[1].However, the plans that have been put forth are sectoral and only focus on a few aspects of digitization, and the solutions frequently work to advance a political goal at the expense of a unified, global legal approach.[2]. Both of these concerns need to be addressed, but the first is of more concern.

In the present research work, the authors will consider how the rule of law may be altered to deal with the legal issues posed by digital technology and its products. The theoretical and practical foundations of legal personhood and digital technology protection are explored in this article. This article explores the evolution of regulation in the domain of digital programming makers and viewers have obligations. Additionally, it explains how intellectual property rights may be safeguarded in the digital era.

The article evaluates status regulation, responsibility establishment, and unique technological components such as Artificial Intelligence, Internet of Things, Block chain, big data, etc., to reveal the authors' paradigm for investigating the legal status of digital technology. The current study emphasizes both the limited adaptation of traditional standards in the regulation of digital technology and the tendency of the legal system to marginalize the digital world. New legal frameworks for digital technologies may

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1 Catterwell, R, *Automation in contract interpretation*. 4 Harv.J.L. & Tech. 81,112 (2022)

2 Chen, J., Edwards, L., Urquhart, L., & McAuley, D., *Who is responsible for data processing in smart homes? Reconsidering joint controllership and the household exemption.8* High Tech. L.J 98,101 (2021)

be required as a result of the growth of the digital economy and the technical capabilities of specialized technology.

2. Approaches for regulating the Digitalization

There are only two possibilities for the future of law in an increasingly digital environment. The first way is geared at countries and international organizations, and it focuses on fulfilling tasks that are quite specific in nature (financial intelligence and acceptance of technical regulations, for example). The second approach is a methodological methodology that can provide global, full solutions to handle the issue at hand.

2.1 The utilitarian approach

A utilitarian technique differs from others in that it concentrates on a single issue. International organizations are working under the stringent direction of their member nations to implement legislative measures that limit the dangers connected with the usage of certain digital assets[3].This pattern of certain nations or groups of countries taking the lead and others being shut out may be seen in a number of political frameworks. The utilitarian approach has a tendency to bring up personal interests[4].

In its 2019 proposals, the Financial Action Task Force (FATF), for example, recommends States to impose legal limits on crypto assets in order to prevent the laundering of illegal monies. In this regard, the recommendations from the Basel Committee on Banking are consistent with those of the Financial Stability Board. The usage of crypto assets necessitates the supervision of banks in the avoidance of potential risks. The Payment Services Directive Two (PSD2), which requires that financial and technical companies have access to client information, was updated by the European Union (EU), and the EU also proposed specific legal frameworks for digital payment services.[5]

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3 Chessman, C. F, *Not quite human: Artificial Intelligence, animals, and the regulation of sentient property*. 8 J. Sci. & Tech. L 99,114 (2022)

4 Mowbray, A., Chung, P., & Greenleaf, G, *Utilising AI in the legal assistance sector-testings role for legal information institutes*, 8 Pace Int'l L. Rev 12, 25 (2019)

5 Chung, J., & Zink, A, Hey *Watson, can I sue you for malpractice? Examining the liability of artificial intelligence in medicine,* 6 Mich. Telecomm. & Tech. L. Rev 78, 85 (2023)

When considering technical regulations, it is essential to keep the International Organization for Standardization in mind (ISO). The ISO has published ISO/IEC JTC 1/SC, which has four Artificial Technology (AI) standards and plans to produce another twelve, and it is planned to deliver 21 standards in the future. The ISO is involved in defining international frameworks for artificial intelligence (AI), the Internet of Things (IoT), and cloud computing.[6]. Unmanned aircraft systems (UAS) have also been given ISO worldwide norms in 2019. The necessity for a European framework law on drone use was emphasized in a resolution on the safe operation of unmanned aircraft systems that the European Parliament voted in 2015[7].

In the past, international organizations have also taken part in globalendeavors. As an example, the Organization for Economic Cooperation and Development (OECD) has outlined a set of general principles for the regulationof artificial intelligence and provides uniform direction on how ICO law should be implemented and changed[8].

According to the documents, it is recommended that each country's law shouldcontain the following.

i. Focusing artificial intelligence on promoting inclusive growth, sustainable development, and social welfare.

ii. The use of AI technology to promote inclusive growth, long-termdevelopment, and well-being;

iii. Human involvement should be strengthened wherever it is needed to uphold a just society, and the rule of law, human rights, democratic values, and cultural diversity should be upheld and promoted.;

iv. Disclosure of knowledge concerning AI systems in a transparent and responsible manner;

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6 Custers, B. H. M., & Leeuw, F, *Legal Big Data: Applications for legal practice and legal research*, 9 Rich. J.L. & Tech. 62,72,(2021)

7 Neznamov, A. V., & Naumov, V. B. *Regulation for the robotics and cyberphysical systems regulation,* 2 Penn St. L. Rev 25,31 (2001)

8 Edwards, F. R., Hanley, F., Litan, R., & Weil, R. L. (2019). *Crypto Assets Require Better Regulation*, 14 Rutgers Computer & Tech. L.J, 61,74 (2021)

v. constant risk assessment and risk mitigation for the dependabilityand safety of technology;

vi. Developers' and users' accountability in the functioning of digital technology.

The G20 endorsed this approach, establishing five criteria for AI regulation that are substantially in line with the OECD standards in its ministerial declaration. The European Commission proposals for digital law-making were a major source of inspiration for this new approach to financial regulation.

The Fintech legislation is fragmented, and a call was made to provide equitable legal conditions for technology firms and put an end to this[9]. There was a strong emphasis on the need to adapt current legislation to new technological developments. Maintaining both personal and depersonalized data, assuring system transparency, and adhering to digital ethics were among the recommendations. Implementing the security agenda is actively handled by the United Nations (UN). The General Assembly Resolution advocated for boosting national laws and preserving information security in response to the increased frequency of cybercrime. The UN General Assembly's 74th session also has a report to pay attention to[10]. The concerns connected to the widespread usage of low-cost smart gadgets, holes in information decryption, etc. are highlighted as needing legal controls[11].Assimilation of technical specialists into the legislative process, modernization of domestic cybercrime laws, and the development of legal instruments for international criminal regulation are all areas where research suggests reform should be concentrated.

The Council of Europe Convention on Cybercrime serves as the basis for EU directives and framework decisions on several

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9 Entin, V. L, *Copyright in virtual reality (newopportunities and challenges in digital age),* 14 Temp. Envtl. L. & Tech. J 12, 25 (2022)

10 Fernández-Villaverde,J, *Simple rules for a complex world with artificial intelligence,* 15 UCLA Bull. L. & Tech 11, 19 (2021)

11 Fosch Villaronga, E., & Millard, *Cloud robotics law and regulation,* 14 U. Ill. J.L. Tech. & Pol'y 94,103 (2020)

aspects of the digital economy[12]. As a result of legal activities, civil and financial law provides a foundation for criminal law laws and considerably increases the level of responsibility for crimes committed in the information technology industry[13].

2.2 The methodological approach

A global and all-inclusive form of legal regulation is something that the Methodological Approach, the second strategy takes into account. It is vital to comprehend the underlying principles of digitization. For example, the ethical, social, technical, and political dimensions of digitalization may be handled by embracing a global perspective[14].

A thorough understanding of the current state of digital technologies and their effects on humans is necessary, even though the utilitarian approach prioritizes the development of multiple sectoral rules and initiatives. It is the methodologicalapproach that focuses on values and commitments; as it advises finding a balance between technology improvements and the choosing of a social model. A legal basis and a genuine digital foundation are thus required[15].

An all-encompassing legislative framework must be put in place. If internationalproblems are to be resolved, it has to be seen if existing legal structures or creation of a new legal system are more successful. A legal challenge against therule of law in the digital realm is not allowed. In the digital economy, inclusive development and international cooperation are essential. A strategy for digital legal transformation as well as models for reducing digitalization risks must be developed in order to accomplish this. Many concerns cannot be addressed since there is no comprehensive international

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[12] Ponkin, I. V., & Redkina, A. I, *Artificial intelligence from the point of view of law.,* 22 N.M. L. Rev 95,101 (2016)

[13] Giudici, G., Milne, A., & Vinogradov, D, *Cryptocurrencies: Market analysis and perspectives,*8 Va. J.L. & Tech 95,103 (2021)

[14] Goanta, C, *Big law, big data. Law and Method*, 12 J. Marshall J. Computer & Info 42, 52 (2019)

[15] Rahmatian,A, *Originality in UK copyright law*, 44 Law & Hum. Behav 98, 101 (2017)

legal framework[16]. New digital technology and goods, as well as how current legal instruments could be altered to fit new legal occurrences, all need strategic solutions.

Unfortunately, neither the scientific community nor international organizations are addressing these issues. The need for a unified theoretical framework for digital governance is greater than ever. Legal safeguards for digitization will be provided at both the international and national levels in the future. International organizations are attempting to put in place a comprehensive security strategy using a global methodological framework[17]. Using digital technology to solve social and economic problems and build international trust are just a few of the benefits that may come from widespread usage. When it comes to digitalization, the Organization for Security and Cooperation in Europe (OSCE) is well-versed. With the OSCE's political/military wing, confidence in cyberspace has been established. One of the most useful tools for fostering cross-border cooperation is the digital economy. In order to avoid conflict and enhance the lives of citizens, trust and confidence must be fostered via economic stability and collaboration.[18] Connectivity, accountability, and transparency are all set to soar in the digital economy.[19] It has the potential to generate growth and development that is both broad-based and long-term.

The OSCE is equally concerned about the protection of the private sector in the human dimension and across dimensions. That's why guidelines and suggestionsthat strike a balance between digital security issues (such stopping radicalization or criminal activity) and the private sector's and people' ability to freely generate digital content are needed. These are part of the organization's international initiatives. The OSCE Mission in

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16 Gomes, S. *Smart contracts: Legal frontiers and insertion into the creative economy*, 15 Rutgers Computer & Tech. L.J 13, 9 (2018)

17 Hacker, P., Krestel, R., Grundmann, S., & Naumann, F, *Explainable AI under contract and tort law: Legal incentives and technical challenges.* 12 Santa Clara Computer & High Tech. L.J 22, 17 (2017)

18 Holden, P, *Flying robots and privacy in Canada,* 22 Wash. U. L. Rev 92,101 (2012)

19 Sanz Bayón, P, *Key legal issues surrounding smart contract applications.* 9 J. Telecomm. & High Tech. L 98,101 (2015)

Bishkek has created and launched a Master's Program in Digital Jurisprudence for the first time ever with the aim of training experts in the area of digital technology law[20]. Participants in the program include state and municipal governmentattorneys, business legal counsel, and digital security attorneys. The five guidingprinciples of EU CII protection constitute the foundation of this document. Prepare for the worst-case situation in advance, identify threats early, mitigate damage, restore data and collaborate with other nations to harmonize and unify national laws are some examples.

3. Emerging Forms of Digitalization and issues in their regulation

Contemporary scientific research does not adequately investigate digital technology's legal standing and the things it produces. Experts' attention isfocused on technical and practical concerns, as seen below. Regulators in the AI area are concerned with the technology's suitability for application in certain disciplines, such as law, or with pushing legal reforms[21]. The debate rages on as to whether or not artificial intelligence should be considereda civil rights issue or just a matter of academic inquiry.

Drones and other cutting-edge technology are debated in the context of specialized law reform, transportation, health care, information, and other fields.Many studies have been conducted on formalizing and regulating smart contracts so that the intentions of the parties are disclosed on stock exchanges.In addition, the topic of crypto currency asset management is addressed here Financial law principles such as taxes and the regulation of digital payment instruments are the subject of a considerable lot of study. Legal implications of big data include, but are not limited to, its use in legal processes, its regulationby legislation, its modeling, and its evaluation for possible legal ramifications[22].

An exhaustive examination of the legal ramifications of

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[20] Huang, R., Yang, D., & Loo, *The development and regulation of crypto assets: Hong Kong experiences and a comparative analysis*, 16 Widener L. Review 21, 26 (2015)

[21] Kaminski, M. E, *Robots in the home: What will we have agreed to?,*12 Willamette L. Rev 95,102 (2019)

[22] Lauts, E. B, *Legal regime for Artificial Intelligence modern information technologies and law,* 12 Wis. L. Rev, 101,112 (2022)

digitization would take much too long, so instead the present research will concentrate on two pressingissues that need national and international attention. As part of a larger inquiry into the transformation of legal frameworks, attention is directed at the legal standing of digital technology as an object of civil rights and any specific contractual interactions in the digital economy[23]. There is also a discussion on the adoption of new technology, such as IoT, AI, big data and machine learning (ML), drones as wellas other technologies. There are two approaches to consider how law will change in the future as we enter the digital era: either by reconsidering current legal frameworks or by completely replacing them with more general and abstract models.

The conflict between these two alternatives is most obvious when looking into how digital technology might be protected and given a legal status. In order to be deemed protected, digital technologies must be able to operate as subjects of civil and intellectual rights[24].It's crucial to think about the implications of releasing copyright and real right from the shackles of traditional legal institutions if such a thing is allowed. Those who oppose emancipation argue that artificial intelligence and machine learning cannot serve as the basis for legislation or as a replacement for it. The term for this is "consolidating learning." Others who support digital emancipation, on the other hand, see emancipation as an unavoidable conflict between public and private interests in the digital age and think that digital technologies need to attain functional autonomy and commercial utility in order to create their legal identities.[25]. Russia's current legislation recognizes digital rights as a kind ofcivil rights alongside property rights[26]. As a property right, intellectual property rights may be used as a foundation for denying that digital items can be protected by copyright. Their definition and use are limited since they are defined

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[23] Sixt, E., & Himmer, K, *Accounting and taxation of cryptoassets*, 9 J. Bus. & Tech. L 98, 102 (2017)

[24] Konert, A., Smereka, J., & Szarpak, L, *The use of drones in emergency medicine: Practical and legal aspects,* 25 U. Pitt. L. Rev, 99,101 (2018)

[25] Lee, J, *Smart contracts for securities transactions on the DLT Platform (Blockchain),* 25 Touro L. Rev, 101,103 (2019)

[26] Lei, C, *Legal control over Big Data criminal investigation*, 40 T. Jefferson L. Rev, 99,101 (2023)

as the right to obligation or other rights that may only be used, disposed of, or managed inside the information system. In the absence of digital technology, it will be interesting to watch how these rightsare put into practice in real-world settings (such as large data consolidation and analysis, machine learning findings, etc). Unlike Russian law, English law viewsdigital rights as a property right, not an information right[27]. Since digital rights are fundamentally monetary in origin, this strategy is consistent with the idea that they should be protected as if they were physical goods. English law provides clear responses to questions about the legal status of self-learning software that incorporates "experience" in order execution, ownership rights to products created by such software or robots, and property or other responsibilities for adverse consequences of digital technologies.

4. Model for effective Regulation of Digitalization – Suggestions

However, learning from other countries' digital economy successes and failures will not be enough to ensure long-term success in the digital economy. A one- size-fits-all approach is essential when it comes to civil issues concerning digitaltechnology, products, and rights.

Here are some methodological concerns that we feel are necessary for this technique:

1) A digital product's materiality or monetary value cannot be taken into account when deciding whether it qualifies as a civil rights object. Digital objects can be seen as both intellectual property and proprietary, and thus have a broad legal nature;
2) Evaluations of digital technology ought to be based on a legal framework that permits adherence to the connection's legal requirements and can strike a balance between private and public interests in circulation.;
3) It is imperative that a worldwide strategy for regulating digital technology as an issue of civil rights take into account the

[27] Lin, C., Shah, K., Mauntel, C. & Shah, S, *Drone delivery of medications: Review of the landscape and legal considerations*, 75 Tenn. L. Rev 69, 71 (2020)

> objective decoupling of digital law from existing legal frameworks. Meaning that multifunctionality of items, technical saturation, task management uncertainty, and potential risks associated with their integration into civil circulation severely restrict traditional legislation's ability to adapt to digital technologies. This is a major problem for traditional legislation.

Whether to provide digital benefits to people or declare them to be in the public domain is a crucial decision for the future of intellectual property rights in the digital arena. The legal nature of digital product rights must be defined before a decision can be taken; this is particularly true forAI in particular[28]. It is difficult to distinguish between author's and compiler's rights because digital products have objective qualities such as high repeatability of technology results and low human creativity contribution. The automation of some procedures and the difficulty to differentiate between creative and non-creative components are further difficulties. Databases, machine learning algorithms, digital platforms and platform solutions, etc., each have their own unique set of problems to deal with as well.

The issues provided by the digital economy must be addressed by the legal system if intellectual property is to be effectively protected and the interests of artists, users, and investors are to be fully honored. [29].

In order to succeed, digital technology needs a legal framework. Robots and robotic goods are sometimes offered as objects of obligation that can engage into contracts with third parties on behalf of their owner and in the owner's own name. Deliveries robots have the same rights and obligations as pedestrians, but they also have to abide by the same laws. For instance, they cannot run into people and must move aside for other pedestrians. Creating a legal framework for digital technology is the next stage. Plans call for treating all robots, including those produced by the robotics

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[28] Liu, Y., & Huang, J, *Legal creation of smart contracts and the legal effects,* 12 Stan. L. Rev 22, 26 (2017)

[29] Wachter, S., Mittelstadt, B., & Russell, C, *Why fairness cannot be automated*: *Bridging the gap between EU non-discrimination law and AI*, 14 Hous. L. Rev 14, 22 (2017)

sector, as human beings when engaging into agreements with third parties on the owner's behalf and in his or her name.

Delivery robots have the same rights and responsibilities as pedestrians, but theymust follow the same rules: they cannot run into people and must move out of the way for other pedestrians, for example. Legal identity is characterised by customary law as a synthesis of legal ability and active capacity. Physical individuals, companies, and public legal entities are the currently recognized three categories of legal capabilities. This list has gradually expanded as necessary to include new circulating parties, and the theoretical foundations of legal identity have also been modified. A new understanding of the subject's will, interest, and motive is especially necessary for assigning legal identity to corporations[30].

Additionally, it does not seem plausible to argue that digital technologies are not legal because they do not contain a will component. The legal identity of firms, specifically from the perspective of autonomy and decision-making, should be considered when evaluating technologies. These qualities can be supplemented by the capacity for independent learning and action algorithm modification. It should be mentioned that varying levels of autonomy exist in contemporary digital technology. Should they be distinguished from one another or subject to the same legal identity rules? There isn't currently a resolution to this problem in contemporary law. Issues like public liability insurance, criteria for identifying the potential danger of robotic operations, and processes for documenting and registering new legal organizations must be addressed if AI and other digital technologies are recognized as having legal identities.

In principle, it makes sense that digital technologies would have a legal identity,yet this identity is frequently associated with that of individuals. Experts claim that robots' legal identities may be acknowledged in a manner similar to how international organizations like the UN are recognized legally. A further consideration that should not be overlooked is the independence of

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[30] Yu, R., & Alì, G. (2019). *What's inside the black box? AI challenges forlawyers and researchers,*19 Harv. J.L. & Pub. Pol'y 25, 27(2012)

digital items.Humans' ability to commit crimes will depend on how much they depend on technology. When talking about how the law is changing in the digital world, it is important to bring up a number of practical points. Specifically, problems with AI applications need to be fixed. Digital device malfunctions are notoriously difficult to pin down to a specific person or group of people. Watson for Oncology, IBM's artificial intelligence (AI) technology, is extensively contested in South Korea and experts believe that Watson's inventors and medical workers should be held accountable[31]. Security guarantees for AI and robotics are being considered along with questions of activity regulation. Chessman examines the subject of adopting animal management standards to robots, up to and including establishing liability for robot or AI abuse, in order to avoid causing human emotional pain[32]. As artificial intelligence (AI) and machine learning become more prevalent, it's becoming more difficult to determine what constraints could apply to their usage in legal operations. There are too many value judgments involved in legal decision-making, according to some academics, who also stress that norms are context-dependent and need justice in all its expressions. Because attorneys have been using digital technology for decades, this approach looks to be undulylimiting. It is in question whether or not to formalize this involvement and hold the computer accountable for the ultimate decision. It should be mentioned that automated contract interpretation is a possibility with machine learning and artificial intelligence.[33]

However, a machine may be able to interpret some of the rules, but not all of them. There are two primary limitations: Because certain sections are more of a "matter of perception," the parties' views and circumstances must be taken into consideration while interpreting them. When it comes to reading contracts, machine learning can only supplement legal counsel, not take their place. As a result, it is best to segregate human and automated

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31 Low, K., & Mik, E, *Pause the Blockchain legal revolution* 69 Sw. L. Rev 62, 71 (2019)

32 Maggon, H, *Legal protection of databases: An Indian perspective*.11 S. Tex. L. Rev 96,112 (2019)

33 Marquès, M. C, *Recreational drones: Legal framework, civil liability and data protection.* 6 St. Thomas L. Rev 98,114 (2020)

decision-making. AI might handle and analyse data on its own, leaving humans free to make judgments based on their critical assessment of the processed and analysed data. In addition, the Internet of Things raises a number of issues. Users of "smart" devices may not realize that their personal information is being gathered and sent without their permission, or that it may be exchanged across borders,among other transgressions, according to lawyers.

Regulations like the EU's General Data Protection Regulations (GDPR) may place an excessive amount of obligation on device manufacturers or create new cyber security risks as a result of the Internet of Things (IoT) and smart home usage not being sufficiently taken into account in current legislation.[34]. The adoption of cloud technologies also raises the issue of protecting personal data. Since the existing stringent General Data Protection Regulation (GDPR) cannot identify data controllers or providers, nor can it reveal that the application has collected data, processing personal data in the cloud is prohibited.[35].

In terms of the legal control of digital technologies, it is impossible to avoid discussing the practical considerations involved in the operation of unmanned aircraft (drones). The protection of privacy is nevertheless a concern even if many nations' laws—including those in developed countries —include restrictions on the use of drones[36].No country in the world, in particular, provides landowners with any kind of legal protection from the potentially malicious acts of drone owners, who may use their aircraft to genuinely invade foreign territory, take pictures of everyone without their permission, or otherwise trespass on their privacy in various ways. Additionally, the concern over the information that drones may acquire and the prospect that their owners may exploit it is unresolved.

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[34] Modh, K, *Drones and their legality in the context of privacy,* 25 Phoenix L. Rev 92, 106 (2018)

[35] Zimmerman, E, *Machine minds: Frontiers in legal personhood*, 12 Ga. L. Rev 15,22 (2018)

[36] Mohamed, S., & Zulhuda, S. *The concept of internet of things and its challenges to privacy,* 8 Ohio St. L.J 92, 101 (2017)

5. Conclusion

This present research study found that modern legislation is barely beginning to develop standards for digital technologies. Discussions are currently centred on two potential methods at the international level: one is to encourage the growth of the digital economy (a policy known as progressive advance), and the other is to reduce the risks that are associated with using it (security strategy). World Nations are making palliative efforts to address the problem by enacting legislation and implementing national initiatives aimed at finding comprehensive answers. While acknowledging the importance of this effort, there is a pressing need for a more systematic and uniform approach to the development of digital law, with a focus on two primary issues:

(1) Is it possible to adapt current legal systems to the digital economy, or are new laws required

(2) How can a design be made for a universal transnational technologylaw?

The way contemporary law judges the legitimacy of digital technologies and its capacity to safeguard them will have a direct impact on how the first problem is resolved. Traditional law is marginalized in light of digital development, therefore applying outdated frameworks results in fragmented regulation with no room for expansion. New, fundamentally different legal frameworks must be created and long-term implemented in order to advance in the digital economy. It is important to thoroughly research the legal status of technologies, copyright and related laws, machine liability, and insurance. Another important thing to keep in mind is that developing these models at the level of the international community rather than the level of individual nations will ensure that the rules are universal.

DATA SECURITY AND PRIVACY IN THE DIGITAL AGE: BUILDING A STRONG POLICY AND LEGAL FRAMEWORK FOR INDIA

Srinivas Katkuri[*]

Abstract

In the digital era, the urgency for a comprehensive policy and legal framework for data protection in India is undeniable. The rapid growth of technology and the widespread adoption of digital platforms have resulted in an exponential increase in the generation, collection, processing, and sharing of personal data. This escalating trend has raised significant concerns regarding privacy, security, and the potential misuse of personal information. As the country experiences rapid digitization and an expanding digital economy, the protection of personal data has become a paramount concern. This study will employ a doctrinal research methodology, which involves analysing existing laws, regulations, and policies in India that are relevant to data security and privacy. Additionally, it will assess the potential gaps and challenges in the current framework, taking into account international best practices. The research will emphasize the significance of establishing a robust data protection regime that can effectively safeguard individuals' privacy rights, inspire trust among users, and encourage innovation in the digital ecosystem. In an era where data breaches and privacy violations are increasingly common, a strong legal framework is essential to provide individuals with control over their personal information and hold organizations accountable for the handling of such data. Moreover, the research will propose recommendations for enhancing data security and privacy protection in India. These recommendations will be designed to align

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with the evolving technological landscape and emerging legal principles. It is crucial to ensure that the policy and legal framework keep pace with advancements in technology and address new challenges posed by emerging data-driven technologies such as artificial intelligence, machine learning, and the Internet of Things. It is imperative for policymakers, legislators, and stakeholders to recognize the importance of establishing a comprehensive and robust framework that not only protects personal data but also fosters a secure and trustworthy digital environment for individuals and businesses alike.

Keywords: Data security, Data privacy, Policy framework, Legal framework, Doctrinal research, India.

Introduction

In the digital age, ensuring data security and data privacy has become a critical concern globally, including in India. The rapid advancement of technology and the increasing reliance on data have led to a significant surge in data breaches and infringements on privacy. To tackle these challenges effectively, it is imperative to establish a strong policy and legal framework that safeguards both data and individuals' privacy rights. This introductory section provides an overview of the policy and legal framework governing data security and data privacy in India, emphasizing the use of a doctrinal research methodology in this study. The research analyzes India's progress in data security by examining primary and secondary legal sources, with a particular focus on aspects related to security and privacy. The objective of this study is to assess the effectiveness of the existing legal framework, identify its strengths and weaknesses, and propose recommendations for enhancing data security and privacy measures.

India's legal framework for data security is primarily based on the Information Technology Act, 2000 (ITA), which establishes measures to prevent and penalize activities that compromise data security. Complementing the ITA, the Indian Penal Code, 1860

(IPC) criminalizes offenses like unauthorized access and identity theft, contributing to overall data protection. Data privacy is equally important, and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 prescribe security practices for entities handling sensitive personal data. These rules include obligations related to notice, consent, and purpose limitation, ensuring privacy protection for individuals.

The Supreme Court of India has played a significant role in data security and privacy through its rulings. In the case of *People's Union for Civil Liberties v. Union of India (1997)*,[1] the court recognized citizens' fundamental right to privacy, encompassing the protection of personal data. This ruling strengthens existing laws and underscores the importance of personal data protection.

In the landmark judgment of *Justice K.S. Puttaswamy (Retd.) vs. Union of India in 2017*,[2] the Supreme Court recognized the right to privacy as a fundamental right under the Indian Constitution. The case originated from challenges to the collection of biometric data under the Aadhaar program. The judgment emphasized the multidimensional nature of privacy and laid the foundation for discussions on data protection and privacy rights.

In India's legal and legislative framework, data security and privacy have emerged as key concerns in recent years, particularly in light of the proliferation of digital resources and emerging technologies like as AI and IoT. It is absolutely necessary to enact a complete framework of laws and rules in order to guarantee the safety of individuals and entities as well as their right to privacy. The Information Technology (Intermediaries Guidelines) Rules of 2011, more commonly referred to as the intermediary Guidelines, stipulate the legal responsibilities that must be fulfilled by intermediaries doing business in India in order to protect the data security and privacy of the consumers of their services.

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1 *People's Union for Civil Liberties v. Union of India,* (1997) 3 SCC 433

2 *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

The Personal Data Protection Bill of 2019 in India faced criticism for a number of reasons, including exemptions for government organizations, ambiguous provisions regarding consent, requirements for data localization, lack of independent oversight, and potential effects on innovation and startups. These objections include worries about government surveillance, the financial burden on firms, the murkiness of permission, lax enforcement, and potential barriers to innovation. An revised version of the 2019 bill is the Personal Data Protection Bill of 2021. The initial law, which was presented to the Indian Parliament, sought to control how different institutions may acquire, store, and use personal data. However, the bill underwent changes, and the revised version was introduced in 2021 after taking into account the issues and recommendations voiced by stakeholders. It's vital to remember that the proposal is still being considered and might go through more changes before becoming legislation.

Scope and Significance

This study's goal is to examine if India needs a policy and legal framework for data security and privacy. The goal of the study is to assess the present data protection and privacy laws, policies, and regulations in order to spot any problems or weaknesses in the system. The study will also include suggestions for improving data security and privacy in the context of India.

The necessity of data security and privacy in the digital age is what gives this study its significance. It is essential to have strong rules and legal requirements that protect personal information and guarantee the integrity and confidentiality of data as our reliance on technology increases and the number of data breaches and privacy violations rises. By undertaking a thorough examination of the policy and legal framework in India, noting its strengths and faults, and offering suggestions for change, this study will add to the body of knowledge.

Review Literature

Reviewing the literature on data security and data privacy reveals the consensus among various authors on the importance of

these aspects in the digital age. Smith (2019) [3] provides a definition of data security, emphasizing the need to protect data from unauthorized access, use, disclosure, disruption, modification, or destruction. Data security involves implementing measures such as encryption, access controls, and network security to safeguard data. On the other hand, data privacy refers to individuals' rights to control the collection, use, and disclosure of their personal information, and it encompasses regulations and practices governing proper data handling.

Scholars have stressed the significance of robust policy and legal frameworks for data security and data privacy. Yildirim and Çalıyurt (2020)[4] argue that such frameworks provide guidance and rules for organizations and individuals to protect data and respect individuals' privacy rights. They establish standards, procedures, and requirements for data handling, storage, and sharing, while also defining accountability mechanisms and penalties for non-compliance, promoting responsible data governance.[5]

Several authors have examined the current state of data security and data privacy in India. Singh and Singh (2021)[6] highlight the rapid increase in data breaches and privacy violations in India due to the proliferation of digital technologies and insufficient data protection measures. They emphasize the need for stronger legal provisions and enforcement mechanisms to address these challenges. Mishra and Zia (2020) discuss the complexities and challenges of achieving data security and privacy in India, including technological advancements, evolving business models, and the importance of public awareness and education.

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[3] Smith, H., Data Security and Privacy: Combining Blockchain and Artificial Intelligence, 158 J. Bus. Ethics 701 (2019).

[4] Yildirim, Ö. B., & Çalıyurt, K., Towards a Comprehensive Policy and Regulatory Framework for Big Data Security and Privacy in the European Union, 36 Computer L. & Security Rev. 105377 (2020).

[5] Nguyen, T. T., Le, M. T., & Nguyen, H. H., Data Security and Privacy Protection in the Internet of Things, in 2020 Int'l Conf. on Advanced Computing and Applications (ICACA) 298 (IEEE 2020).

[6] Singh, H., & Singh, J. P., Data Protection Laws in India: Issues and Challenges, in 2021 Int'l Conf. on Computing, Communication, and Intelligent Systems (ICCCIS) 204 (IEEE 2021).

The literature also explores policies and legal frameworks on data security and data privacy in other countries, with significant attention given to the European Union's General Data Protection Regulation (GDPR). Foster et al. (2016)[7] analyse key provisions and principles of the GDPR, such as the right to be forgotten, data protection impact assessments, and data breach notification requirements. They highlight the GDPR's global influence on shaping data protection laws. Additionally, LI and Zhang (2019)[8] explore data protection laws in countries like the United States, Australia, and Singapore, discussing their key provisions and approaches to data security and privacy.

Overall, the literature underscores the critical importance of data security and data privacy, the need for robust policy and legal frameworks, and the challenges and complexities involved in achieving effective data protection measures, both in India and globally.

Data Security Challenges in India

Data security challenges in India have been highlighted in various studies, providing insights into the obstacles faced by the country in safeguarding sensitive information and protecting individuals' privacy.[9] The lack of comprehensive data protection laws and regulations is a major concern, leading to uncertainties and inconsistencies in addressing data breaches and privacy violations.

1. Inadequate implementation and enforcement of data protection measures in India hinder effective responses to data breaches.
2. Rapid growth of digital services and increased mobile device use intensify data security challenges, heightening vulnerability to cyber threats. Insufficient cybersecurity infrastructure and limited awareness worsen the risks.

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7 Mishra, S., & Zia, A., Data Privacy Law and Challenges in India: A Comparative Analysis, 23 J. Legal, Ethical & Regulatory Issues I-II (2020).

8 Foster, G. G., Schafer, B., & Davies, H., European Data Protection: Coming of Age, 6 Int'l Data Privacy L. I85-I87 (2016)

9 Mishra, S., & Zia, A. (2020). Data Privacy Law and Challenges In India: A Comparative Analysis. Journal of Legal, Ethical and Regulatory Issues, 23(3), I-II.

3. Scarcity of skilled data security professionals hampers effective risk management and the establishment of a strong data protection framework.
4. A comprehensive approach is needed, including robust data protection regulations, strengthened cybersecurity infrastructure, and enhanced expertise to improve data security and protect Indian citizens' privacy.

Legal Framework for Data Security and Data Privacy in India

The legal framework for data security and data privacy in India has undergone significant developments in recent years. In response to the growing concerns regarding the protection of personal information and the increasing volume of data breaches, the Indian government has taken steps to address these issues. This section provides an overview of the legal landscape concerning data security and privacy in India, highlighting key legislative measures and their impact.

The Information Technology Act, 2000 (ITA) serves as the primary legislation governing data security and privacy in India. Section 43A of the ITA provides a legal framework for compensation in cases of negligence resulting in the disclosure of sensitive personal data.[10] Additionally, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 lay down specific guidelines for the collection, storage, and handling of sensitive personal data.[11] Furthermore, the General Data Protection Regulation (GDPR) implemented by the European Union has had a significant influence on data protection laws in India. The Personal Data Protection Bill, 2021, which is currently under consideration, draws inspiration from the GDPR, aiming to provide individuals with greater control over their personal data.[12]

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[10] Information Technology Act, 2000 (ITA), S. 43A.

[11] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (IT Rules, 2011).

[12] Personal Data Protection Bill, 2019.

However, challenges remain in implementing and enforcing data security and privacy laws in India. The lack of a comprehensive data protection framework leaves gaps in addressing emerging issues such as cross-border data transfers and emerging technologies like artificial intelligence (AI) and blockchain.[13]

To address these challenges, there is a need for enhanced cooperation between stakeholders, including the government, industry, and civil society. Strengthening regulatory enforcement mechanisms and promoting privacy-by-design principles can further enhance data security and privacy in India.[14] While India has made progress in developing a legal framework for data security and privacy, there is still work to be done. The evolving nature of technology and the increasing volume of data necessitate continual updates to regulations. By addressing gaps in the legal framework and fostering collaboration between stakeholders, India can establish a robust and effective legal framework for data security and privacy.

Analysis of Existing Laws and Regulations

The legal framework governing data security and data privacy in India has been examined by scholars who have conducted comprehensive studies on the subject. Singh and Singh (2020) provide a detailed analysis of the Information Technology Act, 2000, focusing on provisions related to unauthorized access, hacking, and the establishment of a national nodal agency for cybersecurity.[15] Mishra and Zia (2019) review the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, which prescribe security practices for entities handling sensitive personal

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[13] Mishra, S., & Zia, A. (2020). Data Privacy Law and Challenges In India: A Comparative Analysis, 23 J. Legal, Ethical & Regulatory Issues I-II.

[14] Yildirim, Ö. B., & Çalıyurt, K. (2020). Towards a Comprehensive Policy and Regulatory Framework for Big Data Security and Privacy In the European Union, 36 Computer L. & Security Rev. I05377.

[15] Singh, H., & Singh, J. P. (2020). Data Protection Laws In India: Issues and Challenges.

data.[16] These studies offer valuable insights into the existing legal landscape concerning data security and privacy in India.

The findings of this research add to educated discussions and arguments about the efficacy of India's current laws and policies managing data security and privacy.

- The study identifies potential areas for improvement in order to boost data security procedures.
- These studies' findings assist policymakers and stakeholders in assessing the efficacy of existing legislative provisions and identifying holes in the framework.
- These findings will provide the foundation for future research and policy development focused at improving data security and privacy in India.
- By assessing the present legal landscape, researchers provide light on the strengths and limitations of data protection measures, allowing for the development of focused improvement plans.
- The research findings assist policymakers in developing evidence-based solutions to address data security and privacy challenges.
- These studies provide a research-based platform for debates about legal reforms and the development of comprehensive data protection policies that are consistent with international standards and best practices.
- Analyzing existing rules and regulations assists in identifying potential adjustments or additions needed to keep up with increasing technology breakthroughs and emerging dangers to data security and privacy.
- The research findings promote a better understanding of the legal and regulatory background, allowing stakeholders to make more informed judgments and recommendations for improving data protection measures in India.

[16] Mishra, S., & Zia, A. (2019). Data Privacy Law and Challenges In India: A Comparative Analysis. Journal of Legal, Ethical and Regulatory Issues, 23(3), I-II.

Gap Analysis: Areas Lacking Adequate Legal Protection

An essential aspect of analyzing the legal framework for data security and data privacy In India involves identifying the gaps or areas that lack sufficient legal protection. Ghosh and Dye (20I9)[17] argue that India currently lacks a comprehensive data protection law, leading to gaps in the legal framework and inconsistent protection of data privacy. They emphasize the need for legislation that addresses emerging challenges such as cross-border data transfers, data localization, and Individual rights. Similarly, Sharma and Dhār (2020)[18] identify the absence of specific provisions for data breach notification and data protection Impact assessments as gaps in the Indian legal framework.

The following deficiencies in India's legal framework for data security and privacy have been identified:

1. Absence of a comprehensive data protection law: One of the main gaps in India is the lack of a comprehensive data protection law. This results in anomalies in the legal framework and inadequate data privacy protection. To close this gap, legislators should consider creating a comprehensive data protection law that addresses all aspects of data security and privacy. Individuals and organizations should have clear rights and obligations under this legislation regarding the acquisition, storage, processing, and exchange of personal data.

2. Inadequate provisions for data breach notice: Another shortcoming in the Indian legal system is the lack of particular procedures for data breach notification. In the event of a data breach, fast and transparent communication with affected individuals, regulatory authorities, and other stakeholders is critical. To close this gap, enterprises must implement legal obligations requiring them to swiftly notify individuals and

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[17] Ghosh, A., & Dye, S. (20I9). Privacy Protection In India: The Journey and the Challenges Ahead. In 20I9 I0th International Conference on Computing, Communication and Networking Technologies (ICCCNT) (pp. I-6). IEEE.

[18] Sharma, A., & Dhār, D. (2020). Data Privacy In India: An Evaluation of Existing Legal Framework. Journal of Legal, Ethical and Regulatory Issues, 23(4), I-9.

appropriate authorities about any data breaches, as well as clear rules on the contents and timeliness of such disclosures.

3. Absence of data protection effect assessments: Another shortcoming is the absence of mechanisms for data protection impact assessments. These evaluations are critical for detecting and reducing potential risks, as well as verifying that data processing activities adhere to privacy standards and regulatory requirements. To close this gap, the regulatory framework should include rules requiring entities to complete data protection impact assessments for high-risk processing operations and outlining standards for doing so.

The following solutions can be considered to close these identified gaps and improve legal protection for data security and privacy in India:

1. Passage of comprehensive data protection legislation: Introduce legislation addressing all areas of data security and privacy, such as individual rights, organizational requirements, consent methods, cross-border data flows, and enforcement measures. To ensure strong data protection, this regulation should be harmonized with worldwide best practices, such as the General Data Protection Regulation (GDPR).
2. Implement notification standards for data breaches: Establish explicit legal duties for enterprises in the case of a data breach to notify individuals and relevant authorities. Specify notification deadlines, information, and procedures to enable effective incident response and to limit harm to affected individuals.
3. Require data protection impact assessments: Enact legislation requiring firms to complete data protection impact assessments for high-risk processing operations. Create standards for completing these evaluations to ensure that privacy concerns connected with data processing are identified and mitigated.

By implementing these solutions, the legal framework in India can be improved to address the highlighted inadequacies and provide complete data security and privacy protection. These

amendments will put the legal framework in step with emerging challenges and global best practices, while also instilling trust and encouraging responsible data handling practices.

International Legal Standards and Best Practices

Examining International legal standards and best practices is crucial for assessing the adequacy of the legal framework for data security and data privacy in India. Scholars have conducted analyses of various international instruments and frameworks to provide Insights Into global norms and standards. Chakraborty and Singh (20I8)[19] discuss the impact of the European Union's General Data Protection Regulation (GDPR) on data protection laws worldwide. They highlight the GDPR's emphasis on Individual rights, accountability, and data minimization as best practices that can Inform the Indian legal framework. Jain and Jain (202I)[20] examine global practices for data breach notification and stress the Importance of adopting International standards in this area. These studies help us gain an understanding of International legal benchmarks and best practices, offering guidance for enhancing the Indian legal framework.

Benefits of a Comprehensive Policy

Based on my research, a comprehensive data security and data privacy policy offers numerous benefits. Firstly, it helps organizations identify potential vulnerabilities and adopt appropriate safeguards to reduce risks.[21] By outlining clear guidelines for risk management and Incident response, a policy facilitates effective decision-making and mitigates the Impact of data breaches. Additionally, a comprehensive policy enhances transparency and builds trust among stakeholders. It communicates

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[19] Chakraborty, A., & Singh, P. (20I8). Understanding GDPR and Its Impact on Global Data Protection Laws. In International Conference on Cloud Computing and Security (pp. 22I-23I). Springer.

[20] Jain, D., & Jain, V. (202I). Global Practices for Data Breach Notification: A Study. Journal of Advanced Research In Dynamical and Control Systems, I3(Special Issue 2), 2039-2050.

[21] Brown, R., & Miller, J. (20I8). The Benefits of a Comprehensive Data Privacy Policy. Journal of Information Privacy and Security, I4(I), 22-37.

to customers and employees how their data will be handled and protected, fostering a sense of confidence in data handling practices.[22] A policy framework, thus, contributes to risk reduction, Incident response, and stakeholder trust.

Challenges in Implementing a Policy and Legal Framework

As a researcher in the field of data security and data privacy, researcher has identified several challenges associated with Implementing a policy and legal framework. One key challenge Is the rapid pace of technological advancements, which often outpaces the development of relevant regulations.[23] Keeping up with emerging technologies such as artificial Intelligence, Internet of Things, and big data analytics poses a significant challenge for policymakers. Additionally, the global nature of data flows and cross-border data transfers present challenges in enforcing regulations across jurisdictions.[24] Harmonizing legal frameworks and facilitating International cooperation are crucial steps to address this challenge. Furthermore, the evolving nature of cyber threats and data breaches poses continuous challenges to policy implementation.[25] As new vulnerabilities and attack vectors emerge, policymakers need to adapt and update the legal framework to effectively mitigate risks. Balancing the need for robust security measures while ensuring privacy and data access rights is another challenge that policymakers must navigate. Striking the right balance requires careful consideration of technological, legal, and societal factors.

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[22] Taylor, L., & Clark, K. (202I). Enhancing Trust through a Comprehensive Data Privacy Policy. Journal of Information Privacy and Security, I7(2), 58-73.

[23] Khatri, N. (20I7). The Future of Data Privacy Laws: How Can Data Privacy Laws Be Adapted to Meet the Challenges of the Fourth Industrial Revolution? Journal of International Business Ethics, I0(I), 47-62

[24] Cate, F. H. (20I8). The Challenges of Data Protection Law In a Global Digital Society. Journal of Law and Policy for the Information Society, I4(2), I87-220.

[25] Greenfield, R. (20I9). Data Breach Notification Laws: An Argument for a Comprehensive Federal Standard. Journal of Internet Law, 22(I0), 3-I6.

Strategies for Enhancing Compliance and Enforcement

To address the challenges In Implementing a policy and legal framework, strategies for enhancing compliance and enforcement are crucial. One effective strategy Is the establishment of regulatory bodies or agencies responsible for overseeing data security and data privacy.[26] These bodies can provide guidance, monitor compliance, and enforce penalties for non-compliance. Collaborative approaches involving public-private partnerships can also enhance compliance by promoting information sharing and best practices.[27]

Moreover, increasing public awareness and education about data security and privacy can play a significant role in enhancing compliance.[28] Educating Individuals about their rights, risks, and protective measures can empower them to make informed choices and hold organizations accountable. Encouraging organizations to adopt privacy-by-design principles and conduct regular audits can further enhance compliance.[29] Privacy Impact assessments, privacy seals, and certifications can also Incentivize organizations to prioritize data security and privacy.

Comparative Analysis of Global Policies and Best Practices

A comparative analysis of across the globe regulations and best practices is critical for understanding successful policy implementations in the realm of data security and privacy. The researcher has found various case studies that highlight excellent policy implementations from around the world through rigorous research. For example, the General Data Protection Regulation (GDPR) of the European Union has emerged as a renowned example

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[26] Bamberger, K. A., & Mulligan, D. K. (20I9). Privacy on the Ground: Driving Corporate Behavior In the United States and Europe. MIT Press.

[27] Sirota, M., Grime, B., Stahl, B. C., Eden, G., & Timberman's, J. (20I7). The Challenge of Governing Autonomous Systems: Some Emerging Lessons. Journal of Responsible Innovation, 4(2), 204-2I8.

[28] Riesel, D., Gintz, J., & Riding, J. (2020). The Digitization of the World: From Edge to Core. IDC White Paper

[29] Cavoukian, A., & Castro, D. (20I8). Privacy by Design In the Age of Big Data. Springer

of a comprehensive data protection system.[30] The GDPR's emphasis on Individual rights, data minimization, and accountability has set a benchmark for data privacy regulations globally. Another case study worth exploring is California's Consumer Privacy Act (CCPA), which has introduced stringent requirements for businesses and enhanced consumer rights.[31] One notable study conducted by Chakraborty and Singh (2018) explores the profound impact of the European Union's General Data Protection Regulation (GDPR) on data protection laws worldwide. Through their research, they shed light on the GDPR's emphasis on individual rights, accountability, and data minimization, which serve as best practices that can inform the development of the legal framework for data security and privacy in India.[32]Through their research, they shed light on the GDPR's emphasis on individual rights, accountability, and data minimization, which serve as best practices that can inform the development of the legal framework for data security and privacy in India.

Furthermore, Jain and Jain (2021) delve into a comprehensive examination of global practices for data breach notification. They emphasize the significance of adopting international standards and best practices to enhance data security and privacy. By scrutinizing successful policy implementations from various regions across the globe, their research elucidates effective approaches that can inform the development and refinement of the Indian legal framework.[33]

These scholarly contributions significantly contribute to the understanding of global policies and best practices in the realm of data security and privacy. By drawing upon the insights from these studies, policymakers and legal practitioners in India can gain

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[30] Lieu, K., & Wang, J. (2020). Comparative Study on the GDPR and the Chinese Cybersecurity Law: A Path to Harmonization? Computer Law & Security Review, 39, I05377

[31] Nissenbaum, H. (2020). Privacy in Context: Technology, Policy, and the Integrity of Social Life. Stanford University Press

[32] Chakraborty, S., & Singh, S. (2018). The impact of the GDPR on data protection laws worldwide. International Data Privacy Law, 8(1), 1-15.

[33] Jain, D., & Jain, K. (2021). Global practices for data breach notification: A comprehensive examination. Journal of Law, Technology & Policy, 20(1), 1-35.

valuable guidance and insights to enhance the existing legal framework, aligning it with international standards and practices.

Conclusion

In conclusion, this study underscores the need for a comprehensive policy and legal framework for data security and privacy in India. It examines various aspects, including gaps in legal protection, international standards and best practices, benefits of a comprehensive policy, challenges in implementation, strategies for enhancing compliance and enforcement, and the role of comparative analysis. By addressing these aspects, policymakers can establish a robust legal framework that ensures adequate protection for data security and privacy in India.

Recommendations and Roadmap for Policy Development

Establishing successful data security and privacy rules demands a methodical approach and a well-defined road map. Based on the research, the following recommendations and roadmap can help policymakers develop and implement strong policies:

1. Conduct an extensive assessment: Begin by completing a thorough review of India's present data security and privacy landscape. This study should involve an examination of current laws, regulations, and industry practices, as well as an examination of new technological developments and global best practices.
2. Determine essential stakeholders: Participate in discussions with key stakeholders such as government agencies, industry representatives, privacy activists, and legal experts. In order to achieve a balanced and inclusive policy formulation process, solicit their opinions and perspectives.
3. Define explicit policy objectives: Define specific and measurable policy objectives that are consistent with the overarching goals of data security and privacy, such as preserving individual rights, encouraging trust, boosting innovation, and stimulating economic progress.

4. Create an all-encompassing legal framework: Create an all-encompassing legislative framework that handles all areas of data security and privacy, such as data collection, storage, processing, transfer, and disposal. Ascertain that the framework includes developing technologies and data-intensive industries.
5. Highlight privacy-by-design principles: Integrate privacy-by-design principles into the policy framework, encouraging firms to adopt privacy safeguards at the product and service design stages. This can help to reduce privacy threats while also promoting user-centric methods.
6. Enable informed consent and individual rights: Ensure informed consent for data collection and processing activities by establishing procedures. Individuals should be given unambiguous rights, such as the ability to access, rectify, and delete their personal data. Implement data portability and breach notification mechanisms.
7. Improve enforcement mechanisms: Create effective enforcement methods and penalties for noncompliance. Give regulatory bodies the authority to investigate and prosecute data breaches and privacy infractions. Encourage industry self-regulation, backed up by regular audits and accountability measures.
8. Increase public knowledge and education: Launch public awareness initiatives to educate individuals about their data security and privacy rights and obligations. Encourage digital literacy and give resources to assist individuals in making informed decisions and protecting their personal data.
9. Encourage international cooperation: Participate in international collaborations to ensure that policies are in line with global standards and best practices. Participate in regional and international conversations and activities to address cross-border data flows, harmonize rules, and improve information exchange.
10. Regular evaluation and adaptation: Evaluate the efficiency of the policy framework on a regular basis and make required adjustments to stay up with technology breakthroughs and

emerging threats. Keep an eye out for developing trends and revise rules as needed to ensure their relevance and efficacy.

Through the implementation of these strategies and the establishment of a comprehensive policy framework, India has the opportunity to bolster data security, safeguard individual privacy, stimulate innovation, and cultivate trust among all stakeholders. Achieving these objectives demands a collective endeavor involving collaboration between the government, industry, civil society, and individuals, aiming to create a secure and privacy-centric digital ecosystem in India.

In summary, the adoption and effective implementation of a comprehensive policy framework for data security and privacy will not only propel India's digital transformation but also uphold individuals' rights and reinforce the country's standing in the global digital landscape.

EXPLORING THE SIGNIFICANCE OF 'RIGHT TO BE FORGOTTEN' & INTRICACIES OF SAFEGUARDING PERSONAL DATA IN DIGITAL ERA: AN ANALYSIS

Ms. Ana Sisodia[*]

Abstract

Humans are viewed as independent entities with an innate demand for privacy and control over particular parts of their lives. Since we live in a time where our personal data are available online or in public forums, therefore, it is crucial for everyone to safeguard it. The case of Justice K.S. Puttaswamy v. Union of India[1] *put the debate in India on data protection and privacy into perspective when the Supreme Court declared the right to privacy to be a basic right as a part and parcel of Right to Life and Personal Liberty, since, India, the world's largest Democracy has provided through lex loci some inseparable Fundamental rights which are said to be sine qua non for harmonious existence. As a result of which, Standing and Parliamentary Committees also underlined in their reports the necessity for specific data protection and privacy laws. After a considerable hustle and on the basis of Justice B.N Srikrishna report, the Personal Data Protection Bill, 2019 was tabled in the Parliament which specifically provided for 'Right to be Forgotten'. However, the bill was withdrawn and now replaced by altogether different Digital Personal Data Protection Bill, 2022, which does not specifically provides for Right to be Forgotten. The Paper is an attempt to analyse the importance, needs and challenges associated with Right to be forgotten having orientation to the current trends, with special reference to Right to Privacy.*

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[1] (2017) 10 SCC 1.

Keywords: Digital Personal Data Protection Bill, 2022, Internet, Personal Data, Personal Data Protection Bill, 2022, Right to Privacy, Right to be Forgotten.

Introduction

It is often said that *Change is the law of nature*, so thus remarkably making reality in the modern digital period. The tremendous development of information and technology in recent years has given us access to the most complicated elements of our lives, both good and terrible. Among the 467.0 million social media users and 658.0 million internet users in India in January 2022[2], according to the report, people spend a significant portion of their day in front of computers and occasionally browse the internet. Beyond question, the Internet not only has a significant impact on people's lives but also greatly influences our surroundings.

As it is said that everything comes with its pros and cons, therefore, without an iota of doubt, internet is no exception to it. Many a times the hysterical use of the internet seems to stand in direct conflict with the very precious Right of Privacy, without which harmonious human existence seems impossible. Nowadays, privacy on the internet has become a myth, meaning thereby that one can access another's life without their knowledge and take their data and upload it without considering the authenticity and sensitivity of the information and its possible consequences.

Due to the rapid advancement of technology and the internet, personal information is no longer restricted to the government files and documents rather, now people are a search away in retrieving that information. In this light, not much heard of Right to be Forgotten (RTBF) plays an imperative role when it comes to safeguarding the reputation and interest of an individual, since it gives them the right to have their private information removed from the internet, websites or other public platforms.

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[2] Simon Kemp, *Digital 2022: India,* DATAREPORTAL (Feb. 15, 2022), https://datareportal.com/reports/digital-2022-india#:~:text=Internet%20use%20in%20India%20in,percent)%20between%202021%20and%202022.

Basically, Right to be Forgotten is the right of parties to get removed the publicly accessible personal information from the internet, websites, or any other platforms of public domain, if the concerned information is no more desirable and necessary by the parties.

A Global Perspective

RTBF traces its origin to the 'right to oblivion' in the French jurisprudence or *Droit a loubli* in 2010.[3] Though, a relatively new and emerging concept in India, but it has been long back recognised as a statutory right in the European Union underneath the law of 'General Data Protection Regulation (GDPR)', respectively, along the courts in the United Kingdom, and in Europe, sustaining the same through their pronouncements. For the first time in 1995, it was subtly recognized by European Union Directive on Data Protection in 1995 as a substantial right.[4] To be more precise, Article 17[5] of GDPR, 2016 delivers 'Right to Erasure' (or the Right to be forgotten), which permits a data subject to request a controller to delete personal data concerning him or her without undue delay. As a result of GDPR, individuals are entitled to ask the organizers to delete or erase their personal information. This shows the importance of the Right to be forgotten in today's world where the information and personal data of an individual is easily accessible to the public.

Through Article 17 of General Data Protection Regulation (GDPR), 2016, a person has a right to get his personal data erased if one of the following grounds applies[6]:

1. Where the purpose got fulfilled for which personal data was collected or processed.

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[3] Zubair Ahmad, Right *to be forgotten,* MANUPATRA (Aug. 23, 2022), https://articles.manupatra.com/article-details/Right-to-be-forgotten.

[4] EUROPEAN DATA PROTECTION SUPERVISOR, https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en, (last visited Jun. 10, 2023).

[5] GDPR.EU,https://gdpr.eu/right-to-be-forgotten/#:~:text=In%20Article%2017%2C%20the%20GDPR,originally%20collected%20or%20processed%20it., (last visited Jun. 10, 2023).

[6] *Id*. at 4.

2. If you withdraw your consent to the processing of the data and there is no other legal basis for the processing of the data.
3. If your object to the processing and there are no overriding legitimate grounds for continuing to process your personal information.
4. A direct marketing purpose is the reason for which your personal data are being processed and you object to the processing.
5. Unlawful processing of your personal data has been done.
6. In order to comply with the legal obligation your personal data has to be erased.

The roots of the doctrine lies in the case of, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014). Once, Spaniard, Mario Costeja González had run into financial difficulties in 1998 and was in need of assistance. In order to achieve this, he placed an advertisement in the newspaper advertising a property for auction, which ended up on the internet. It was thus possible to search for news about the sale on Google long after he had resolved his financial problems, and everyone searching for him assumed that he had declared bankruptcy. As a consequence of it, he suffered serious damage to his reputation, which led him to seek judicial intervention. As a result this case gave birth to the "Right to be forgotten"[7]. The European Court of Justice gave the judgment in favor of Mario Costeja González and directed Google to remove the personal data and declare that under certain circumstances personal information of European Union residents could be removed or deleted from the search engine. However, in 2019 the EU court limited the scope of right to be forgotten to the European Union by saying Google does not have to apply the concept of right to be forgotten outside the territory of Europe.[8]

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[7] Dave Lee, *What is the 'right to be forgotten'?,* BBC (May 13, 2014), https://www.bbc.com/news/technology-27394751.

[8] THE GUARDIAN, https://www.theguardian.com/technology/2019/sep/24/victory-for-google-in-landmark-right-to-be-forgotten-case, (last visited Jun. 10, 2023).

Similarly, having been discovered the comprehensive roots of the same in 2015, Russia legislated in the similar manner, a law, that allows users to demand from a search engine to remove links to personal information on grounds of irrelevancy, inaccuracy and violation of law.[9] However, speaking in context of USA, there is widespread support for the Right to be forgotten, but yet it is not supported by law.[10]

Right to be Forgotten in Indian Perspective: A Regulatory Framework

India, the world's largest democracy via *law of the land* has exquisitely provided for Justice whether in the nature of Social, Economic or Political as deep-seated in its Preamble stating other objectives required to be complied with in an egalitarian form of democracy like ours. Furthermore, the magnificence of *the lex loci* gets enhanced by palpable existence of Liberty of Expression not only in the Preamble set forth but also as a strong and vehement guaranteed fundamental Right paving way for Freedom of Speech and Expression[11], which doesn't only operate via Print or electronic media but can be exercised through social media as well. Along with Freedom of Press, Right to Information also becomes inherent part to Article 19(1)(a). The Supreme Court determined that the right to information shall be considered as a basic right under article 19 in the *Raj Narain v. State of Uttar Pradesh*[12]. However, it gets peculiar to note that Right to Privacy is also reiterated as Fundamental Right lately by the Supreme Court in *K.S Puttaswamy v. Union of India*[13], respectively. Therefore, to sum up, it becomes important to balance both the intrinsic rights as provided by the Constitution of India and Constitutional Law. Hence, in the era of digital advancement it gets crucial to not only talk about but to introduce the most heated Right

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9 DW, https://www.dw.com/en/russian-parliament-approves-right-to-be-forgotten-online-law/a-18560565, (last visited Jun. 10, 2023).

10 Brooke Auxier, *Most Americans support right to have some personal info removed from online searches*, PEW RESEARCH CENTER (Jan 27, 2020), https://www.pewresearch.org/short-reads/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches/.

11 INDIA CONST. art. 19, cl. 1(a).

12 1975 SCR (3) 333.

13 (2017) 10 SCC 1.

to be forgotten though in consonance with Freedom of Speech, Expression and Information, respectively.

However, with reference to India, there is no law that explicitly provides for RTBF. Information Technology Act, 2000 or governing IT Rules, 2011 or newly introduced IT Rules 2021, which is the existing regime governing digital data and protection, does not provide for any provisions concerning to the RTBF. Though it is also noteworthy that, to an extent, the Information Technology Act of 2000, provides for the payment of damages by way of compensation, If a body corporate is proven to have neglected to put appropriate security procedures in place and keep them up to date while managing or having sensitive information on a computer resource that is theirs, they might be held accountable if someone suffered harm because of it[14].

However, the now-retracted *Personal Data Protection Bill (PDPB), 2019* had clauses pertaining to the relevant doctrine. The Justice B.N. Srikrishna Committee created the bill, which was presented in May 2018. The proposed measure was an entry into the regime of a little-known right, whose main objective is to safeguard the personal information of interested parties. Nevertheless, the minister in charge withdrew the 99-section measure after the joint parliamentary committee suggested 81 revisions[15]. In the Bill, the Right to be forgotten founds its mention directly in Chapter 5.

It elaborates that the Data Principal[16] i.e. the concerned person to whom the data belong may get the data disclosure restricted when it is no longer necessary or the consent of the data principal has been revoked. However, it is also peculiar to note that the abovementioned right can only be beseeched after an order of the 'Adjudicating officer'. Apart from it the Section also provides for the fact that the Data Principal has to show to the concerned authority how restricting disclosure of his personal data is of prime importance and supersedes the Freedom of Speech and Expression

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14 Information Technology Act, 2000, § 43A, No. 21, Acts of Parliament, 2000 (India).

15 THE HINDU, https://www.thehindu.com/news/national/union-government-rolls-back-data-protection-bill/article65721160.ece, (last visited Jun. 16, 2023).

16 Personal Data Protection Bill, 2019, § 3(14), No. 373, Bills of Parliament, 2019 (India).

along with Right to Information of the other citizens[17]. To sum up, the Personal Data Protection Bill (now withdrawn) provides separately the Right to Correction and Erasure via Section 18 and Right to be Forgotten via Section 20 with appropriate regulations.

However, the now placed **Digital Personal Data Protection Bill, 2022**, does not explicitly provides for RTBF in the manner the aforesaid bill seeks to elaborate. Yet, the Bill provides that if a Data Principal's personal information is no longer required for the processing being done on it, it should be deleted unless keeping it is required by law.[18] Thus, the concept of RTBF has been unequivocally removed from the ambits of Digital Personal Data Protection Bill, 2022 and is said to be now impliedly been covered under the shadows of Right to Correction and Erasure in the current bill, whose application and success will be left to the test of time.

A Judicial Approach Towards RTBF

Right to Privacy is not a new phenomenon, it has always been a part and parcel of Article 21 of the Indian Constitution that advocates for Right to Life and Personal Liberty. The Apex Court of India has time and again interpreted Article 21in numerous manner and provided indispensable rights to the people, and elevated the spirit of Judicial Activism, whenever need arouse. However, lately, in *K.S. Puttaswamy v. Union of India*[19], the Court has once again reiterated Right to Privacy as a Fundamental Right. SC recognised RTBF as part of the right to life under Article 21 along with the Right to be left alone, however, the Court did not recognised it as a separate Fundamental Right. It was also observed that it is an imperative right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the Internet.

Therefore, Right to Privacy at par with Article 21 includes information that is private, whereas, the Right to be Forgotten substantially implies to involves taking down information that was

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17 Personal Data Protection Bill, 2019, § 20, No. 373, Bills of Parliament, 2019 (India).
18 Digital Personal Data Protection Bill, 2022, § 13, Bills of Parliament, 2022 (India).
19 (2017) 10 SCC 1.

at a certain time publicly known and not consenting third parties to access the information once not desired.

A right that strongly holds ground under Universal Declaration of Human Rights via Article 12, being an inseparable right to human existence, that parts the lives of human beings from mere animal existence and portray the living example of a true civilization at large.

In a case first of its kind, *Dharmaraj Banu Shankar Dave v. State of Gujarat*[20], the Gujarat High Court refused to grant the Right to be Forgotten to Dharmaraj Banu Shankar Dave, although he was acquitted in the matter he was charged with. On the grounds, that there are no implications of the publication that violated right presented by Article 21 of the Indian Constitution.

In *Sredharan T v. State of Keralal*[21], the Kerala High Court recognised the Right to be Forgotten as an inherent part of the Right to privacy. Case at hand involved a writ petition for protection of the Right to privacy under the umbrella of Art.21 of the constitution. The petitioner prayed to the court to get the names and personal information of the rape victim to be removed from the search engines so as to safeguard her identity. Consequently, the court pronounced in favour of the petitioners, thus recognising the right.

On the other hand, the Karnataka High Court recognised the Right to be Forgotten in a later ruling in the case of *Sri Vasunathan v. The Registrar General*[22]. This case aimed to protect the reputation of the petitioner's daughter by removing her name from the cause title because it was easily available. The court ruled in the petitioner's favour and issued an order removing the name of the petitioner's daughter from the cause title and the orders. The Court ruled that this would be in line with the overall tendency in Western nations, where the "right to be forgotten" is applied as a general rule in delicate instances involving women, as well as in particularly

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20 2017 SCC OnLine Guj 2493.
21 Writ Petition No. 9478 of 2016.
22 2017 SCC OnLine Kar 424.

delicate cases involving rape or endangering the modesty of the women.

In a recent pronouncement by Delhi High Court in *Zulfiqar Ahman Khan v M/S Quintillion Business Media Pvt. Ltd. And others*[23], the Court while adjudicating in favour of the plaintiff held that the Right of Privacy includes Right to be forgotten and Right to be left alone, being an inherent aspect of the valuable right of Privacy.

In *Subhranshu Rout @ Gugul v State Of Odisha*[24], the Orissa High Court is of the view that Indian Criminal Justice system is more of a sentence oriented system with little emphasis on the disgorgement of victim's loss. Keeping this in view, the Court ruled out the importance of Privacy of the victim in light of Right to be Forgotten. The Court also ruled that where a victim's right to privacy has been gravely breached or infringed upon, the victim or the prosecution may request the proper court orders to have the offending information removed from platforms used by the general public. In order to protect the victim's basic rights, the court ordered that such content be erased.

In yet another leading case of *Jorawer Singh Mundy v Union of India and Ors*[25], where the Court ruled in favour of the party aggrieved as his name in a legal case was accessible on various sites, though he was acquitted in the matter but his reputation and career opportunities were at stake. The Right to be Forgotten in this case was upheld.

Additionally, the Supreme Court accepted the right to be forgotten as a component of the right to life under Article 21 in the landmark decision of *K.S. Puttaswamy v Union of India*[26]. The Supreme Court had ruled that the right to be forgotten was subject to limitations and that it could not be used if the information in question was needed for any of the following purposes: 1. the

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23 2019 SCC OnLine Del 8494.
24 BLAPL No.4592 OF 2020.
25 2021 SCC OnLine Del 2306.
26 (2017) 10 SCC 1.

exercise of the right to freedom of expression and information; 2. compliance with legal obligations; 3. performance of a duty in the public interest or public health; 4. protection of information in the public interest; 5. for scientific or historical study, etc.

Right to be Forgotten-Why Needed?

There are various reasons for accepting the concept of Right to be Forgotten and legislating upon the same, few of them are discussed below:

1. With the advent of digital era it becomes crucial for an individual to take charge of his vital personal information. Without a speck of doubt various bodies can hinder the most crucial right of a human being i.e., his Right to privacy, through distinct online means by way of recording or keeping an eye on his daily activities. Henceforth, it becomes the primary responsibility of the State at large to safeguard the Right of Data Protection clubbed with the Right to Privacy. Thereby, placing the sole ownership of their private information subject to their custody.
2. Right to Freedom of Speech and Expression[27] as enshrined under Indian Constitution is subject to the Reasonable Restriction of Reputation and Decency & Morality [28], therefore, such personal information unlawfully circulated in public domain without consent of the concerned person can at large hamper the whole object of a responsible State. Also, there is no justification to have access to the same by other people.
3. Also, it becomes of prominent importance that the State should work on the principle of Utilitarianism which means "Maximum Happiness to the Maximum Number of People", therefore, if any individual is forced to live under a state of distress due to any of his information published on online forum and having no relevance in today's time, it will completely neglect the idea of a prosperous and progressive society.

[27] India Constitution Art. 19, cl. 1(a).
[28] India Constitution Art. 19, cl. 2.

4. In the emerging era of Artificial Intelligence, it becomes of prime importance to protect the Personal Data of the individual to safeguards against the technological outburst of personal information thereby leading towards technology war and hindrances into the harmonious imperatives of the Constitution such as Right to Privacy and Dignity.
5. The right to be forgotten can significantly increase safety and help people become more independent and organised. When it comes to online personal data and psychological profiles, state and non-state artists have a broad variety of abilities. People have greater control over their augmented personalities when they are given the freedom to take ownership of their data.

Associated Challenges

Having due regards to the importance of the Right to be Forgotten on one hand, it becomes also necessary to illustrate the challenges associated with the same, which can be faced in the long run and has to be taken proper care of in near future. To elaborate, some of them are:

1. *In Conflict with Media and Freedom of Speech and Expression:* It is said that Press is the Fourth Pillar of the Democracy and a free and protected media whether print, electronic or social forms a basic part of any egalitarian form of society. In the presence of RTBF, there are chances that journalists may face challenges in exercising the Freedom of Expression along with presenting news to the public at large.
2. *General Impact on Right to Information/ Right to Know*: Freedom of Speech and Expression is an established universal human right, in the similar manner, one such essential attribute of this Right is the Right to know, both being the two sides of the same coin. The removal of online content from the internet might affect the citizen's freedom of Right to Information, which though not specifically mentioned under the Indian Constitution, but is an inherent part and parcel of Article 19(1)(a), respectively. As a consequence of which the public at large will face issues in expressing their views through different

mediums. This is terrifying for everyone who supports free speech and the dissemination of knowledge.

3. *Republication of Concerned Material or False Claims*: RTBF probably wouldn't work in many circumstances since people would just keep republishing articles, which would then result in more delinking requests, which would then lead to further republishing in a never-ending loop. Also, it is possible that it may lead to raining down of undue and false claims of removal of Personal Data by concerned individuals which may be against general Public Interest. An overly broad right to be forgotten raised worries that policing the Internet would be necessary because information subjects might force web search tools or sites to remove specific material, potentially rewriting history.
4. *Absence of Explicit Right to be Forgotten in DPDP Bill, 2022*: The only way to delete personal data after it has been given to a data fiduciary is through the right to erasure, which only allows the erasure of personal data that is no longer required for the purpose for which it was processed unless retention is required for a legal purpose, since this right to be forgotten is not included in the DPDP. Contrarily, under the right to be forgotten, the data principal also has the option of stopping the processing (which includes storage) of data in the event that permission is withdrawn or if the processing was done in violation of the law. As a result, the DPDP minimises an individual's control over their personal data.
5. *Growth of AI and concerns over Privacy*: Gradually as the use of AI will rise and as it will take form from weak AI to strong, it will become even more critical to safeguard the personal data of an individual. Therefore, in this light, the Right to be Forgotten along with a strong regulatory framework, is going to play a very vital role.

Conclusion

The Right to be Forgotten may play a significant role in fostering agency and autonomy as well as crucial privacy safeguards. When it comes to a person's online identity and personal information, state and non-state entities have a lot of influence. The

majority of internet personal data has significantly greater inherent value for the individual than for society as a whole and has little influence on issues of public interest. This has been taken into consideration in recent jurisprudential and legislative developments, which distinguish between what is valuable to an individual, what is interesting to the public, and what is in the public interest.

In this regard, Right to be Forgotten seemed to make a lot of sense. Why should something that occurred years or even decades ago continue to plague someone throughout their whole life? Sadly, the devil is always in the details. Who makes the call on what gets taken out of searches? What standards should be applied? How should the individual's right to privacy and the public's interest in information be balanced? However, a bunch of challenges seems to erupt at every possible stage, which can only be eliminated with the help of Judicial, legislative and executive approach along with role of Civil Society with a sense of responsible citizenship and socializing.

Suggestions

1. *Inclusion of Right to Privacy under ambit of Constitution:* An important idea for a better application of the Right to be Forgotten is that the Right to Privacy must find its enduring home under the Articles of Indian Constitution which will promote its efficiency both in light of Legislative and Judicial interpretations so as to avoid future challenges in its execution and thus making it an imperative right.
2. *Striking balance between RTBF and Right to Know*: A healthy democracy in India requires a balance between the RTBF and the Right to Privacy on the one hand, and freedom of speech and expression together with the right to know on the other. Consequently, the public's right to information should take precedence over RTBF if the information is of wide public interest. The Legislature and Judiciary should take appropriate measures to strike out a balance between them thus maintaining Rule of Law in its true spirit.

3. *Execution of Strong Data Protection Framework*: The government should execute a strong Data Protection Policy to prevent misuse and leakage of data. Currents laws in this regard are insufficient. The now withdrawn and replaced Personal Data Protection Bill, 2019 showed a ray of hope by specifically providing for this Right under Section 20, however, now placed Digital Personal Data Protection bill touched its limited aspects via Section 13. This might be instilled in each person right away with the help of a solid information security policy. People may use the right to be forgotten to help them better ensure their security.
4. *Specific inclusion of Right to be Forgotten*: It should be noted that the Right to be Forgotten, which was included in the drafts from 2018 through 2019 and 2021, is absent from this Bill, and there is no justification for this omission. To better comprehend the government's stance on this section, it would be helpful to know the rationale behind the decision to eliminate the Right to be Forgotten, especially given the Bill is founded on the concepts of purpose restriction and data reduction. The right to be forgotten should be included in the current draught legislation since it would allow data principals more control over personal data.

THE NEED FOR REGULATION: BALANCING CREATIVE FREEDOM AND ACCOUNTABILITY ON OTT PLATFORMS IN INDIA

Kush Kalra[*]

Abstract

Over the past few years, the popularity of Over-The-Top (OTT) platforms has increased significantly in India. These platforms, which offer streaming services and original content to viewers over the internet, are currently subject to self-regulation codes but are largely unregulated by the government. However, concerns have been raised regarding the content on these platforms, particularly regarding inappropriate or offensive content and the lack of age restrictions. This article discusses the need for legislation to regulate OTT platforms in India and the proposed amendments to the Information Technology Act, the Cable Television Networks Regulation Act, and the Cinematograph Act. The article provides a comparison of how other countries regulate OTT platforms and analyses the potential impact of regulation on the OTT industry and society as a whole. It also discusses the challenges in implementing regulation and how legislation can balance creative freedom with accountability. Overall, this article argues that while OTT platforms have been a source of innovation and growth for the entertainment industry in India, government regulation is becoming increasingly necessary to ensure that the content provided by these platforms is responsible and appropriate for viewers of all ages.

Keywords: OTT platforms, legislation, regulation, technology, global scenario

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Introduction

OTT Platforms: Meaning

OTT is an abbreviation for Over-the-Top. This handy phrase describes the new method of delivering film and television content over the internet whenever we want, across a variety of devices, without the need for traditional broadcast, cable, or satellite pay-tv providers. In layman's terms, OTT streaming entails paying an internet service provider. In layman's terms, OTT streaming entails paying an internet service provider. it is an audio and video hosting and streaming service which started as a content hosting platform, but soon branched out into the production and release of short movies, feature films, documentaries, and web series themselves. By streaming on-demand material straight to consumers, OTT platforms are today replacing other traditional media distribution channels like cable providers and radio stations. Amazon, Netflix, YouTube, Disney+ Hostar, Zee 5, Alt Balaji, and other well-known streaming video providers are a few examples. It also covers other internet-based media, such as music and podcasts, which are available through sites like Spotify, Apple Podcasts, Amazon Music, etc. These platforms provide a variety of content, including movies, music, series, daily news, and even live streaming of sporting events like the Olympics, Cricket, Football, and Kabaddi matches. Artificial intelligence is also used to suggest content to users based on their search history or past preferences.

Rise in OTT platforms

The days of Doordarshan and satellite discs are quickly being replaced by a culture of "binge-watching," with OTT material providing leisure viewing at home. Every business and industry has been impacted by the Covid-19 pandemic. Some firms were impacted favourably even though most enterprises fell sharply. A boom was seen in online gaming, video conferencing, and Over the Top (OTT) services like Netflix, Hotstar, Amazon Video, and online meeting platforms. The pandemic led to an upsurge in popularity for all OTT services worldwide. Many OTT platforms were helpful during those two years when it was not possible to

release films in theatres. According to The Ormax OTT Audience Sizing Study 2022, there are currently 424 million OTT viewers in India[1]. There are 119 million active paid OTT subscribers in India out of this total. Despite the theatres reopening, the research states that India's OTT universe increased by 20% from 2021. In fact, 3 out of 10 Indians watched an internet video at least once in the previous month, according to Ormax Media. At this moment India has around **45 million over-the-top (OTT)** platform subscribers including various services. India's digital segment ranks second for the largest share of media and industry which will excel in the television market in the coming future.[2]

Need for Regulation

Regulations for OTT platforms have frequently come under fire due to their growing popularity and ability to host a range of content. According to the adage "everything has two sides," these platforms have grown to be a haven for criminal activity and obscenity, which has an impact on the public. Children may be significantly impacted by the obscenity displayed in episodes like Game of Thrones and Mirzapur on these sites. Many court petitions seeking to impose limits on the content presented on these platforms, such Amazon and Netflix, have been filed since the content displayed there is uncontrolled. Pre-screening content on OTT platforms is currently not governed by any such laws or authorities.

In terms of religion, customs, dialects, and a host of other factors, Indian society is diverse. The Internet is becoming more and more commonplace, and it may be used to deliberately sow disinformation, propaganda, and strife. Online platforms are in fact

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1 Srishti magan, 'Over the top growth: OTT subscribers up 20% this year to 424 million, says Ormax' <https://www.businessinsider.in/india/news/indias-ott-universe-grew-to-424-million-users-in-2022-up-by-20-from-2021/articleshow/96053777.cms?utm_source=copy-link&utm_medium=referral&utm_campaign=Click_through_social_share> accessed 11 April 2023

2 Barry Elad, 'Top 10 Indian OTT Platforms<https://www.enterpriseappstoday.com/stats/indian-ott-platformsstatistics.html#:~:text=The%20estimated%20video%20OTT%20market,languages%20is%20Amazon%20Prime%20Video> accessed 11 April 2023.

subject to contradictory demands, one of which calls for complete content policing to ensure adherence to public laws, and the other of which calls for proactive substance monitoring motivated by a paranoid dread of common negative liberties. In India, there are no rules or regulations in place to control the operation and content of OTT services. Many media audiences have expressed dissatisfaction with the material created and broadcast on these platforms as a result of this disparity.

Existing Regulatory Framework in India

Constitution of India- Freedom of Speech and expression

The right to freedom of thought, speech, and belief is guaranteed under the Preamble of the Indian Constitution. In order to influence public opinion on social, political, and economic matters, people must have the liberty to speak their minds and express themselves. It is a basic and inalienable right. The freedom of speech and expression has been described as the mother of all liberties.[3]

Article 19 (1) (a) of the Constitution of India, it includes the freedom of expression and the right to communicate or publish one's thoughts in any medium, including print media like newspapers and magazines, motion pictures like movies, and television, as well as digital and audio-visual media.[4]

Rights of OTT Platforms:

- To Broadcast: The freedom to free speech and expression has been extended by technological innovation to all broadcast media, including online (OTT). In the case of *Odyssey Communications v. Lokvidayan Sanghatana*[5], the Supreme Court held that the right under Article 19 (1) (a) is similar to the right of a citizen to publish his views through any other media such as newspaper, magazines, advertisement hoardings etc.

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3 *Ramlila Maidan Incident, re, (2012) 5 SCC 1.*
4 *S. Rangarajan v P. Jagjivan Ram (1989) 2 SCC 574.*
5 1988 AIR 1642

- To Dissent: Article 19(1)(a) safeguards the right to criticise the government in OTT movies and web series, which is essential for a functioning democracy. In *Nikhil Bhalla v Union of India*[6], the Delhi High Court dismissed the petition in which the petitioner requested a grievance redressal mechanism to handle complaints about online content, OTT services, and the censorship of particular dialogue in the Netflix series Sacred Games, which portrayed the former Prime Minister in a negative light.

- To portray social evils: In *Bobby Art International v Om Pal Singh Hoon*[7], the petitioner sought the banning of frontal nudity images of Phoolan Devi, a rape victim who later rose to prominence as India's most feared dacoit. The Supreme Court denied the petition, concluding that Phoolan Devi's transformation was explained by the rape scenario. In the case of *Anand Patwardhan v. Union of India*[8], in which Doordarshan refused to broadcast an award-winning film because of racial violence, the Supreme Court upheld the filmmaker's right to have his film broadcasted.

Article 19(2) Restrictions on Freedom of Speech and Expression- Article 19(2) of the Indian Constitution provides for restrictions on OTTs and the making of laws imposing reasonable restrictions in the interests of India's sovereignty and integrity; state security; friendly relations with foreign states; public order; decency or morality; contempt of court; defamation or incitement of an offence. A lawsuit was brought in *Divya Ganesh prasad Gontia v Government of India*[9] to demand that the content of web series be regulated. It mentioned Netflix's Sacred Games and the ALT Balaji platform's Gandi Baat. It has been argued that these programmes feature pornographic-like indecent, nudist, and vulgar sequences that violate the Cinematograph Act, the Indian Criminal Code, the Indecent Representation of Women (Prohibition) Act, and the Information Technology Act. In response to this petition calling for

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6 *Nikhil Bhalla v. Union of India, W.P. (C) No. 7123/2018*

7 *Bobby Art International v. Om Pal Singh Hoon (1996) 4 SCC 1.*

8 *Anand Patwardhan v. Union of India (2006) 8 SCC 433*

9 *Divya Ganesh prasad Gontia v. Union of India* (Public Interest Litigation No. 127/2018)

the regulation of such online series, the Bombay High Court sent letters to the MIB.

Indian Penal Code, 1860

Online platforms are subject to Section 295A of the Indian Criminal Code, 1860 ("IPC"), which makes it illegal to offend religious sentiments intentionally and maliciously, as well as Sections 499 and 500 of the IPC, which make it unlawful to disseminate libellous material. Additionally, it punishes anyone who insults a woman's modesty or displays an object that invades her privacy. Considering that there are many OTT platforms with content that is obscene and sexually explicit in nature, controversy recently surrounded ALTBalaji for showcasing sexually explicit contents.

Basically, IPC serves to punish anyone who has participated in or been discovered engaging in the selling or distribution of obscene works of literature as described in Section 293. The next being the deliberate and malicious purpose to offend religious sensibilities as described in Section 295 A. Any act of publishing false information, or defamation as defined by Section 499 of the IPC, as well as any offence against a woman's modesty as defined by Section 354 of the IPC.[10]

The Indecent Representation of Women (Prohibition) Act, 1986

This is an act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.

Protection of Children from Sexual Acts, 2012

The Commission released the Guidelines to Regulate Child Participation in the Entertainment Industry in 2011. This Act, however, broadens the principles' application to include social media and OTT platforms for the first time. TV programs, including

[10] The Indian Penal Code, 1860 ACT NO. 45 OF 1860

but not limited to reality shows, serials, news, and educational media, movies, content on OTT platforms, content on social media, live performances, advertising, and any other type of involvement of children in for-profit entertainment activities are included in the new guidelines' purview.

Information and Technology Act, 2000 ("IT")

Sections 67A-C of the Information Technology Act, 2000 which says that anybody who publishes, transmits, or causes to be published or transmitted in electronic form any material containing sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term up to five years and a fine up to ten lakh rupees, and on second or subsequent conviction with imprisonment of either description for a term up to seven years and a fine up to ten lakh rupees.[11]

In the recent case *TVF Media Labs Private Limited v. State (Govt of NCT of Delhi)*, [12]the infamous case of web series, College Romance. The "College Romance" web series, which primarily airs on YouTube, the TVF Web Portal, and mobile applications, contains vulgar and filthy content and shows women in an indecent manner in violation 292/294 of Penal Code, 1860 ('IPC'), 1860, Section 67/67A of Information and Technology Act, 2000 ('IT Act') and Sections 2(c), 3 and 4 of Indecent Representation of Women Prohibition Act, 1986. The Judge concluded that web series' content will unquestionably bring criminal liability under Section 67 of the Information Technology Act (publishing or conveying any material that is lascivious in electronic form). Code of Best Practices for Online Curated Content Providers

The Internet and Mobile Association of India's (IAMAI) self-regulatory code of best practises was voluntarily signed by the Online Curated Content Providers (OCCP). (IAMAI).

The code was signed by well-known platforms like Netflix, Hotstar, Voot, Zee5, Arre, SonyLIV, ALTBalaji, and Eros Now.

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[11] Section 67-A of the Information technology Act, 2000

[12] Crl.M.C. 2214/2020

The OTT platforms chose to sign the self-regulation code in 2019, which established a specific structure that was revised and reintroduced in 2020. OTT platforms that continued to practise self-censorship will now be subject to regulation by the I&B Ministry. The main goal is to protect the interests of the consumer while also maintaining the creative freedom of content suppliers. Additionally, it strives to give consumers the information they need to choose age-appropriate content.

Part B of the Code broadly provides for three things:

1.Prohibited content,
2. Age inappropriate or sensitive content, and
3. Internal Complaints Redressal Forums and procedures for filing complaints with them.[13]

The only drawback to this type of self-regulation is that it does not cover all OTT service providers, resulting in unequal treatment.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules)

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules) represented the initial effort to offer a specific structure for the hitherto unregulated OTT sector. Part III of the rules provides the Code of ethics and procedure and safeguards in relation to Digital Media. Section 8 of the Rules states the applicability to the publishers of online curated content.

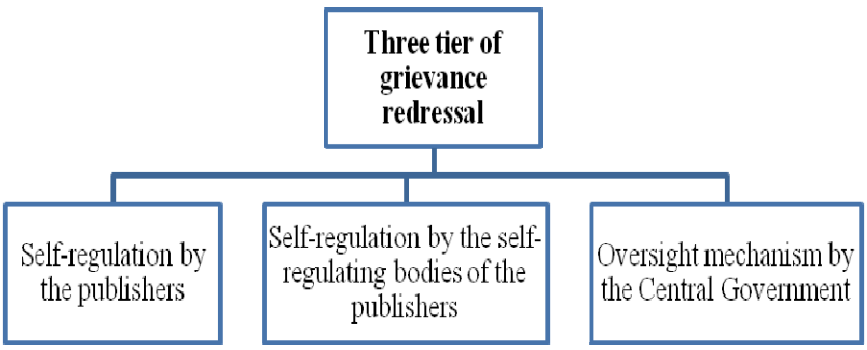
According to these rules for OTT platforms, these platforms must abide by Indian law and refrain from streaming any material that is offensive to the sovereignty or integrity of the country or that could incite violence. These platforms must also be mindful of

[13] Anusha Nanda, 'New Self-Regulation Code signed by Online Curated Content Providers' (Indian Law Portal, OCTOBER 22, 2020) <https://indianlawportal.co.in/new-self-regulation-code-signed-by-online-curated-content-providers/> accessed 11 April 2023

people's different ethnicities, cultures, beliefs, and religious practises. The rules also lay down a soft-touch self-regulatory architecture with a Code of Ethics. Two crucial rules were outlined in these new regulations created by the government:

1. Three-tiered grievance resolution process

It called for the establishment of a three-tiered grievance resolution process with a government entity as its third level. [14] Section 9 of the Rules states this three-tier structure-



The government-instituted three-tier system placed some restrictions on the freedom of OTT platforms. Self-regulation needs to be developed at the platform level for each individual in the first tier. An officer for handling complaints must be appointed by the government. Any complaints must be resolved by an officer within 15 days, and if the officer is unable to do so, the issue must be moved to the second tier of the system. By working together, OTT players create a self-regulatory body in the second tier.

If there is a complaint, this body is capable of censorship. According to the rules, this body will be presided by a retired Supreme Court or High Court judge or by a prominent independent figure from the media, broadcasting, entertainment, child rights, or other related disciplines. The Inter-ministerial committee, which is

[14] Ameet Naik, Regulation of OTT Platforms: Challenges and Solutions, WION, (April 3, 2023) https://www.wionews.com/opinions-blogs/regulation-of-ott-platforms-challenges-and-solutions-567573

at the third tier and serves as a monitoring body, has the highest authority.

2. Content Classification

According to the consumers' ages, the content must be divided into five groups. The following categories are available for this classification: U (universal), A (adult), U/A 7+ (for users older than 7 years), U/A 13+ (for users older than 13 years), and U/A 16+ (for users older than 16 years). This method of categorising the content based on audience age has been adopted by all the major players.

Global stand on the regulation of OTT content

To provide a proper framework for the regulation of the OTT sector, special enactment was introduced known as The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules), which was the first attempt by the government. It came up with the formation of a three-tier grievance Redressal mechanism and government body was placed at the third level. The rules provided that if any OTT service providers receive government notice, it must remove the content within 36 hours of receiving such order or notice. Additionally, AI have come into play for identifying the objectionable contents like sexual violence, vulgarity etc. in order to suppress the content from being broadcasted.

Much like India, many countries have suffered before finally introducing a proper regulation of OTT platforms. India is not the only country, which is still struggling to provide for a better regulatory framework for OTT service, provides which have rapidly conquered the entertainment industry. The Ministry of Information and Broadcasting has conducted several meetings inn Delhi, Chennai and Mumbai in the last previous years to discuss and encourage the OTT service providers to come up with their own self -regulating mechanism for a better regulation. The Ministry has looked upon the foreign models of regulatory framework on media in UK, Singapore and Australia from time to time. By referring to

the success of the institutional and self-regulatory mechanism in foreign nations, the Ministry have attempted to frame moreover the same structure for India.

United Kingdom

Though, in 2018, the British Board of Film Certification proposed the argument that OTT platform requires no such regulations, United Kingdom under the Brexit framework, adopted the EU Electronic Communications Code (EECC)[15] and was implemented on 21stDecember, 2020, just before the end of the Brexit transition period on 31st December, 2020. Later, the UK government for the OTT service providers to comply with EECC issued a notification. UK transposed the code into English law and hence framed regulations on 2 December 2020 and new rules, which would now guide the service providers[16]. It is yet to see how the rules are affecting the OTT platforms.

Singapore

OTT content is regulated by the regulatory body called Infocomm Media Development Authority (IMDA) in Singapore. It is responsible for issuing a code of conduct for the regulation of such platforms and mandates for a service providers to obtain a license. IMDA has also emphasised on the parental code for the content accessed and available to the age group of16 and 21 and the rating, which must be given to the varied OTT content as rated in offline content. Proper parental code is required in cases when the content is made and available only for the age group of 16 and above, however only proper verification is required for the content made for the age group of 21 and above. If any providers faults, the content is withdrawn and imposed penalties. Apart from these guidelines, the OTT service providers are mandate to comply with the existing laws of the nation.

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[15] Poorva Pandey, Guidelines for OTT Platforms and Social Media, 2021: Regulation or Restriction?, 24 Supremo Amicus [729], (2021)

[16] Richard Kemp , Regulating 'Over The Top' Services In The UK – A Brief Overview, Mondaq (15 June, 2021) https://www.mondaq.com/uk/broadcasting-film-tv-radio/1079992/regulating-over-the-top39-services-in-the-uk-a-brief-overview

Australia

Australia has framed proper act to regulate the OTT sector, called, The Broadcasting Service Act, 1992[17]. The act takes a two-way approach to govern the content with an Australian connection and content hosted outside of Australia. The Act contains all the guidelines to be mandatorily followed by the OTT service providers and a proper complaint mechanism. It has emphasised over the classification of contents, classified and not classified. Non-classified obtains its classification through ratings. Refused classification covers the classification of the content which is not allowed to be sold or published or advertised. X 18+ classification includes the contents restricted to the adults, which majorly features sexually explicit material. R 18+ classification given to contents restricts a certain section of adult, which are likely to be highly affected. Content for the age group until 15 years has been given the MA 15+.

Concerns with unregulated OTT content

In the case of *S Rangarajan v. P Jagjivan Ram*[18], the Supreme Court of India stated that "the cinema cannot function in a free market area like the newspaper, magazine, or advertisement.

The Delhi High Court has received a few Public Interest Litigations (hence referred to as "PILs") requesting the creation of rules to control how OTT operates. An NGO by the name of Justice for Rights Foundation filed a PIL in Delhi High Court, alleging that the content on OTT was illegally restricted, sexually explicit, vulgar, and inappropriate. This case is referred to as the "JRF case" because it was not regulated or certified. The Honourable Delhi Court ruled that even though there is no general authority to regulate internet platforms, the IT Act's provisions must be respected. The Court dismissed the petition by stating that the competent authority may adopt deterrent measures under the IT Act if the internet platform is utilised improperly to spread information or material that is illegal under the law. A notice was sent to the Government

[17] Ibid
[18] 1989 SCR (2) 204

after the petitioners, who had been disappointed by the dismissal, filed an appeal with the Supreme Court. The Supreme Court agreed and ruled that the Information Technology Act of 2000 already contains sufficient regulations for OTT services.[19]

In another case of *Nikhil Bhalla v. Union of India* [20], the Delhi High Court, the main contention put out was that historical accuracy must be maintained when portraying historical political personalities and that artistic licence cannot be taken to defame or tarnish their reputation. Also, it is disgusting that solely for the sake of TRPs and to earn some profit the producers have come down to such a level that they have portrayed former prime minister in the bad light while he is a role model to millions of Indians.

"Patal Lok," a web series, was recently highlighted on Prime Video. A writ petition was also filed in the Calcutta High Court under the case name Pranay Rai v. Clean Slate Films Pvt ltd &Ors[21]. Despite the show receiving praise from all over the world, the creators and producers came under fire from various religious and caste groups as well as politicians from the ruling party and its allies. A police complaint asking for a FIR against the producer under sections 153, 295A, and 298 of the Indian Penal Code was sent to the directors and the OTT platform for hurting the feelings of the Sikh community and claiming that the content could disrupt law and order conditions across the nation. Another MLA also complained about how his photo was used in the show without getting his consent, thus this wasn't the only complaint made. In addition, he urged that a National Security Act lawsuit be brought against the producer for upsetting the peace. [22]

Numerous arguments were brought up in this case as to why OTT services in India require censorship. The claim made was that section 67 of the Information Technology Act had been broken because violent, offensive, and anti-social material was shown

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19 Justice for Rights Foundation v. Union of India, 2019 SCC OnLine Del 10962

20 WP(C) 7123 of 2018, order dated 9-4-2019 (Del)

21 W. P. No. 5441 (W) of 2020 with C.A.N. 3148 of 2020

22 Anant Sharma, 'Legal Challenges faced by Over The Top (OTT) Platforms in India' (Mylawyer, 16th September 2022) <https://mylawyersadvice.com/legal-challenges-faced-by-over-the-top-ott-platforms-in-india/ >

without regard to the audience's age. The online series was also contested for depicting the gang rape case in violation of the Indecent Representation of Women (Prohibition) Act, 1986. Additionally, the petition claims that the event is illegal under Indian Penal Code sections 153A and 298.

The petition's main defence was that, unlike movies shown in theatres, where one can choose where to go and view them, movies still require certification before being released, whereas the method used by online platforms is defective and impractical because one has no control over the information that is being displayed. However, the petition was denied since there is no concrete evidence of a human rights violation in the claims.

The way Indians consume material has been revolutionised by OTT platforms, yet there are worries about the absence of regulations in this area. Some of the main concerns include:

1. **No classification of contents according to the age groups:** The OTT content is open for all people to watch and enjoy with no discrimination on consumption. However, the issue lies with no proper classification of contents according to the age groups for which the content is made. Hence, there is no control over what of kind of content has to be shown to which category of people. During the COVID-19 pandemic, every school student had the access to mobile phones through which they could watch such contents, which was not appropriate for them at such tender age. Proper parental code must be established in order to restrict the children from watching inappropriate content featuring vulgarity, obscene videos, violence, abusive languages etc.
2. **Lack of censorship:** Unlike, the regular and traditional content which is subject to regulation censorship by institutions like the Central Board of Film Certification (CBFC). This implies that on these platforms, content that would be ruled inappropriate for transmission on TV or in theatres can be streamed. There have been multiple occasions where OTT services' material has come under fire for being overly graphic, violent, or offensive. For instance, "Tandav," a web serial, received criticism from some viewers for supposedly offending their religious sensibilities. In

a same vein, "Gunjan Saxena: The Kargil Girl" came under fire for supposedly encouraging gender inequality.

The consequences for society of this absence of censorship could be severe. Children, who increasingly consume video on OTT platforms, may be negatively impacted by explicit or violent content, for example. On these platforms, there are no parental controls, which raises concerns that kids might access improper content. Given that some of the content on these platforms may be too mature or violent for children, there are further worries regarding the effect of this content on their development.

3. **Issue of data protection and privacy:** The OTT service providers collects all the data and information of their users, which serves as an important financial product to help the companies in identifying their potential audience. There exists no transparency on the part of the sector to inform the users. OTT platforms uses this sensitive information of the users such as personal information, preferences and traits to provide better options. Hence, the OTT must protect the information as it has the potential to raise question on the violation of the fundamental right to privacy. Moreover, the users must be self-conscious before providing their personal information and must read the privacy guidelines of the platforms.
4. **Impact on children:** There are worries regarding the effects of this content on children's development as they encounter OTT content more frequently. There are worries about the lack of parental controls on these platforms, as well as the fact that some of the content on them may be too mature or violent for kids.
5. **Threat to traditional media:** People worry that OTT platforms may threaten traditional media if they continue to grow in popularity. Both the number of jobs in the traditional media sector and the calibre of the material that these businesses generate may be significantly impacted by this. Furthermore, there are worries about the government losing money because OTT companies do not pay the same taxes and fees as traditional media.

6. **Issue of data protection and privacy:** The OTT service providers collects all the data and information of their users, which serves as an important financial product to help the companies in identifying their potential audience. There exists no transparency on the part of the sector to inform the users. OTT platforms uses this sensitive information of the users such as personal information, preferences and traits to provide better options. Hence, the OTT must protect the information as it has the potential to raise question on the violation of the fundamental right to privacy. Moreover, the users must be self-conscious before providing their personal information and must read the privacy guidelines of the platforms.
7. **Revenue loss:** OTT platforms do not have to pay the same taxes and levies as traditional media because they are not subject to the same rules. Concerns about the government losing money as a result have arisen.

Challenges faced by OTT Platforms due to no regulations.

The number of difficulties experienced by producers, directors, and the digital platform that displays the content is continuously increasing because there is no regulation to monitor the content that is being shared on OTT platforms.

1. **Controversies over content:** The content that OTT services provide is one of their biggest legal obstacles. There have been many disputes regarding the content that these networks give because there are no defined regulations. For example, backlash faced by Amazon Prime series Tandav and Patal Lok over the content which had hurt religious sentiments of the people.

2. **Jurisdictional issues:** As these OTT platforms offer content globally and the problem is to determine which laws and regulations apply to these platforms. For instance, if an OTT platform has its headquarters in the US but provides services in India, it may be governed by laws and regulations from both of those nations. Additionally, it could be difficult to discern which laws are relevant because the platform's

material is generated and transmitted from various nations. Like, in the case of series, Sacred Games streamed on Netflix which is headquartered in United States and the show was streamed and produced in India, the case encountered jurisdictional issues and case was dismissed by the Supreme Court.[23] Similar situation happened in the case of Mirzapur, wherein the complaint was filed that had allegedly derogatory to the people of Mirzapur, a city in Uttar Pradesh. The series was streamed on Amazon Prime which was headquartered in United States, and they argued that they were subject to US laws and regulations.

3. **IPR and enforcement:** This refers to the issues faced by OTT platforms in enforcing their intellectual property rights in digital space.

    a) **Piracy:** Unauthorized use, storage, and sharing of such unsolicited content is one of the biggest problems facing digital platforms. It has become common practise in the digital ecosystem for people to avoid paying a fee to legally obtain viewership rights, especially when the same content is available as a pirated file for free on other illegal platforms. This results into a great financial loss to the platforms. While it is difficult to eradicate piracy completely, these platforms are trying to take measures such as Digital Rights Management (DRM). One illustration of such an unlawful content platform is uTorrent, one of the most popular programmes in the world for downloading unauthorised content.

    b) **Copyright and trademark infringement claims:**OTT platforms might be accused of copyright infringement by distributors and content owners, among other parties. This may occur if the platform distributes or broadcasts content without first securing the required licences or consents. In order to avoid this, before streaming or

[23] Scroll Staff, Plea filed in Delhi HC against 'Sacred Games', demands deletion of 'derogatory' sceneshttps://scroll.in/latest/886142/plea-filed-in-delhi-hc-against-sacred-games-demands-deletion-of-derogatory-scenes , 11th July 2021

distributing material, OTT platforms must make sure they have the necessary licences and agreements in place. If OTT platforms utilise the name or logo of another business without authorization, they may potentially be accused of trademark infringement. Confusion among customers may result if the platform adopts a name or emblem that is similar to an already established brand.

Content Regulation in India: Way forward

The complex balancing act between the public interest and the fundamental rights protected by the Constitution is crucial to media regulation. These concepts serve as the foundation for media democratisation and set internet content apart from traditional media. Web material is typically more open-minded, addressing ideas and issues that are not typically found in traditional media. As a result, it frequently departs from accepted censorship norms.

Currently, out of the five different forms of media—print, radio, television, films, and over-the-top (OTT)—only the first four are subject to regulation.

The evolution of technology and three major policy actors—the government, judiciary, and industry—have shaped content regulation in India. From the advent of cinema to the on-demand media of today, content regulation in India has been characterised by a paternalistic state and a mismatch between technology and legislation, with rules significantly lagging behind the latter.

Although the introduction of OTTs has altered watching preferences, their operational infrastructure remains the main cause for concern. The government finds it challenging to enact restrictions due to the open internet, which has significantly impacted Indian viewers' viewing patterns. Anyone who has access to digital devices can now access content thanks to the internet. The government is no longer able to control when television programmes are shown or to enforce content grading.

Notably, the amendment to the IT Rules that were published in 2022 are still a source of worry because of their ambiguous and unknown provisions. It is feared that the planned censorship body will lack transparency to a great extent and may impose unreasonably onerous limitations on media. In fact, given the variety of this nation, the purpose of media-related law or regulation should not be "censorship," but rather ensuring that content reaches the right audiences. Although censorship may have been necessary in British India, it has no place in a free, democratic country. For instance, the Indian Broadcasting Foundation, a self-regulatory organization, controls television content. (IBF).

The Supreme Court has remarked that there is an enormous flood of OTT content from foreign nations, which complicates matters. There is still concern about how well domestic redressal measures are enforced against international businesses. Unintentionally, the suppression of foreign content fuels the spread of piracy, another plague that legal regimes have found difficult to contain.

There will be obstacles in the way of content regulation no matter how it is done. Any method of spreading content sparks protests calling for its removal; this problem affects both theatrically released movies and web series, as evidenced by the rise in petitions filed against web series. Previously discussed, in the case of petitions filed against the web series like Tandav, Pataal Lok, Sacred Games and Mirzapur.

Conclusion and Recommendations

Unfortunately, identifying the problems is not as simple as finding a solution. While it is common knowledge that the freedom of speech and expression is a fundamental human right, it is also subject to legitimate limitations. The regulation is a good idea but difficult to implement and challenging to practice in order to provide a comprehensive legal framework, especially for digital media.

An approach that combines governmental censorship with self-regulation is perhaps more popular in India because of its regulatory tradition. A hybrid model of regulation can be implemented. There can be a self-regulatory body be implemented for OTT platforms, which comprises the stakeholders from the industry. This self-regulating body be governed by a code or guidelines issued by the government to deal with the grievances and complaints related to the OTT content. The impact of foreign content on society has been a key worry for content authorities over the past century in both television and movies. The state's cinema censors determined that foreign content was advantageous for Indian audiences in one of their initial evaluations. However, panels tasked by the government with developing television content regulatory models consistently stated that sensitive cultures were impacted by foreign content. These worries have grown as OTTs have flooded India with content from all over the world. The content on OTT platforms is influenced from western countries which also leads to the issues with jurisdiction as most of these headquarters are in United States. It is not possible to strictly regulate them with an Act or imposing strict regulations as India is a country of diverse culture and religions.

Recommendations

When content control is implemented, a set of parameters and indicators should be considered, according to the analysis in this paper. The following suggestions are based on four concepts: accessibility, portability, cultural disruption, and freedom of choice.

1. Hybrid Model approach: The new kinds of content regulation that would rely on current regulatory models as well as self-regulation patterns are likely to result from the paternalistic approach of the Indian government to content regulation (as in television broadcasting). The courts have pressured the government to adopt a framework for policy that is consistent with technological progress and perhaps even moves at the same rate as it. There can be a strict guideline be framed by the government to guide the proposed self-regulatory body and defining the restrictions on the content,

2. Creation of a self-regulatory body: Considering the current circumstances, an unbiased regulatory agency is required to control the content on OTT platforms. This self-regulatory body will be guided by the proposed guidelines and will form a co-regulatory model of regulation where the State will have an upper hand. This self-regulatory body's recommendations might be challenged in front of an appellate committee that was assembled by the same body and included impartial members. The next level of regulation may be a quasi-judicial body made up of legal and business professionals, whose judgement would be final. With fewer spurious lawsuits against OTT content being filed before High Courts and Supreme Courts, this arrangement can assure prompt resolution and minimise their workload. However, the proposed system's performance is totally dependent on the autonomy of self-regulatory bodies, its guiding principles, its participants, and other little elements.

Internet use has been increasing in India, where it has developed into a marketplace for ideas, a way for content providers to reach a wider audience, and a brand-new platform for entertainment and education. Because of this, both the government and the industry should recognise the increased space for free speech that the internet has provided in India and the necessity to adopt a more restrictive and freedom-focused regulatory strategy. A better dispute resolution and regulation structure for OTT material is undoubtedly becoming more and more necessary. However, the media sector, the general public, and governmental policy must all come together in order to find a workable answer. While regulating the OTT platforms, the major factors must be considered as discussed in the paper namely the freedom of speech with reasonable restrictions, the accessibility, the freedom of choice and cultural disruption. There must a balance of these platforms' creativity in the content and the religious and cultural sentiments of the people of India with a speedy and redressal system for these platforms.

CRYPTOCURRENCY: A CASE OF ENVIRONMENTAL ETHICS AND REGULATORY GOVERNANCE

Dr. Abha Yadav[*]*, Ritima Singh*[♦] *& Hriday Kochhar*[♠]

Abstract

"*Cryptocurrency is a good idea on many levels and we believe it has a promising future, but this cannot come at great cost to the environment*"

The above single tweet from Elon Musk is rather a historic one and known to any person remotely aware of cryptocurrency. This single tweet from the CEO of Tesla and SpaceX moved the value of cryptocurrencies into a downward spiral. However, it simultaneously steered discourse on the internet on the environmental impact of cryptocurrencies. The environmental concern around the cryptocurrencies stems from the fact that mining of these coins consumes a mass amount of energy which is being majorly drawn from non-renewable sources. Many world leaders, tech giants, governments, researchers and citizens have deliberated around the theme of cryptocurrency, such as its regulation, issues of accountability, transparency, blockchain etc,. However, the discourse around the environmental impact of these currencies is still a rare sight. According to Bitcoin Energy Consumption Index (BECI), Bitcoin consumes around 118.9TWh energy every year which is approximately close to energy consumption of countries such as Pakistan (125.9TWh/year), Netherland (117.1 TWh/year). As per data driven by Statista, one Bitcoin transaction on an average consumes 1200.86 kWh, on the other hand, 1,00,000 VISA transactions consumes only 148.63 kWh. To add to the magnitude of the issue in

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hand, BECI reveals that one single bitcoin transaction leaves around 579.92 kgCO2 carbon footprint while 12,85,295 VISA transactions leave the same amount of carbon footprint. The introduction of cryptocurrency is a burden on non-renewable sources of energy, an increase in carbon footprints and E-waste. This article is an attempt to look at the regulatory gaps in the environmental aspects of cryptocurrency. The premise of the article is based on the principle of sustainable development and brings forth a comparative analysis between cryptocurrency and traditional currency. The article argues that the technological intervention, in this case digital currency, should meet the test of sustainability and that its implementation should not add up to the existing environmental crises. The article will prove to be the foundation stone for further research and development in the area of environmental governance pertaining to cryptocurrency.

Key Words: *Sustainable development; cryptocurrency v. traditional currency; environmental impact; environmental governance*.

Introduction

Innovation has been a reform that has played a quintessential role in the evolution and development of mankind across the globe. In addition, digital innovation is a crucial part of this reform. From robots to autopilot-driven cars, this branch of innovation has been pivotal in economic growth and raising the standard of living. Today, several organizations are adapting and relying on data-driven technologies, AI, and blockchain in their daily pursuits. These technologies are driving various sectors towards growth and development. However, the concerns about the environment are at bay. Development and growth have often blinded the policymakers and often the environmental concerns are overlooked or are not taken into account. For instance, leaded petroleum took over the world until the environmental concerns were alarming and in the late 1990s, the same was banned. The 21st century has witnessed

several such innovations and some of them have had irreversible damage to the environment. The application of AI and blockchain has been adopted by various countries in many of their sectors. This adaptation has been rather mindlessly done without evaluating the environmental concerns.

This paper intends to cover the most burning topic around the globe, that is, cryptocurrency. A cryptocurrency (or "crypto") can be defined as a digital currency that may be used to buy goods and services. The technology uses an online ledger (blockchain) based on strong cryptography to secure online transactions. These digital currencies are currently serving a large customer base in the exchange market and are becoming a very popular mode of day-to-day transaction. Some famous cryptocurrencies around the world are Bitcoin, Ethereum, XRP, Tether etc. These currencies are enabled or exist on the technology called the blockchain. Blockchain is a decentralized ledger that is used to confirm transactions. The article by using secondary data available brings out the environmental impact of minting these cryptocurrencies. The purpose of the article is to highlight the impact of cryptocurrency and the technology involved in the environment. The article should not be construed as regressive in nature. Rather it promotes technology and innovation, however, it argues that the adaption of the same should be done on the touchstone of the principle of sustainability.

The "Science" behind the Cryptocurrency

Cryptocurrency can be categorized under the head of a digital assets/currency. They have not been given the stature of legal tender in most countries but primarily they can be stated as a virtual currency that is issued and controlled by its developers and is used and accepted among members of a specific virtual community (*Cryptocurrencies and Blockchain*, n.d.). Published through a white paper in general it is a computer code that generates or issues virtual currency and is electronically stored on blockchain using encryption techniques. This technique ensures the controlled creation of blocks and verification of the transaction. All the transactions on the blockchain are recorded in chronological order which makes it

impossible to tamper with the record of any transaction. Some key features of cryptocurrency are:

1. Digital asset
2. Enhanced transparency in transactions
3. Transactions stored on a permanent ledger
4. Decentralised in nature

As per the definition given by Forbes of Cryptocurrency "Cryptocurrency is decentralized digital money that's based on blockchain technology"[1]. Now before we break this definition further, it is essential to understand the concept of blockchain and the technology on the back of which the cryptocurrency has come to life. A blockchain facilitates a decentralized ledger of all the transactions that occur within a peer-to-peer network comprising globally distributed nodes (computers). In this peer-to-peer network, each node maintains a copy of the blockchain and contributes to the functioning and security of the network. A blockchain thus is a digital, ever-growing list of data that contains records in blocks of data which is organized in chronological order and linked to one another, and secured by cryptographic proofs[2].

The decentralized ledger system does not require any third party either to validate the transaction or to keep a record of the data pertaining to the transactions. For instance, in a contemporary banking system, the bank keeps records of all the transactions that take place and further it verifies that transaction and settles the account at the other end. Further simplified, "X" wants to send money "Y". X knows the required details to transact the amount into Y's account and tells his bank to transfer the money from his account to Y's bank account. Now what the bank does is, that as per the instructions, the bank being the third party, transfers the amount

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1 Kate Ashford, John Schmidt, 'What Is Cryptocurrency? – Forbes Advisor' (2022, January 25) Forbes https://www.forbes.com/advisor/investing/what-is-cryptocurrency/ accessed on 12 April 2022

2 Kate Ashford, John Schmidt, 'What Is Cryptocurrency? – Forbes Advisor' (2022, January 25) Forbes https://www.forbes.com/advisor/investing/what-is-cryptocurrency/ accessed on 12 April 2022

from X to Y's bank account, while maintaining the record of the transaction.

In a similar situation when X wants to transact using cryptocurrency which relies on blockchain technology, without the involvement of a bank, X will have a wallet in their name and so will Y. X will have Y's wallet number or say a public key through which X will transfer the amount into Y's wallet. X will add Y's wallet details to their account and transfer the money directly into Y's account, this transaction will then be sent to the nodes that are running the blockchain after which each node (computer) will approve the transaction. Thereafter, this transaction will then be scripted or added to a block of how X has placed some amount into Y's account and the same will be stored on the ledger for infinity. If there are any further transactions that will take place then more such transactions will be added to the block and so on and so forth. Once a block is full, another block will be mined or minted, and thus, another block will be added to the chain. A pictorial representation to illustrate as shown below:

X wishes to send money to Y

Y wishes to receive money from X

We will treat X sending money to Y as a transaction taking place:

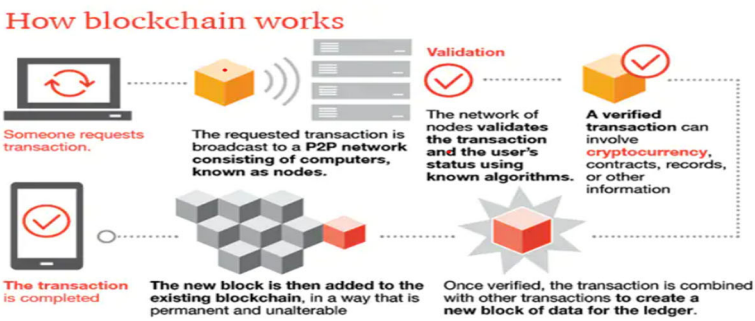

Figure 1: Photo credit – 'Making sense of bitcoin, cryptocurrency and blockchain, PWC. https://www.pwc.com/us/en/industries /financial-services/fintech/bitcoin-blockchain-cryptocurrency.html

Using blockchain technology, the participants can confirm transactions without the intervention of any central clearing authority. Potential applications can include fund transfers, settling trades, voting, and many other issues[3].

Delving further into the science behind Cryptocurrency, the word is made of "crypto" & "currency". "Crypto" comes from the word cryptography, a process that is necessary for securing the cryptocurrency as it transforms the information into a form that only the intended recipients can process and read. Modern cryptography uses mathematical theories and computation to encrypt and decrypt data that guarantees the integrity and authenticity of the information[4]. This can also be called an encryption algorithm in which encryption will be done through the vires of an algorithm that will alter the data and transform data into ciphertext (which is unreadable) which can only be decrypted with a specific key[5].

2.1 What is Crypto Mining?

Crypto mining refers to the process of verifying and adding new transactions to the blockchain which is on a distributed ledger. The process is completed only after the transaction is validated by a network of nodes. The process involves computers that solve the cryptographic hash puzzles. Simply put, when a computer solves a complex mathematical equation to add and verify a transaction to the blockchain it is rewarded with a cryptocurrency. As stated earlier, blockchain is the enabling technology behind cryptocurrency so when a person invests or makes a transaction using a cryptocurrency, the details of the investment are recorded on the blockchain. To complete this process of recording the transaction on the blockchain a "miner" has to verify the transaction as legitimate. This is a crucial procedure in the world of cryptocurrency since these currencies are decentralized in nature.

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[3] 'Making sense of bitcoin, cryptocurrency and blockchain' PWC https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html accessed date: 12 April 2022

[4] 'Cryptography' Binance Academy https://academy.binance.com/en/glossary/cryptography accessed date: 12 April 2022

[5] 'What is encryption? | Types of encryption' Cloudflare https://www.cloudflare.com/en-in/learning/ssl/what-is-encryption/ accessed date: 12 April 2022

Every successful verification leads to a new block entering the system. Therefore, calling the process "mining".

Mining requires heavy computing as many miners are in a race against each other to solve the problem or guess the right answer. The miner who successfully cracks the equation gets to write the next block and approve the transactions that will be added to that block from which the miner will earn a fraction of the transaction as a fee for their effort and a reward to solve the code. Therefore, this process is said to be based on the concept of "proof of work". It is very essential for the miners to employ applications of robust high processing units and huge amounts of electricity to win the "race". The high computing power required by the Bitcoin network initially involved the use of CPU and Graphics Processing Unit (GPU) (2009-2011), Field Programmable Gate Array (FPGA) (2011-2013) and later they reached Application-Specific Integrated Circuit (ASICs) since 2013[6]. The employment of GPU/ASICs along with huge amounts of electricity makes mining a costly process. Due to this large cost involved in the mining of cryptocurrency, it is often done in a pool wherein a group of miners combine in a network to mine.

Proof of Work vs Proof of Stake

Proof of work and proof of stake are two different validation techniques that may be employed to verify the transactions which later on are added to a blockchain. Cryptocurrencies typically use either proof of work or proof of stake to verify transactions.

Proof of Work*:* "Proof of work is a method of verifying transactions on a blockchain in which an algorithm provides a mathematical problem that computers race to solve," says Simon Oxenham, social media manager at Xcoins.com. Each miner (computer) tries to solve the algorithm by guessing a random number that will solve the algorithm and verify the transaction or a group of transactions that will be added to a block which then will

[6] Suman Ghimire 'Analysis of Bitcoin Cryptocurrency and Its Mining Techniques' (2019, May) UNLV https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=4606&context=thesesdissertations accessed on 12 April 2022

be sent to the nodes for verification and eventually be added to the blockchain ledger. The first miner to successfully crack the puzzle is rewarded with a small amount of cryptocurrency for their efforts. This race to mine requires an extensive amount of computer power and electricity as the more the computer power, the more the guesses one can produce per second.

Proof of Stake: To reduce the amount of power for the verification of transactions, some cryptocurrencies have started relying on the proof of stake verification method. Under this method, a stake is raised by the validator which reduces the competition against one another for guessing the right number to solve the algorithm. It is through this method that the validatory stakes his own crypto in exchange for a chance of getting to validate the new transaction, update the blockchain, and earn a reward[7]. With proof of stake, the number of transactions each person can verify is limited by the amount of cryptocurrency they are willing to "stake". "It's almost like bank collateral," where each person who stakes crypto is eligible to verify transactions, but the odds a miner will be chosen to do so increase with the amount they front[8]. "Because proof of stake removes energy-intensive equation solving, it's much more efficient than proof of work, allowing for faster verification/confirmation times for transactions," says Anton Altement, CEO of Osom Finance. To discourage fraud, if a miner verifies invalid transactions, their stake is forfeited[9].

How Does Crypto Mining Affect the Environment?

Following are the ways in which the mining of cryptocurrency is affecting the environment.

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7 'What is "proof of work" or "proof of stake"?' Coinbase https://www.coinbase.com/learn/crypto-basics/what-is-proof-of-work-or-proof-of-stake Accessed on 12 April 2022

8 Kate Ashford, John Schmidt, 'What Is Cryptocurrency? – Forbes Advisor' (2022, January 25) Forbes https://www.forbes.com/advisor/investing/what-is-cryptocurrency/ accessed on 12 April 2022

9 Kate Ashford, John Schmidt, 'What Is Cryptocurrency? – Forbes Advisor' (2022, January 25) Forbes https://www.forbes.com/advisor/investing/what-is-cryptocurrency/ accessed on 12 July 2022

1. ***Mass electricity consumption***: In a study[10] it was estimated that one bitcoin transaction consumes around 1,544 kWh of power, which is almost equivalent to 53 days of power consumed in an average American household. Following are the two tools for estimating electricity consumption by the Bitcoin network:

   a. "Cambridge Bitcoin Electricity Consumption Index (CBECI), developed by the University of Cambridge".

   b. "Bitcoin Energy Consumption Index (BECI) realized by Digiconomist".

As per the statistics produced by CBECI, bitcoin yearly electricity consumption is around 0.55% of the total world electricity production[11].

2) ***E-Waste generation***: E-waste is a potential threat to our environment that has been persisting since the invention of e-gadgets and appliances. The waste ranges from toxic chemicals and heavy metals dumped into soils, to air and water due to improper recycling. The issue now has intensified and multiplied by the introduction and minting of crypto coins on a vast scale. Bitcoin's annual e-waste generation adds up to 30.7 metric kilotons as of May 2021[12] The same report reflects that on average Bitcoin generates 272g of e-waste/transaction[13]. With the surge in price, Bitcoin could

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[10] Shivam Arora 'What Is Bitcoin Mining: How Does It Work, Proof of Work and More' Simplilearn. (2022, March 7) https://www.simplilearn.com/bitcoin-mining-explained-article accessed date 12 April 2022

[11] '*Cambridge Bitcoin Electricity Consumption Index' (CBECI)* Cambridge Bitcoin Electricity Consumption Index (CBECI) https://ccaf.io/cbeci/index/comparisons Accessed date 12 April 2022

[12] Alex de Vries & Christian Stoll 'Bitcoin's growing e-waste problem' Resources, Conservation and Recycling (2021) *175*(1), 105901. https://www.sciencedirect.com/science/article/pii/S0921344921005103 accessed date 12 April 2022

[13] Alex de Vries & Christian Stoll 'Bitcoin's growing e-waste problem' Resources, Conservation and Recycling (2021) *175*(1), 105901. https://www.sciencedirect.com/science/article/pii/S0921344921005103 accessed date 12 April 2022

produce up to 64.4 metric kilotons of e-waste as seen in early 2021[14].

Comparative analysis between cryptocurrency and traditional currency

To attain better understanding on the energy consumption of cryptocurrency, it is essential to draw a comparative analysis between the existing currency that is traditional currency and cryptocurrency on grounds of energy consumption. According to VISA, the company consumed a total amount of 740,000 Gigajoules of energy (from various sources) globally for all its operations which is equal to the energy consumption of around 19,304 U.S. households[15]. We also know VISA processed 138.3 billion transactions in 2019. When compared to the energy consumption of bitcoin, it is concluded that cryptocurrency is extremely more energy-intensive per transaction than VISA. The difference in carbon intensity per transaction is even greater, as the energy used by VISA is relatively "greener" with the carbon footprint per VISA transaction being 0.45 grams CO2eq and most of which is drawn from a renewable source of energy[16].

Regulating Cryptocurrency: Moving from anthropocentric approach to ecocentric approach.

The ideology of treating sapiens as the most crucial part of the world is called the Anthropocentric approach. The policy frameworks with an anthropocentric approach are inherently designed to serve humankind and neglect other essential components of the ecosystem such as the environment, flora & fauna etc. As opposed to the anthropocentric approach, the ecocentric approach refers to finding intrinsic value in all living

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[14] Alex de Vries & Christian Stoll 'Bitcoin's growing e-waste problem' Resources, Conservation and Recycling (2021) *175*(1), 105901. https://www.sciencedirect.com/science/article/pii/S0921344921005103 accessed date 12 April 2022

[15] 'Bitcoin Energy Consumption Index' Digiconomist https://digiconomist.net/bitcoin-energy-consumption/ accessed date 12 April 2022

[16] 'Bitcoin Energy Consumption Index' Digiconomist https://digiconomist.net/bitcoin-energy-consumption/ accessed date 12 April 2022

organisms including the environment. Considering the growing environmental concerns around the globe, it is very essential that the policymakers adopt an ecocentric approach while framing regulations. In the context of cryptocurrency, this segment identifies the approach adopted by various countries toward cryptocurrency. The Library of Congress (LOC) has been conducting periodic reviews of various countries' stances on cryptocurrencies. Following is the data as on December 2021. The data also reflects if the regulations were inclusive in nature i.e ecocentric approach addressing the environmental concerns as well.

Sl. No.	**Country or territory**	**Stance on crypto-currency**	**Regulation on environment front**
1.	USA	Regulated	None
2.	European Union	Legal (Proposal to regulate the same is in the process)	None in the proposal document.
3.	Northern Africa (Algeria, Egypt, Morocco)	Illegal	-
4.	Mauritius	Regulated	None.
5.	Southern Africa (Angola, South Africa, Namibia, Zimbabwe)	Regulated	None
6.	Canada	Regulated	None
7.	El Salvador	Legal tender	yes
8.	UAE	Regulated	None
9.	Singapore	Regulated	None
10.	Germany	Regulated	None
11.	Switzerland	Regulated	None
12.	Russia	Regulated	To an extent. The Regulation placed an upper limit on energy

			consumption for mining of cryptocurrency.
13.	UK	Regulated	none
14.	India	Regulated (in-process)	None
15.	China	Banned	One of the grounds of banning.

Table1: Status of cryptocurrency regulation in various jurisdiction with special emphasis environmental regulation provisions.

The above set of data has been assimilated from the official regulation documents of the respective countries available on their websites. The purpose of the above table is twofold, first, to identify some major countries that have regularised/legalized cryptocurrency, in order to assess the mining area across the globe. Secondly, to identify if the regulations governing the respective country have dealt with the rising environmental concerns due to the mining of cryptocurrency. While few countries are completely oblivious to the impact of cryptocurrency on the environment, some of them have started to work around the alternatives that have a less lasting impact on the environment. Following are the few alternative practices that are being undertaken by several countries.

1. In a revolutionary step in September 2021, El Salvador became the first country to announce cryptocurrency as a legal tender. Acknowledging the rising environmental concerns due to energy-intensive crypto-mining El Salvador shall rely on its volcanic geothermal energy for mining coins.

2. China after having the first mover's advantage from minting and trading in cryptocurrency banned the same in September 2021. One of the prime reasons behind China's crackdown on cryptocurrency was its impact on the global environment due to the energy-intensive mining process.

3. Russia in its regulation governing the digital asset has prescribed that miners exceeding the energy consumption limit shall be subjected to taxation. It is a commendable alternative approach to deter the exploitation of energy resources for the mining of crypto.

4. Green Coins- Keeping the environment in mind, cryptocurrencies are trying to be more environmentally friendly by changing their validatory system from proof of work to proof to proof of stake. There are a few cryptocurrencies or green coins which since their inception are environment friendly, a few examples are:

    1) Cardona- it is a Proof of Stake cryptocurrency built on a peer-reviewed blockchain

    2) Lumen - Uses an energy-efficient blockchain stellar that uses a consensus mechanism which relies on a group of trusted nodes to authenticate transactions.

    3) Nano- uses "blockchain lattice technology" that creates user blockchains for everyone present on the Nano network. Transactions are confirmed by Open Representative Voting (ORV), where representatives voted in by members of the network act as validators to name a few.

The above alternative practices stand good on the test of sustainable development which is the underlying principle behind the ecocentric approach. The principle of sustainable development is the overarching paradigm of the United Nations[17] which states that development should meet the needs of the present without compromising on the scope of future generations to meet their own needs.

It is very essential for governments to invest and uplift technologies that successfully pass the test of sustainability to enhance the quality of life in the long run as well. It is a refined and more balanced approach to economic planning as it not only aims

[17] 'Sustainable Development' UNESCO https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd Accessed on 12 April 2022

to uplift the economic growth of the country but also maintain the quality of the environment for the healthy survival of our later generations. This approach is premised on the principle of equity as defined by the United Nations Environment Programme to include inter-generational equity and intragenerational equity.

The principle of Inter-generational equity states that every generation holds an equal right to the natural resources available and Intra-generational equity states that every person of the same generation has equal rights over the earth's natural resources. The main objective behind this principle is to ensure that the present generation should use the non-renewable resources wisely enough to not strip the upcoming generation of the resources.

In instances where the risk of environmental harm cannot be estimated, the precautionary principle should be brought to play to permit protective measures to be taken without waiting for the actual damage. It is the responsibility of the State to ensure sustainable development and that no activity that is in contravention of the principle should be permitted. Executing the public trust doctrine, some resources are conserved for public use and those resources need to be maintained for public use. The state is a trustee of all-natural resources which are for public use and enjoyment.

Conclusion

With technological innovation taking place at lights speed, it is essential to evaluate its impact on the already depleting environment. Therefore, developing an appropriate structure for supporting global environmental governance in reducing greenhouse gases will be a critical step toward preserving the environment. It is indisputable that most of the work to mitigate climate change effects will have to be undertaken at the national level however, the same can be done in collaboration with the international organizations and agreements. Today, most of the governments are paving their way to regulating cryptocurrency without addressing the concerns of the environment and its enhanced degradation due to mining.

Beyond the prevailing technical know-how arising from crypto mining and its regulation, the perspective of the environmental impact due to the mining process must also be given due importance. As reiterated in the article, there are currently thousands of cryptocurrencies that are mined using electricity generated from a non-renewable source of energy. Several studies have focused primarily on electricity consumption that is generated from a non-renewable source of energy, however, it must be borne in mind that there are other impacts to it such as e-waste generation, mass electricity consumption due to deployment of cooling systems where mining takes place in hot and humid regions. Very few jurisdictions have enacted legislation that specifically provides for such environmental issues.

Following are a few recommendations that may be considered:

1. *Common but differentiated responsibility:* This principle implies that every nation holds an obligation to participate in joint efforts commensurate with national capacity and level of development. Poorer countries can expect, as a matter of equity, that richer ones will shoulder a larger share of the cost burden arising from the impact of crypto mining.

2. *A "grand bargain" agreement* needs to be done that ensures both meaningful emission commitments by countries and financial support for requisite action in the developing world.

3. One of the proposed solutions is the application of the "polluter pays" principle. Within the EU, this principle is enshrined in Article 191 (2) of the Treaty on the Functioning of the European Union[18]. As per the principle, the entity generating waste or acting on the environment due to crypto mining must pay taxes/fines to compensate for the harm caused. This will also have a deterrent effect on the miners.

[18] Liana Badea & Mariana Claudia Mungiu-Pupazan 'The Economic and Environmental Impact of Bitcoin' *IEEE Access*. 10.1109/ACCESS.2021.3068636 Accessed on 12 April 2022.

4. In *"Choices on the Road to Clean Energy Future*"[19], it is recommended to use carbon credits under which the carbon emitters to purchase equivalent credits from emission reduction projects by way of smart contracts in proportion to their carbon emissions. Nasdaq is the first global stock exchange to examine carbon trading using the application of blockchain technologies[20].

5. Lastly, cryptocurrency can be transformed into assets that are in line with the principles of sustainability both from the perspective of environmental implications as well as economic perspectives. For instance, mining of coins can be done at cooler places where energy consumption on deploying coolants for the computers can be saved.

[19] David W Cash & John W. McCormeck, 'Choices on the Road to Clean Energy Future' Research Gate (2017) < https://www.researchgate.net/publication/321133598_Choices_on_the_road_to_the_clean_energy_future > Accessed on 12 April 2022

[20] Prabhleen Bajpai, Erika Rasure & Vikki Velasquez 'Countries Where Bitcoin Is Legal and Illegal' Investopedia. https://www.investopedia.com/articles/forex/041515/countries-where-bitcoin-legal-illegal.asp#citation-28 Accessed on 12 April 2022

DIGITAL OPEN-SOURCE INTELLIGENCE (OSINT) TO TACKLE CONFLICT RELATED SEXUAL AND GENDER BASED VIOLENCE

Shagufta Syeda[*]

Abstract

In the age of information, where data is the new oil, crimes have also largely transgressed their mere physical form, wherein perpetrators have identified and exploited data to commit crimes. However, with the advent of rapid advancement in digital responses to crimes, in the context of conflicts and human rights violations, we do not see Conflict-Related Sexual and Gender-Based Violence (CR-SGBV) being tackled through the means of gender mainstreamed Open-Source Intelligence (OSINT). Unlike war crimes, crimes against humanity, genocide or other domestic crimes, there is limited systematic usage of modern digital forms of OSINT, targeted to fight and mitigate CR-SGBV using tools like geolocation, image/video analysis, archiving, mining meta data through social media/dark web, etc. Although OSINT has helped human rights defenders in the recent years to better respond to conflicts, its fullest potential is yet to be discovered to help in identifying CR-SGBV, tracking and aiding human rights efforts to fight CR-SGBV, fighting impunity, etc. Furthermore, there is limited literature available on digital OSINT specific to CR-SGBV, and warrants a study and analysis of the same.

This paper seeks to uncover various opportunities and challenges associated with the use of Digital OSINT to help victims of gender-based violence in conflicts. In addition, the author also unpacks existing efforts and various possibilities of including such evidence in

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practice, i.e., organized efforts to formally include it within the international human rights law framework and admissibility of such evidence before judicial authorities, particularly in the ICC.

Key Words – Conflict related sexual and gender-based violence (CR-SGBV), OSINT, digital investigations, human rights, women and peace, armed conflict, international criminal justice system

Introduction

Gender-based violence (GBV) became an important aspect of human rights in the 1990's and the United Nations, over the years, has emphasized on the importance of women's participation and their rights in peacekeeping and their excessive vulnerability during conflicts. The UN Security Council Resolution 1325 expressed concerns regarding women and children accounting for the vast majority of those adversely affected by armed conflict and the consequent impact it has on sustainable peace.[1]

Women and children are adversely affected by armed conflict and several attempts have been made to carry out gender mainstreaming in conflict situations, yet, women are not as directly involved in the peace processes, and any efforts to help women in conflict do not adequately address their interests, subsequently failing to contribute to systematic efforts for such needs in conflict and post-conflict recuperation.[2] This calls for more involvement of women in all ways possible to ensure CR-GBV is addressed and solved, with women at the forefront of such efforts.

OSINT i.e., open-source intelligence refers to data processed through material that is openly available and accessible for public use at large and in the recent times, through digital means. It is the process of searching and filtering data to suit a particular

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1 Candice Garcia, *Gender-based violence in times of war and armed conflicts,* Gender in Politics Institute, (May 25, 2022), https://igg-geo.org/?p=7549&lang=en.

2 Conflict Prevention and Resolution, UNWOMEN, https://www.unwomen.org/en/what-we-do/peace-and-security/conflict-prevention-and-resolution. (Accessed on June 20, 2023 at 7 PM PT)

need or purpose. The information is used in the context of intelligence gathering and is summarized, sorted, and/or produced using OSINT tools.[3] Digital OSINT uses publicly available information from social media, websites, maps and other online mediums to gather information. Although OSINT has existed for several years, it was institutionalized much later and is an emerging field that is yet to be exploited by many stakeholders[4], especially in its digital form. What OSINT does to publicly available information is that it allows us to facilitate radical retellings of violence and has a democratizing potential in terms of those who contribute to open-source investigations and around whom the stories center. OSINT becomes increasingly important at a time when governments, media institutions and non-government organizations no longer enjoy the trust and faith of its people and emerging open-source methods are being looked at as an alternative set of truth practices, becoming new fact bearers for those who can no longer rely on state institutions as fact bearers.[5] The following sections explore the intersection of OSINT with human rights in the context of CR-GBV.

Conflict Related Gender Based Violence – Applying the gender lens:

Conflict is gendered, and violence and instability cannot be seen as uniform experiences for both women and men.[6] The UN Bureau for Crisis Prevention and Recovery characterizes gender as having socially constructed variables for each sex in a particular community and culture, having varied roles, responsibilities, opportunities, needs and constraints. In the midst of continuing

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3 Yong-Woon Hwang, Im-Yeong Lee, Hwankuk Kim, Hyejung Lee, Donghyun Kim, *Current Status and Security Trend of OSINT*, HINDAWI Wireless Communications and Mobile Computing, 2022-1290129, 14, 2022. https://doi.org/10.1155/2022/1290129.

4 Schaurer F. and Störger J., *The Evolution of Open Source Intelligence (OSINT),* Intelligencer: Journal of U.S. Intelligence Studies*,* 19, 3, 53-56, (2013), https://www.afio.com/publications/Schauer_Storger_Evo_of_OSINT_WINTERSPRING2013.pdf.

5 Dyer, S., Ivens, G. *What would a feminist open source investigation look like?.* Digi War 1, 5–17 (2020), https://doi.org/10.1057/s42984-020-00008-9.

6 *Women and conflict: An uphill battle*, Concern Worldwide, (July 11, 2022), https://www.concern.net/news/women-and-conflict-uphill-battle.

political and security crises, combined with trends of arms proliferation and militarization, sexual violence continues to be used as a mode of terrorism, war and torture.[7] A gender lens applied to conflicts and wars prompts us to view gender as a power relation wherein men are traditionally fighters and combatants who are exposed to brutality and violence whereas women are often viewed as victims.[8] However, women and girls face intersectional challenges within their communities and often times many gender power relations are invisible. Women and girls have never merely been victims of armed conflict, they are active agents in that they are involved as perpetrators, care providers, weapons of warfare, agents of change, members of resistance movements, peacebuilders, combatants, etc.[9]

Fig: Women combatants in Liberia who were largely ignored in demobilization programs. Source: Amnesty International[10]

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7 *Conflict Related Sexual Violence: Report of the Secretary General (S/2022/272),* United Nations Security Council, 4, (Mar. 29, 2022), https://reliefweb.int/attachments/f1f6387d-31b4-3638-88bb-60fd74394474/N2229371.pdf.

8 *Supra* note 2.

9 *Supra* note 7.

10 *Women, war and peace*, Amnesty International, https://www.amnesty.org.uk/files/whr_war_and_peace.pdf. (Accessed on June 10, 2023 at 11:20 AM PT)

Sexual and gender-based violence such as sexual assault, torture, rape, forced marriage, forced impregnation, forced abortion, trafficking, sexual slavery and the deliberate spread of sexually transmittable diseases all disproportionately affect women. In addition to these, women are also victims of enslavement and genocide. Women and girls are also viewed as culture bearers and reproducers having maternal responsibilities and an essential role to play in family making, which heighten their vulnerability to abuse.[11] They are often exploited by their partners (intimate partner violence), and armed forces or enemy capturers in conflict and post-conflict situations. They do not have adequate channels to address their concerns with many having unreliable partners or no partners during conflict, oppressed by dictatorial regimes and policies, exploited by the patriarchal armed forces who may or may not be state actors.[12] They also continue to face these issues after the conflict ends or when they seek refuge away from home in complex humanitarian settings with added risks of trafficking.[13] Thus, women are left with very limited options to rely upon a stakeholder when the government/state itself is involved in CR-SGBV, humanitarian actors are handicapped due to their shortcomings or are themselves involved and their families are uprooted or are themselves perpetrators of CR-SGBV.

Civilians in conflict face a SGBV continuum, rooted in pre-conflict situations, aggravated during the conflict and continues to exist in the post-conflict/peacetime phase. SGBV becomes an accepted practice that can continue after hostilities have ceased.[14] This means that they would have limited recourses due to the limited jurisdiction of international courts which often require a systemic form of SGBV or SGBV during conflict. Hence, systemic and evidence-based coordination for SGBV becomes an essential

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[11] Bureau of International Information Programs, United States Department of State, *Women Girls and Armed Conflict*, In GLOBAL WOMEN'S ISSUES: WOMEN IN THE WORLD TODAY, EXTENDED VERSION, (BCCampus, 2012).

[12] *Supra* note 2.

[13] *Gender Based Violence in Conflict,* Free Network, (May 30, 2022), https://freepolicybriefs.org/2022/05/30/gender-based-violence-conflict/.

[14] Bouta, Tsjeard, Georg Frerks, and Ian Bannon. *Gender-Based and Sexual Violence: A Multidimensional Approach,* Gender, Conflict, and Development. World Bank, (2005), http://www.jstor.org/stable/resrep02478.10.

component of every humanitarian response, from the nascent phases of a conflict, to ensure that there is accessibility and safety of services that are available, and prevention or mitigation instruments are implemented to reduce such violence[15], with women at the center of such efforts. Rape, humiliation and coercion to carry out repugnant acts are systematically inflicted during armed conflicts[16] which require a robust mechanism of evidence collection and redressal forum for victims.

OSINT, human rights and gender:

Human rights defenders are increasingly using technology to aid investigations and overcome obstacles faced in discovering and documenting various human rights violations.[17] One of the key challenges in leveraging this kind of evidence for the documentation of human rights abuses is the volume of potentially relevant information that can be discovered by investigators. OSINT has been extensively used in situations of war and conflicts and has undergone a revolution as seen in the recent times during the Ukraine-Russia conflict[18]. Protocols like the Berkeley Protocol on Digital Open-Source Investigations, which is a practical guide to navigate through Digital Open-Source Information in investigating violations of international criminal, human rights and humanitarian law[19], have facilitated the use of OSINT for human rights investigations.

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[15] Raftery, P., Howard, N., Palmer, J. et al. *Gender-based violence (GBV) coordination in humanitarian and public health emergencies: a scoping review*. Confl Health 16, 37 (2022). https://doi.org/10.1186/s13031-022-00471-z.

[16] *Gender and Violent Conflict,* NOW Research Line Proposal, Women's Institutional League for Peace and Freedom, http://www.peacewomen.org/assets/file/Resources/Academic/wps_genderandconflict_nwo_dec2010.pdf. (Accessed on Dec, 15, 2022 at 2 AM PT)

[17] *Workshop 2: Tech Development for Human Rights Investigations*, OSR 4 Rights, (Feb. 2021), https://osr4rights.org/workshop-2/.

[18] Robin Kemp, *OSINT's influence on the Russian air campaign in Ukraine and the implications for future Western deployments,* Atlantic Council, (Aug 30, 2022), https://www.atlanticcouncil.org/content-series/airpower-after-ukraine/osints-influence-on-the-russian-air-campaign-in-ukraine-and-the-implications-for-future-western-deployments/.

[19] Berkeley Protocol on Digital Open Source Investigations; A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law, OHCHR,

The United Nations has also recognized its use to map the human rights situation of women, men and others by surveying open-source materials to understand the socio-economic, legal, political, and cultural challenges they face, to identify intersecting forms of discrimination based on gender, nationality, sexual orientation, ethnicity, class and others, and to map the concerned actors or perpetrators and their needs, interests, roles and positions in carrying out human rights violations.[20]

Various digital OSINT tools have helped human rights defenders in identifying and planning investigations where otherwise they would have nowhere to go due to lack of evidence due to access barriers.[21]

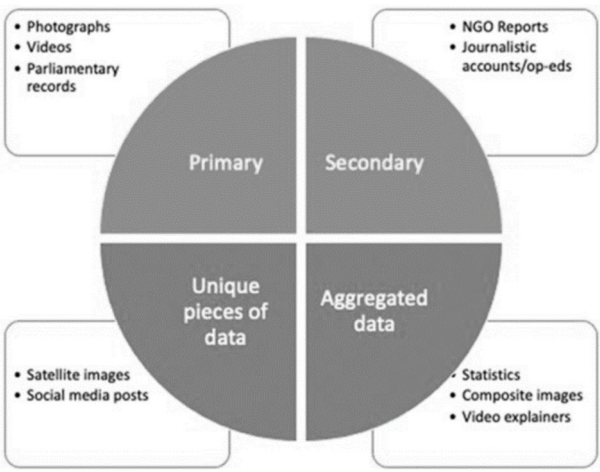

Fig: Types of Open-Source Information
Source: Journal of Human Rights Practice[22]

https://www.ohchr.org/sites/default/files/2022-04/OHCHR_BerkeleyProtocol.pdf. (Accessed on Dec 15, 2022 at 4:30 PM PT)

[20] Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice OHCHR, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/Publications/GenderIntegrationintoHRInvestigations.pdf. (Accessed on Dec 15, 2022 at 4:30 PM PT)

[21] Daragh Murray *et al.*, *Mapping the Use of Open-Source Research in UN Human Rights Investigations*, J. Hum. Rights Pract., 14, 2, (July 2022), 554–581, https://doi.org/10.1093/jhuman/huab059.

[22] *Id.*

User generated, first party or eyewitness evidence / testimonies that form important components of investigations and mapping of violations are primary sources that hold high evidentiary value. Not only does OSINT help in generating leads and putting together missing pieces of information, it also helps in giving a voice to those who were previously unheard and also provides a platform for those who otherwise had no access to such information which could be empowering and informative to the victims and witnesses of the violations.[23] Reports, statistics, visual aids, satellite images, social media and other forms of evidence have additionally helped in gathering evidence of systematic and widespread violations of human rights.[24] From collecting data to analyzing it, through Digital OSINT, a platform for participation of various users has opened up the investigations to allow digital volunteers, geographically scattered activists or any interested party with an internet connection. [25]

When it comes to women in the context of open-source information or online information, they make up only 25 percent of the people in internet news stories. [26] "The journalistic gender lens in source selection is not only male-centered, but it is also skewed to a certain kind of masculinity when selecting interviewees for all types of views, from 'expert' opinion to 'ordinary' person testimonies."[27] This restricts the participation and voices of a large portion of women who are negatively affected due to the restricted access to OSINT and representation in the field of open-source investigations. Gender divide has caused women's relative disadvantage in the digital components.[28] However, digital open-

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[23] *Id.*

[24] Marena Brinkhurst, *Mapping human rights abuse*, Mapbox, (June 28, 2018), https://blog.mapbox.com/mapping-human-rights-abuse-cbdda8e3c68d.

[25] *Troll Patrol Findings, Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse against Women on Twitter*, Amnesty International, https://decoders.amnesty.org/projects/troll-patrol/findings. (Accessed on March 15, 2023 at 10:35 AM PT)

[26] *Women in OSINT: Diversifying the Field*, Part 1, Bellingcat, (Dec 8, 2015), https://www.bellingcat.com/resources/articles/2015/12/08/women-in-osint-diversifying-the-field/.

[27] *Id.*

[28] *Bridging the Digital Gender Divide: Include, Upskill, Innovate*, OECD, (2018), https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf.

source investigations can aid human rights fact-finding by bringing to the forefront the experiences of groups whose voices are oppressed, marginalized or excluded in conventional reporting.

Recent Trends in Digital OSINT usage:

Digital OSINT has been used to gather evidence and account for human rights violations in the recent times with the advent of rapid technological advancements in the field. For example, the NGO Syrian Archive used images published on social media by civilian witnesses, who would other not be able to provide any evidence or voice their sufferings due to the restrictions brought forth by the conflict, to investigate human rights violations in the Syrian conflict. The NGO's work provided data for broadcasting the conflict, aided criminal investigations and systematically collected more than three million user generated visual evidence that would otherwise never be accounted for and could potentially be erased or destroyed. [29] Another example includes Amnesty International's attempt in 2019, to facilitate micro-tasking to involve more than 6000 volunteers in its open-source investigation into abuses against women on Twitter.[30]

The United Nations has also aligned its mandate to include findings based on OSINT derived evidences. The Venezuelan fact-finding mission followed the lead of recent missions mandated by the UN in identifying open-source information as essential investigative resources. The Commission of Inquiry of the UN Human Rights Council reviewed and verified photos and videos from social media platforms in reaching its conclusions on the protests in the Occupied Palestinian Territory. In Yemen, the Group of Eminent Experts on Yemen used open-source information to find leads, establish or corroborate the reliability or veracity of further information sources. The Fact-Finding Mission on Myanmar heavily relied on social media evidences for their findings on hate speech. They also utilized satellite imagery that showed new infrastructure, large buildings and a boundary under construction, indicating the establishment of a new army base. The report of the

[29] *Supra* note 6.
[30] *Supra* note 25.

Office of the High Commissioner for Human Rights on Jammu and Kashmir, owing to the lack of availability of information and access, also relied on open-source information to monitor the region.[31]

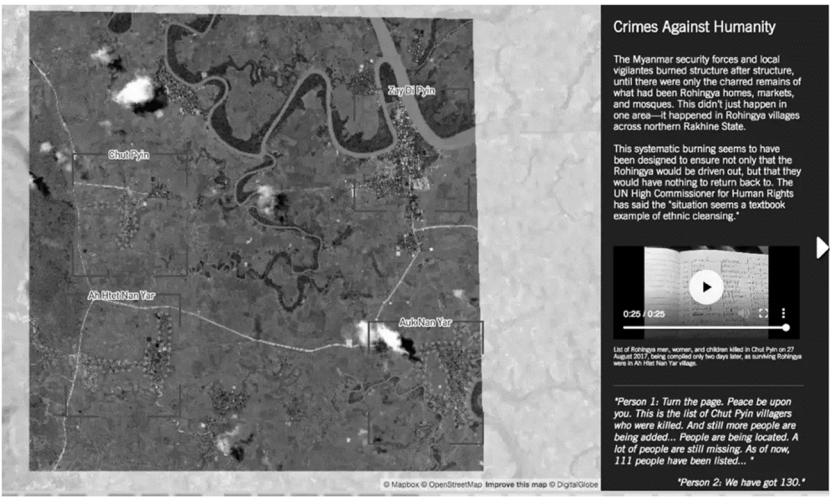

Fig: Mapping Myanmar's atrocities against Rohingya
Source: SITU Research cited by Mapbox

But the most extensive and all-encompassing use of OSINT has been observed in the Ukraine-Russia conflict in which Ukraine has designed apps and chat bots to crowdsource evidences of human rights violations and provide a platform for victims and other affected parties. Victims, the government, human rights defenders, the military and other concerned parties are being involved and connected through Digital OSINT through social media, radio and other platforms, allowing victims and witnesses to upload evidence, seek reparations, testify and contribute to the dialogue on defending the rights of Ukrainians.[32] Conflict related sexual violence is also being addressed by the activists in Ukraine it has been identified by

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31 *Supra* note 22.

32 Vera Bergengruen, *How Ukraine Is Crowdsourcing Digital Evidence of War Crimes*, TIME, (Apr 18, 2022 at 6:00 AM EDT), https://time.com/6166781/ukraine-crowdsourcing-war-crimes/.

defenders that there needs to be a change in the way these cases are investigated.[33]

Gender and the ICC

The ICC, unlike many other courts in the past, has had more inclusivity for gender-based crimes within its mandate than what other tribunals in the past could formally offer. Under the Rome Statute, a broad range of sexual and gender-based crimes have been explicitly criminalized including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual/gender-based violence, within war crimes and crimes against humanity.[34] Gender has also been defined and included as a basis of persecution under crimes against humanity.[35] However, discussions on gender-based grounds for prosecution have very recently surfaced in the ICC, which was boosted by the Office of the Prosecutor's attempt to pay particular attention to sexual and gender-based crimes through its Policy Paper on Sexual and Gender-Based Crimes[36] way back in 2014, under the leadership of Fatou Bensouda.[37]

In terms of jurisprudence on sexual violence crimes, the ICC in the *Ntaganda* case, supported the Prosecutor's vision to further the cause of sexual and gender-based violence in conflict, even though the perpetrators were from the same forces, giving the case

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[33] *Pushing forward: Ending conflict-related sexual violence in Ukraine,* UN Women, (Nov 18, 2022), https://www.unwomen.org/en/news-stories/feature-story/2022/11/pushing-forward-ending-conflict-related-sexual-violence-in-ukraine.

[34] *Accountability for sexual and gender-based crimes at the ICC: An analysis of Prosecutor Bensouda's legacy*, FIDH, (Jun 26, 2021), https://reliefweb.int/report/world/accountability-sexual-and-gender-based-crimes-icc-analysis-prosecutor-bensouda-s-legacy.

[35] *Police on the Crime of Gender Persecution,* ICC- OTP, (Dec 7, 2022), https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf.

[36] *Policy Paper on Sexual and Gender-Based Violence,* ICC, (June 2014), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

[37] *Prosecutor publishes historic Policy Paper on Sexual and Gender-Based Crimes*, Coalition for the International Criminal Court, (Jul. 31, 2014), https://www.coalitionfortheicc.org/news/20140731/prosecutor-publishes-historic-policy-paper-sexual-and-genderbased-crimes.

elements of both an international and non-international armed conflict.[38] The suspect in the *Al Hassan*[39] case, faced charges for various crimes including forced marriage and forced pregnancy, torture, cruel treatment, outrages on personal dignity, sexual slavery, rape, and persecution on religious and gender grounds. It was the first time that the crime of persecution based on gender grounds had been charged.[40]

In the more recent times, the Independent International Fact-Finding Mission in Myanmar discovered violence being inflicted not only on women and children but also on transgender people.[41] Gender-based prosecutions will have far-reaching consequences for future ICC cases on sexual and gender-based crimes, including in Myanmar, Syria and Iraq.[42] It is apparent that CR-SGBV is a growing concern, posing critical challenges for prosecutors to prove the same before international legal authorities.[43] This opens the doors for the acceptance of OSINT derived evidences in cases of gender-based crimes, similar to the cases of war crimes and crimes against humanity in the recent times. However, the ICC has to define the extent to which gender crimes can be prosecuted for evidence to be collected and corroborated since many of the gender crimes start much before and end long after the conflict arose/ended.

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[38] *The Prosecutor v. Bosco Ntaganda*, Situation in the Democratic Republic of the Congo, ICC, (2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_03920.PDF.

[39] *The Prosecutor v. Al Hassan Ag Abdoul Aziz AG Mohamed AG Mahmoud*, Situation in the Republique of Mali, ICC, (2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03499.PDF.

[40] Eglantine Jamet, *New opportunities in the prosecution of gender-based violence: Intersectionality and grounds for persecution*, Leiden Law Blog, (Mar. 30, 2021), https://www.leidenlawblog.nl/articles/new-opportunities-in-the-prosecution-of-gender-based-violence-intersectionality-and-grounds-for-persecution.

[41] Saumya Uma, *Where does international criminal law stand when it comes to sexual and gender-based violence?*, The Wire, (Sep 6, 2021), https://thewire.in/rights/where-does-international-criminal-law-stand-when-it-comes-to-sexual-and-gender-based-violence.

[42] Georgiana Epure, *Writing the Jurisprudence on Gender-based Persecution: Al Hassan on Trial at the ICC*, International Justice Monitor, (Jul. 16, 2020), https://www.ijmonitor.org/2020/07/writing-the-jurisprudence-on-gender-based-persecution-al-hassan-on-trial-at-the-icc/.

[43] *Supra* note 41.

Challenges

There are several challenges that victims of CR-SGBV and human rights defenders face while dealing with collection, segregation and admissibility of evidence related to such crimes. Most victims or survivors of SGBV do not have the means or access to report or seek help regarding their experiences of SGBV.[44] Even though there is evidence suggesting that SGBV plays a huge role in a conflict and is often a main form of violence in a conflict, there is lack of specific information that could help in identifying humanitarian responses to various forms and drivers of GBV and the availability or extent of existing SGBV services is missing or unclear.[45]

There is a severe lack of access to essential support for SGBV victims, specifically the vulnerable groups in remote conflict-ridden areas. SGBV survivors' safety, care, reparation and rehabilitation are impacted by gaps in access to comprehensive SGBV case management. It includes access to services like healthcare, social services, safety support (like safe spaces and shelters for women and girls), access to legal aid. NGOs and governments are also posed with problems that prevent victims/survivors from accessing existing government and NGO services, due to limited resources and capacity, lack of training, capacity building, long travel distances, stigma and limited community awareness. [46]

Not all persons have access to digital platforms or the internet to take advantage of open-source information. There is a concern related to the services provided in terms of insufficient mediators, trained staff, GBV services and other shortcomings in

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[44] Elie Baaklini and Paul VanDeCarr, *Deep wounds: In the Arab Region, survivors of gender-based violence wonder where to turn*, UNSDG, (Dec. 06, 2021), https://unsdg.un.org/latest/stories/deep-wounds-arab-region-survivors-gender-based-violence-wonder-where-turn.

[45] *A rapid assessment of the gender-based violence (GBV) situation and response in Cabo Delgado, Mozambique [EN/PT],* UNHCR, (Nov 17, 2022) https://reliefweb.int/report/mozambique/rapid-assessment-gender-based-violence-gbv-situation-and-response-cabo-delgado.

[46] *Id.*

conflict regions due to the remoteness or the restrictions to access due to safety or security concerns.[47] Furthermore, there are several barriers to seeking help due to the stigma associated with victimhood and the fear of such stigma resulting in discrimination. The victims do not have faith in or expectations from the aid providers and many do not even have knowledge of SGBV help-seeking. Geographical and physical challenges add to the lack of effectiveness of SGBV programs.[48]

Open-source hides social hierarchies and there is no guaranteed way of ensuring equal participation for all. Women, people of diverse gender, racialized people, at-risk populations and people with disabilities do not have the same opportunities to access OSINT tools even though there is no specific bar on their participation. Open source often becomes biased and discriminatory, thereby resulting in the reduced participation and equal recognition of women and underrepresented groups.[49] Investigators have realized that rape, amongst other crimes of a sexual nature, is difficult to investigate. Although there are guiding documents that strengthen investigations of sexual violence, they give limited guidance regarding digital open-source information.[50]

The ethical challenges that frequently arise in digital investigations have a lot to do with power and positionality. Many investigators fear that prosecutors and judges will become habituated to or excessively reliant on digital evidence, which could affect the evidentiary value of witness testimonies or other evidences, giving more weightage to digital open-source information.[51] Additionally, there is a risk of access to misinformation/disinformation through open-source information.

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47 *Supra* note 16.

48 Conflict And Gender-Based Violence (GBV), JICA-RI, https://www.jica.go.jp/jica-ri/research/peace/l75nbg00000bwayb-att/GBV_pamphlet_A4_ENG_print.pdf. (Accessed on Dec 16, 2022 at 8:30 AM PT)

49 Mariana Fossatti, *Gender, Diversity and Inclusion in Open-Source Communities,* Gender IT, (Apr 29, 2021), https://genderit.org/feminist-talk/gender-diversity-and-inclusion-open-source-communities.

50 Alexa Koenig, Ulic Egan, *Power and Privilege: Investigating Sexual Violence with Digital Open-Source Information*, 19-1, Int. Crim. Justice, 55–84, (May 17, 2021), https://doi.org/10.1093/jicj/mqab014.

51 *Id.*

For example, Myanmar was plagued by disinformation and persecution that was promoted by the media.[52]

These challenges could affect the reliance and impartiality of Fact-Finders, Prosecutors or Adjudicators who would not be able to give victims of CR-SGBV adequate remedies or access to justice.

Opportunities and the Way Forward

There are many solutions to the problems or challenges discussed above. Open-source tools could help in filling the vacuum for insufficient mediators, trained staff, SGBV services, etc., like in the case of Ukraine where the government has designed chat bots that have various services from seeking counseling to reporting evidence and being able to communicate with experts or defenders with human rights, which is what GBV services aim to provide.

- Open-source investigations would help in making sure that publicly available information is collected in a systematic manner which would help in identifying humanitarian responses to various forms and drivers of GBV, and whether the availability or extent of existing GBV services is missing or unclear.
- Reporting and identification of crimes and victims becomes easier with Digital OSINT because of tools like geolocation, face recognition, imagery analysis, social media, etc.
- A multi-stakeholder approach would ensure policies and practices related to CR-SGBV are not one sided or ignorant of the needs of the victims or the aid providers. A community-based and multi-pronged approach with structured referral pathways will result in sustained engagement with multiple stakeholders and effective results. This would also help in dealing with risk factors that lead to violence, including lack of

[52] *Weaponizing social media: The Rohingya Crisis,* CBS News, (Mar 19, 2018), https://www.cbsnews.com/news/rohingya-refugee-crisis-myanmar-weaponizing-social-media-main/.

awareness, and social norms regarding gender roles and tolerance levels of violence.[53]

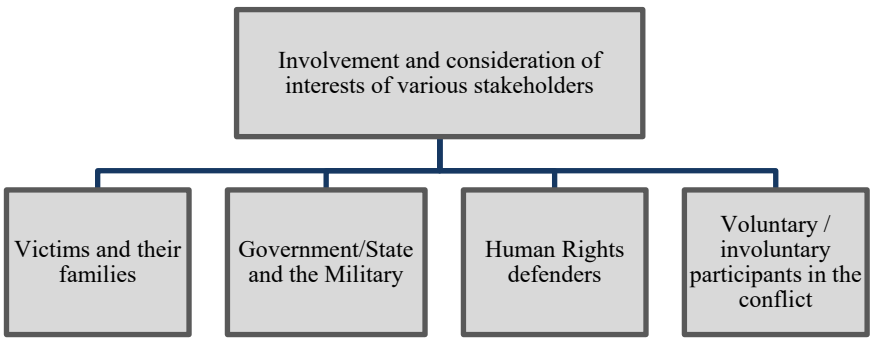

Fig: Multi-stakeholder approach

- Addressing SGBV requires a broad multi-sectorial, interagency approach, therefore, successful GBV coordination through open source would depend on actors collaborating to achieve safe, ethical and comprehensive SGBV programs and services. OSINT would allow various agencies and partners to seek information through various sources, facilitate knowledge sharing and design strategies that would make SGBV coordination more systematic and inclusive. [54]
- Applying an intersectional lens to digital investigations can contribute to the mitigation and prevention of SGBV, by facilitating gravity assessment, the contextualization of crimes, and the drafting of charges.[55] It would also allow one to assess how the crime was compounded by various discriminatory grounds as inalienable factors of perpetration of violence.[56]

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[53] Gender Based Violence, The Committee of Women in Security and Intelligence - CWSI; a fight against Gender-Based Violence, IOSI, https://iosi.global/gender-based-violence/. (Accessed on April 4, 2023 at 6:20 PM PT)

[54] *Supra* note 16.

[55] Beringola, A.M., *Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC*, Amsterdam Law Forum, 9(2), 84–109, (Mar. 1, 2017), http://doi.org/10.37974/ALF.296.

[56] *Supra* note 41.

- OSINT could help legal authorities in carrying out harm mitigation measures[57] like forensic assessment of consenting victims or survivors, their access to justice, legal aid, victim protection, etc. Furthermore, human rights defenders and legal authorities could use OSINT tools like Hunchly and Bayanat to collect, document, organize, spread, audit and analyse data related to crimes, victims and perpetrators, and other relevant information in an effective and timely manner[58].
- Applying a gendered analysis approach would help in effectively researching crimes that affect each gender differently. Such analysis, when applied in open-source investigations, can help in mining data that would be relevant to the cause of the research and would not be ignorant of or insensitive to the specific needs of the victims for whom the data is being collected, which would yield more lucrative results. When this method of analysing data is gender mainstreamed then all investigators would resultantly design and review their investigation plan with a particular sensitivity to the gendered challenges associated with investigation of sexual and gender-based crimes.[59]
- Marginalized groups' experiences as victims and perpetrators must also be considered to design a proper strategy to hold criminals accountable. Without applying a gender lens, one would not be able to use OSINT tools to determine the criminality of a person's actions, and analyse the conflict, and how it affects the rights of the parties.[60]
- An intersectional feminist approach, as scholars believe, would help in better accounting for violations or crimes that affect each person differently in addition to the challenges posed by gender

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[57] *Framework for the Prevention of Conflict-Related Sexual Violence*, United Nations, https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/09/auto-draft/202209-CRSV-Prevention-Framework.pdf. (Accessed on Fe. 7, 2023 at 8:30 AM PST)

[58] *Supra* note 18.

[59] Alexa Koenig, Ulic Egan, *Power and Privilege: Investigating Sexual Violence with Digital Open Source Information,* Journal of International Criminal Justice, Volume 19, Issue 1, March 2021, Pages 55–84, https://doi.org/10.1093/jicj/mqab014.

[60] Nigeria Training Module on Gender Dimensions of Criminal Justice Responses to Terrorism, UNODC, (2019), https://www.unodc.org/pdf/terrorism/Web_stories/UNODC_Nigeria_Gender_Training_Module.pdf.

crimes which would aid OSINT efforts to account for such crimes without being indifferent towards different forms of discrimination and different effects of each crime.[61]

- Human Rights organizations/activists have already started integrating practices to report SGBV through OSINT tools to access relevant data related to Gender-Based Violence. Such data would then help in enforcing laws and providing a systematic method of identifying perpetrators of SGBV and protecting victims, while decreasing the time it traditionally takes to investigate SGBV crimes.[62] However, this must be extended to providing a voice to the victims as well and allowing all stakeholders to make use of OSINT and not just investigators or defenders of human rights.
- OSINT could further promote women's role as agents of change[63] by allowing them to reach out to the masses as mediators, peacemakers, defenders and advocates of human rights since it provides a large platform to its users.
- OSINT allows users to employ various methods to identify the perpetrators, the weapons used, the place of perpetration, etc. which could help in victim rescue missions.
- Many existing efforts to help in fighting SGBV through open-source information need to integrate a proper system for allowing victims and related persons to access information, file complaints, seek legal aid, seek counselling, access other resources for physical and mental wellbeing. One such App that helps women in accessing CR-SGBV resources is the Safe You App that allows women to seek protection in an emergency, share location, report violence, etc. [64]

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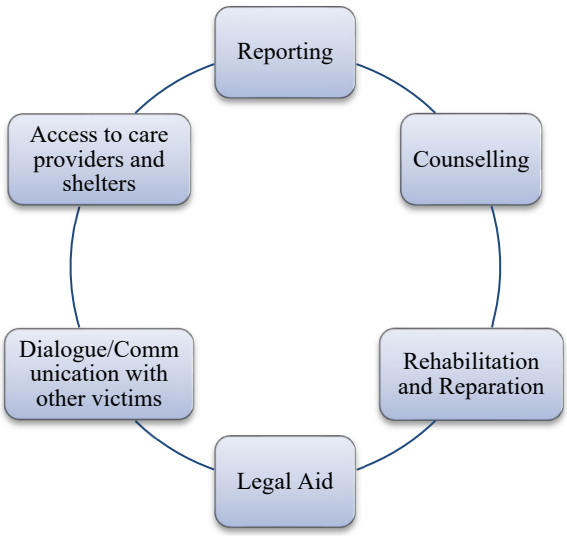
[61] Marta Silvia Vigano, *Women in OSINT*, (Dec 1 2020), Medium, https://medium.com/what-the-osint/women-in-osint-e3a136a94dc0.

[62] *Supra* note 6.

[63] Caoimhe de Barra, *Women and girls should not be seen solely as victims of conflict – they must have a role as agents of change*, Trocaire, (Dec 9, 2021) https://reliefweb.int/report/world/women-and-girls-should-not-be-seen-solely-victims-conflict-they-must-have-role-agents.

[64] *UNFPA, MOI KRI launch Safe You App, helping women and girls in Kurdistan be protected from gender-based violence,* UNFPA, (Dec 17, 2021), https://iraq.unfpa.org/en/news/unfpa-moi-kri-launch-safeyou-app-helping-women-and-girls-kurdistan-be-protected-gender-based.



- States, and where the state is unwilling, NGOs, should maximize efforts to develop or collaborate to use existing Apps that could train vulnerable groups to use open-source resources to sustainably address SGBV instead of investing in short term and ineffective programs. Digitization of SGBV efforts and community training would ensure that victims have access to digital open-source tools and the information would spread within the community. This would allow aid providers to focus on remote locations without overburdening the workforce and resources.
- Victims and members of the community need to be informed of and trained to use open-source tools and information so that OSINT can effectively help victims of SGBV. They must be made aware of the requirements to qualify evidence for trials. For example, Ukraine has a visually illustrative webpage accessible to all, that gives information to the public about international crimes, laws associated with it, current news, donations, support, how to report, geolocating and mapping, resources available and authorities who could be approached, connecting all stakeholders. [65]

[65] *Ukraine War,* MFA Ukraine, https://war.ukraine.ua/arm-ukraine-now/. (Accessed on March 12, 2023 at 3:50 PM PT).

- Many conflict-ridden areas now have access to internet and where there is lack of internet or devices to access open-source information, NGOs or government or human rights defenders can help in setting up access to the same by redirecting efforts to digitize responses to CR-SGBV crimes where possible. For example, the Rohingya refugees in Myanmar effectively used social media to report and document cases of possible crimes under the ICC.
- Victims should be made aware of the available laws, resources and information regarding the use of open-source information that needs to be cascaded amongst at-risk communities.
- Guidelines regarding the use of open-source information in the context of sexual and gender-based crimes must be developed in line with the ICC policies[66] on gender crimes to ensure stakeholders are able to legally collect and report evidence regarding CR-SGBV violations.
- Members of the affected conflict and post-conflict communities should also be informed and educated regarding misinformation and disinformation while accessing open-source information.
- In post-conflict settings where SGBV remains a big concern[67], organizations should ensure gender parity concerns are addressed within workspaces because men and women view SGBV differently because they are affected differently and investigators are sensitized to the disadvantaged position in which certain genders are constantly put. Capacity building which would include proper training for all genders and gender mainstreaming for work that is carried out by the organization would ensure data is handled sensitively and safely.
- Implementation of an intersectional feminist approach to investigations, which includes equity in attribution, objectivity, respect for all adversities, practice of feminist ethics of care, empathetic decision making, collaborate to share information and address uncertainties or missing information.[68] Establish organizational standards that are equitable and in still a sense of

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66 *Supra* note 35.

67 *Supra* note 8 at 21.

68 *Intersectionality Resource Guide and Toolkit,* UN Women, https://www.unwomen.org/sites/default/files/2022-02/Intersectionality-resource-guide-and-toolkit-large-print-en.pdf. (Accessed on June 25, 2023, at 6:05 PM PT).

understanding for various inequalities that could create bias or false analyses. OSINT Protocols need to take gender challenges into account and must formally mainstream gender into the OSINT system so that investigations fill gaps that the law fails to fill.

- There is a need for international criminal justice mechanisms to address gender-based crimes as intended by policy documents, review the policies to hold perpetrators sufficiently accountable and adopt an intersectional approach to handling such cases.[69] This would be facilitated through the development of forensic facilities[70] by adopting various tools of OSINT to advance investigations.

Conclusion

While Digital OSINT has its own challenges in terms of lack of equal access to digital resources and inadequate representation, it can prove to be resourceful in providing easy and wide access to socio-economic and legal aid through a wide range of resources available to the public at large at minimum to no cost. As our world is moving towards digitalization, it is important to note that not all conflict-ridden communities can access the internet and efforts should be made to ensure they are not left behind and all circumstances are kept in mind while implementing CR-SGBV responses. Many SGBV, war crimes, crimes against humanity and genocide related efforts have included the use of Digital OSINT but there is potential for its use in CR-SGBV specific responses. Only when efforts are harmonized with existing intersectional challenges, can we effectively address SGBV concerns. It is time for the international criminal justice system to increasingly consider addressing gender concerns within criminal law independently, to ensure victims of CR-SGBV are not put in a disadvantaged position, while recognizing the uses of OSINT in this space.

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69 *Supra* note 35.

70 *Supra* note 8 at 25.

CONTEXTUALIZING CORRECTIVE RAPE IN AN ERA OF TRANSFORMATIVE CONSTITUTIONALISM IN INDIA

Sharon Singh[*]

Abstract

The discourse on homosexuality is underscored by the conception of social identities being inherently antagonistic. Definition wise, corrective rape refers to rape perpetrated against lesbians by straight heterosexual men with the intent of 'curing' their homosexuality but fundamentally speaking, apart from the curative intent element, corrective rape includes ingredients of being a hate crime based on a combination of gender-based violence and homophobic violence. It is also viewed as a form of sexual punishment for violating the traditional gender representation. Traditionally, corrective rape referred to commission of rape against lesbians but presently the scope of the term also includes commission of rape against any such individual who does not conform to the conventional typology of sexual identity. The intersectionality between patriarchy, heteronormativity, heterosexism, homosexuality and heterosexuality helps in understanding why homosexuals in general, and lesbians in particular are more prone to discrimination and violence. Targeted violence against homosexuals is underscored by a variety of factors, patriarchy being the chief cause of the violence against lesbians. The adoption of any technique which is aimed at curing homosexuality is in direct conflict with an individual's right to bodily autonomy, right to dignity and right to equality. The preambular language of the Indian Constitution embodies these cardinal values and over

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the last decade, the judicial discourse on the rights of homosexuals has also gathered momentum such that it has encouraged a more progressive and inclusive State policy on this front. The theory of transformative constitutionalism has ushered in a positive change yet human rights violations of homosexuals continue unabated. For such inhuman practices to cease against homosexuals and for acceptance to flourish, beyond procedural and legal changes, value modification through social change is of vital importance.

KEYWORDS: corrective rape, homosexuality, lesbian, transformative constitutionalism, Indian judiciary, LGBT, Constitution, State.

There are many branches on the tree of life. There is no one way to be, and there is room for everyone to be who they are.
- *Justice N Anand Venkatesh*[1]

Diversity among humans is a captivating subject-matter that is underlined by the sum of unique *biological* and cultural variation within our species. Within *Homo sapiens*, the extent and degree of differentiation is 'polytypic'. Polytypic behaviour is a phenomenon whose core feature is differentiation. The differentiation within human population is affected by a combination of the following five factors –

1. *Demographic conditions* including the population size and structure.
2. Forces impacting individual survivorship and *fertility.*
3. Extent of *isolation* leading to inter-population diversity.
4. Levels of *intra-population gene flow* that promotes the spread of individually acquired novelties.
5. *Time gap* between present situation and the time spent at an ancestral source.[2]

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1 *Sushma v. Commissioner of Police*, W.P.No.7284 of 2021.

2 Marta M Lahr, *The shaping of human diversity; filters, boundaries and transitions*, (Mar. 21, 2023, 09:30 AM)

While these factors define the human experience, the relationship between two distinct yet inter-related facets, i.e., *sexual orientation and gender identity*, emanating from the second factor, is of prime concern.[3] Defining the sexuality of an individual necessitates delimiting the relationship between these two facets.

Between 5% and 10% of every race, every continent, every culture, every language, every religion has some measure of same-sex orientation, thereby suggesting that *same-sex orientation is not a 'deviation'.*[4]

Despite homosexuality being factually established, it is viewed as an ailment and even as a sin. In 2015, the US Supreme Court granted equal marriage rights to same-sex couples,[5] there was widespread public criticism of the same. Such a public reaction demonstrated that public acceptance of homosexuality was low even in Western societies.

The discourse on homosexuality demands a study of the intersectionality between patriarchy, heteronormativity, heterosexism, homosexuality and heterosexuality. The underlying peculiarities of these phenomena help in deciphering why homosexuals in general, and lesbians in particular are more prone to discrimination and violence. As heterosexism embodies the belief that a particular way of loving is superior to all other ways of loving, such assigned superiority to certain kind of relationships reinforces the subordination of women to men, thereby strengthening patriarchal notions and greater marginalisation of homosexuals. Moreover, by regulating gender as a binary relation, homosexuality is rendered inconsequential. As such, homosexuality is pathologized and a sense of perversion is attached to same-sex

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https://royalsocietypublishing.org/doi/10.1098/rstb.2015.0241#:~:text=Human%20diversity%20is%20defined%20by,extent%20of%20human%20'polytypism.

3 *Resolution on Sexual and Gender Orientation Diversity in Children and Adolescents in Schools*, (Mar. 22, 2023, 10:00 AM) https://www.apa.org/about/policy/orientation-diversity.

4 Edwin Cameron, *Eudy Simelane Memorial Lecture*, (Apr. 17, 2023, 08:00 AM) https://www.concourt.org.za/images/phocadownload/justice_cameron/Eudy%20Simelane%20Memorial%20Lecture%20Thursday%207%20April%202016%20(updated).pdf.

5 Obergefell et al. v. Hodges Director, Ohio Department of Health, et al, No. 14-556.

relationships, thereby normalizing homophobia. As lesbians challenge monolithic gender (masculine) expectations through their individual expression of sexuality, the violence perpetrated against them should be understood within the broad framework of heteronormative values.[6]

The paper is divided into three parts, where Part I defines what corrective rape is and what does the commission of such an act entail for the victim. Besides, the obsession with curing homosexuality and what are the factors that make lesbians more vulnerable to corrective rape are other themes covered by this part. Part II explores the intersectionality between human rights, constitutional values and homosexuality. The concept of transformative constitutionalism lies at the centre of this part. Part III identifies procedural, legal, and social issues in combating ill-treatment against homosexuals. It concludes by stating that a social change must precede initiation of any systemic changes.

Part I

A. Understanding Corrective Rape

According to *Doan-Minh*, corrective rape is a form of political, systemic and group-based violence.[7] Corrective rape is a reality that is not unique to any particular geographical context rather it is an actuality that is furthered by a mix of factors including the socio-economic status of individuals and the prevailing politico-cultural landscape. As homosexuality is seen as an aberration, the conventional understanding of corrective rape is that it is an act of rape perpetrated *by straight men against lesbians* with an aim of 'curing' them or 'correcting' their trait of homosexuality. It is an act that penalises an individual for violating the traditional (binary) gender presentation. The act is based on a highly subjective perception which stigmatises homosexuals and therefore the

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6 Nadia Sanger, *'The Real Problems Need to be Fixed First': Public Discourses on Sexuality and Gender in South Africa* 114 (Apr. 10, 2023, 09:00 AM), https://www.jstor.org/stable/27917341.

7 Sarah Doan-Minh, *Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence* (Apr. 05, 2023, 09:00 AM), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1418&context=hwlj.

perpetrators focus on *teaching a lesson* to the victim for transgressing the traditional boundaries of femininity.

Gradually, the scope of the term has enlarged to include the commission of rape against any such individual who does not conform to the traditional notion of sexual orientation.

The Eudy Simelane Memorial Lecture conducted in 2016 identified the following factors which made lesbians more vulnerable to such gender-based violence[8] –

1. Lesbians, as a sub-group of the LGBT community, experience such grave violence for developing same-sex relations, therefore, being *'non-traditional' females* and thereby.
2. Homophobic and transphobic violence emanates from the non-acceptance of traditional *patriarchal* norms. As a social system, patriarchy is highly male-centred, such that the dominance of men over women and children is institutionalized and a violation of such social system is viewed as an aberration.[9]
3. Homosexuality violates the existing *gender-structure of the society* as also a break-away from familial responsibilities. Women choosing to have sex with other women can be seen as an act of rejection of male ownership of their bodies, negatively impacting reproduction and thereby the family structure.
4. Lesbian females who are *economically dependent* on their families or communities face higher chances of violence and threat. If they participate in opposite-sex marriages, such females become highly vulnerable to human rights abuses by their partners and if they bear children, then they face the risk of losing access to their children.

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8 Edwin Cameron, *Inaugural lecture on behalf of The Other Foundation and The Ujamaa Centre*, University of KwaZulu-Natal, South Africa.

9 Abeda Sultana, *Patriarchy and Women's Subordination: A Theoretical Analysis*, (July 02, 2023, 08:00 AM), https://www.researchgate.net/publication/270175197_Patriarchy_and_Women's_Subordination_A_Theoretical_Analysis.

5. Inadequacy of *laws* or deficient nature of laws puts lesbians in a greater position of uncertainty, leaving them devoid of any form of legal protection or support measure.
6. In majority cases of corrective rape, the *perpetrators are family members*. The commission of such a gruesome act by a family member against another family member is not only deplorable but mentally devastating.

Thus, corrective rape is a result of the *perceived* breach of standard personal and societal boundaries concerning gender and sexual orientation.

B. Explicating The Obsession With *'Curing'* Homosexuality Through Corrective Rape

Despite the 2018 judgment decriminalising same-sex relations, the Indian Association of Clinical Psychologists has noted that conversion practices by therapists were still rampant in our country. The following real-life incidents illustrate how homosexuals face intolerance, indignation, threats and intimidation to their lives due to the use of physically painful stimuli or other emotionally traumatising methods by their immediate family members to 'cure' them.

Aswathi from Kerala identified herself as a lesbian and when she informed her parents about the same, they took her to a nun and then to a doctor to provide her treatment *to make her straight*. The doctors wanted to put Aswathi through hormone tests and to see what was 'wrong' with her. Another such case from Kerala was of Anjana Harish who committed suicide after being put through traumatising curing methods for over two months.[10]

As far as corrective rape is concerned, families in India are using this 'curative method' to convert their gay, lesbian and transgender sons and daughters into *straight-heterosexual individuals.* While in Africa or in the Caribbean, corrective rape is

[10] Devasia Jose, *Woman's suicide prompts Indian state to mull LGBT+ conversion therapy ban,* (Mar. 28, 2023, 13:30 PM) https://www.reuters.com/article/us-india-lgbt-court-feature-trfn-idUSKBN27D1OU.

known to be perpetrated by unknown third parties but, in India, the practice of corrective rape is carried out by families. Consequently, the practice of corrective rape is hardly known to the vast majority of people, as it is treated as an internal family matter.

Disturbed by two such incidents in Bengaluru, where a young lesbian was raped by her cousin to make her *'normal'*, and another case, where the family of a gay man tried to make him have sex with his mother in order to cure him of his homosexuality, director Deepthi Tadanki, decided to shed light on this social reality. She is directing a movie titled *Sathyavati,* portraying the story of three friends whose lives take a turn for the worse when one of the girls' family suspects her to be involved with her friend and take matters into their own hands.[11] She makes a very poignant remark that when a stranger assaults 'you', you go to your family but *when one's own family attacks you, whom do you go to?*

The incidents of corrective rape in Africa carry a different connotation whereby lesbian females need to be 'corrected or fixed' by heterosexual men. In 2006, Zoliswa Nkonyana was brutally murdered. The sole reason for her death was her openness in being a lesbian. Upon police investigation, it was found that her killers admitted to killing her because she was a lesbian.

The gruesome gang-rape and murder of Eudy Simelane in 2008 ignited the debate on the pre- conceived notions about lesbians and the subsequent 'punishing' practice of corrective rape. While pronouncing the judgment, Justice Ratha Mokgoathleng noted that Eudy Simelane, a promising international football player who was vocal about her sexuality, suffered a *brutal and undignified death*.[12]

Similarly, in 2013, the murder of Duduzile Zozo was so brutal that it was immediately followed by a strong condemnation by the Minster of Women, Children and People with Disabilities

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[11] *Victims of the Unimaginable Hate Crime*, MILAAP, (Mar. 28, 2023, 12:30 PM) https://milaap.org/stories/satyavati.

[12] David Smith, *Life for man in rape and killing of lesbian South African footballer,* (Mar. 15, 2023, 07:30 AM) https://www.theguardian.com/world/2009/sep/22/eudy-simelane-gangrape-and-murder.

who stated that any act of harassment, intimidation or violence against any member of the society especially women, children, people with disabilities, the lesbian and gay community shall not be tolerated.

Part II

A. Corrective Rape: A Blow to A Gamut of Human Rights

Corrective rape is a practice that produces a complex web of ramifications for the victim, including but not limited to the mental, physical, and psychological aspects of a victim's life. From the violation of bodily autonomy to the deprivation of mental liberty, corrective rape affects the entire spectrum of human rights.

The adoption of any mental or physical techniques aimed at curing homosexuality manifestly denies the *right to life of dignity and equality* as well as the right to live a life without indignity and fear. Practice of such techniques not only nullifies the human rights of the victims but it is *against the basic constitutional ideals*. A general non-acceptance and denial of the non-binary sexual identity as *normal* creates a long-lasting psychological impact on the minds of the LGBT members. It leads to a *double-whammy* for the LGBT members, as first there is a personal struggle to acknowledge one's identity, and added to that is the societal disregard. Such discriminatory attitudes lead to normalization of the various curing techniques like corrective rape or conversion therapies. The practice of such therapies infringes one's *right to bodily and sexual autonomy*. Negation of the right to bodily autonomy is fundamentally a negation of human dignity. Hence, a deprecatory act in the nature of corrective rape is violative of an individual's core of existence i.e., human dignity.

B. Corrective Rape as an Anti-Thesis to the Idea of Transformative Constitutionalism

Traditionally, State was seen as an institution that played a limited role but the evolving externalities have transformed the State into a *central moral force.* Besides, the citizen's demand for

justice, equality, dignity and assistance from the State remain mere symbolism if the state does not actualise these expectations.[13]

According to *Klare*, transformative constitutionalism implies a combination of the elements of constitutional enactment, interpretation, and enforcement that are together committed to transform a country's political and social institutions including its power relationships through a non-violent process such that it yields a more democratic, participatory, and egalitarian society.[14]

The concept of transformative constitutionalism emerged in post-apartheid South Africa with the essence of this concept being rooted in the transformation of the African society from one characterised by strife, conflict, suffering and injustice, into a society founded on the recognition of human rights, democracy and peaceful co-existence.[15] Transformative constitutionalism is underlined by a dominant role of the State, including that of the judiciary, primarily focussed at fulfilling the objective of building and enriching the *constitutional ideals of liberty, equality and fraternity* in a changing society. In any society, the relevance of these principles grows and evolves through an *'ebb and flow'* and therefore the onus lies on the State to constantly strive to synchronize the relationship between the State's perspective on these notional principles and the demands by the citizens for their actualisation. According to *Justice Krishna Iyer*, the interpretation of the Constitution is based on the State's understanding of the people for whom it is made including their *frustrations and aspirations*. Such an approach shall certainly aid the State in finding principled solutions to various social disabilities. Hence, establishing equality by eliminating all forms of discrimination in

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[13] Sudipta Kaviraj, *'For me, it now means personal liberty': Indira Jaising explains Transformative Constitutionalism*, (Feb. 26, 2023, 11:30 AM) https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism.

[14] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, (Jan. 28, 2023, 08:30 AM), https://www.tandfonline.com/doi/abs/10.1080/02587203.1998.11834974.

[15] Sudipta Kaviraj, *'For me, it now means personal liberty': Indira Jaising explains Transformative Constitutionalism*, (Feb. 26, 2023, 11:30 AM) https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism.

order to build positive social relationships lies at the heart of the concept of transformative constitutionalism.

The Preamble of the Constitution of India lays the foundation of a system of values to protect the *right to live with dignity*. Part III of the Constitution expands on this right by incorporating the right to health, right to personal liberty, right to privacy, right against torture or cruel, inhuman and degrading treatment, right to equality and the right to equality of opportunity in public employment within it. The Constitution thus secures a life of dignity for the people.[16]

The Indian Constitution embodies the spirit of human rights underscored by values of equality, tolerance, non-discrimination and justice. In the broader context, the Indian Constitution as well as its democratic order are aimed at establishing a society that ensures equal dignity and respect to all human beings.[17] The right to dignity is recognised as inherent in all human beings and its subordination or abrogation to other rights is seen as impermissible. The essentiality of according dignified treatment to human beings was well captured in *Carmichele v Minister of Safety and Security*[18], where the constitutional court of South Africa provided a key principle that placed a positive obligation on the State to protect and uphold the right to life, human dignity, and security of the person through an appropriate mechanism of laws and structures. Factually, the case was based on sexual assault of a woman by a man who had been released pending trial for the attempted rape of another woman, and the court held that the obligation on the State included taking preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual. Additionally, the court held that the police and prosecuting authority had a constitutional duty to protect the public in general and women in particular from violent crimes. In the absence of protective

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16 Aparna Chandra, Mrinal Satish, *Securing Reproductive Justice in India*, (Mar. 17, 2023, 21:00 PM) https://reproductiverights.org/sites/default/files/2020-02/SecuringReproductiveJusticeIndia-Full.pdf.

17 Another v. Hugo, 1997 (6) BCLR 708 (CC).

18 2001 (4) SA 938 (CC).

measures, both at the judicial and policy level, the State ends up falling short of fulfilling the constitutional spirit.

The continuing practice of corrective rape during a time when the Indian judiciary is actively pursuing, nurturing and building the idea of transformative constitutionalism is a manifestation of the deep-rooted stigma against homosexuality. While in a deeply divided world, creating a harmonious and inclusive social order is the immediate priority of the judiciary, the parallel existence of such gory reality is illustrative of regression, exclusion and marginalization.

The jurisprudence concerning rights of the LGBT community began developing when in *Naz Foundation v State of Delhi*[19], when the court emphasized upon the violation of principle of equality provided under Articles 14 and 15 by undertaking a comprehensive and detailed analysis of the law against discrimination in India and applied the highest international standards on equality to the Indian context in order to pen down a progressive judgment.

The essence of Article 14 lies in the idea of *intelligible differentia* i.e., classification based on a reasonable basis. In case of absence of intelligible differentia, the action can be challenged as arbitrary and unreasonable. In the immediate case, according to the court, categorization and the resultant criminalization of same-sex relations under Section 377 of the Indian Penal Code was arbitrary and unreasonable, hence violative of Article 14. By expanding the import of equality under Article 14, the court emphasised that there was a *need to include sexual orientation among protected grounds of discrimination.* Secondly, the court concurred with the judgment of *Toonen v Australia*[20] and held that discrimination on the basis of sexual orientation was not permitted by Article 15. According to the court, the theme of inclusiveness was the basic tenet upon which the Indian Constitution was built. Therefore, not discriminating against persons of different sexual orientation was implied under Article 15. Further, the court noted that despite Section 377 being a part of the

[19] WP(C) No.7455/2001.
[20] No.488/1992, CCPR/C/50/D/488/1992.

statutory law in India, the level of criminal conviction under it has been rather low whereas the same provision has caused harassment, victimisation and persecution of the LGBT community by law enforcement agencies, culminating in the violation of their human rights.[21] Through this far-reaching and status-quo altering judgment, the idea of *restorative justice*, thus seemed well-served. The recognition of constitutional ideals and the good intention of the court instilled faith among the LGBT community members of an ameliorative future. Yet this hope turned out to be short lived as in the following case, the Supreme Court retreated upon the previous judgment and re-criminalized same-sex relations.

In *Souresh Koushal v Union of India*[22], the Supreme Court held that Section 377 of the IPC did not violate the Constitution. With regard to Section 377, the court stressed that the courts must exercise *self-restraint*. The court held that the penal provision did not criminalise a particular group of people possessing a distinct identity or orientation, it merely identified *certain acts as offences*. By negating the argument that homosexuals faced discrimination in various ways, the court provided a different interpretation of Article 14, and stated that a particular piece of legislation need not treat all people exactly the same, but that *all such persons who are similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.* As the current petition revolved around violation of fundamental rights, thus locating the constitutionality of Section 377 in the light of the Golden Triangle gained prominence. By holding that those individuals who indulged in 'carnal intercourse in the ordinary course' and those individuals who indulged in 'carnal intercourse against the order of nature' constituted *different classes, the court held that those individuals falling in the latter category could neither argue that Section 377 was arbitrary nor aver that the classification was irrational and hence violative of Article 14.*

The observation of the Supreme Court that only a miniscule fraction of the country's population constituted lesbians, gays,

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[21] Naz Foundation v. Government of NCT of Delhi, (Feb. 21, 2023, 10:30 AM) https://www.equalrightstrust.org/ertdocumentbank/case%20note.pdf.

[22] Civil Appeal No. 10972 of 2013.

bisexuals or transgenders and that fewer than 200 persons had been prosecuted under Section 377 up till then, completely defied the previous acknowledgement of the theory of transformative constitutionalism. The reversal of the judgment passed in the Naz Foundation case and the apparent inconsistency in the judicial mandate concerning Section 377 contributed to the ambiguity surrounding rights of the LGBT community. Moreover, such contrariety on the part of the State agencies leads to the persistence of an atmosphere that is conducive for the practice of discriminatory attitudes towards the community members.[23]

Despite the setback caused by the above judgment, the idea of the *progressive realisation of rights* continued to be pursued by the Supreme Court as is evident in the following judgment. By expanding the import of privacy as an individual concept, the court included the rights of the LGBT community and extended protection to their human rights as well as fundamental rights. By connecting the strings of human dignity, privacy and LGBT rights, the court rightly fulfilled its mandate as the protector and guarantor of fundamental rights.

In *Justice Puttaswamy v Union of India*[24], the Supreme Court decisively upheld the right to privacy as a fundamental right under Article 21. Justice Chandrachud refuted the averment that privacy was a mere elitist construct. He acknowledged that the right to privacy was not independent of the other freedoms guaranteed by Part III of the Constitution and hence it could not be viewed in isolation. *Privacy was accepted as an element of human dignity and as an inalienable natural right of all human beings.*

Justice Chelameswar quoted Gary Bostwick's concept of privacy and held that the right to privacy comprised of three facets-

1. Repose - *freedom from unwarranted stimuli.*

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[23] *Suresh Koushal and Ors v. Naz Foundation and Ors*., (Feb. 21, 2023, 08:00 AM) https://www.equalrightstrust.org/ertdocumentbank/Case%20Summary%20Suresh%20Kumar%20Koushal%20and%20another%20v%20NAZ%20Foundation%20and%20others.pdf.

[24] Writ Petition (Civil) No. 494 OF 2012.

2. Sanctuary - protection from intrusive observation.
3. Intimate decision making - *autonomy to make personal life decisions*.

Within intimate decision making, Justice Nariman included the facet of privacy of choice implying the *individual autonomy over fundamental personal choices* while Justice Malhotra included *spatial and decisional privacy* as the other two important facets of the right to privacy.

As per the court, privacy is inextricably tied to human dignity, therefore personal life decisions including relations between and among homosexuals are an intensely intimate domain. Non-acceptance and denial of such relationships and adopting inhuman methods like corrective rape against individuals is wholly violative of their inherent right to bodily autonomy and therefore of their right to privacy. Further, if an attempt is made to establish a relationship between the practice of corrective rape and the right to privacy, it can be concluded that the three conditions enlisted by the court, namely, *legality, legitimate aim, and proportionality* are repudiated, thereby striking at the core of the aspirational nature of the Indian constitution. As far as the existence of derogatory practices against LGBT members is concerned, the real test of privacy will lie in how subsequent courts will strive to protect the rights of the community in order to adjudicate upon the larger interests of the LGBT community.[25]

The jurisprudence relating to the LGBT community reached a new milestone when in the case of *Navtej Singh Johar v Union of India*[26], the Supreme Court unanimously held that Section 377 of the IPC in so far as it applied to consensual sexual conduct between adults in private, was unconstitutional. By relying upon its decision in *National Legal Services Authority v Union of India*[27] the court

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[25] Vrinda Bhandari, Amba Kak, Smriti Parsheera and Faiza Rahman, *An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict,* (Feb. 21, 2023, 07:30 AM) https://www.ssoar.info/ssoar/bitstream/handle/document/54766/ssoar-indrastraglobal-2017-11-bhandari_et_al-An_Analysis_of_Puttaswamy_The.pdf?sequence=1.

[26] AIR 2018 SC 4321.

[27] (2014) 5 SCC 438.

reiterated that *gender identity was intrinsic to one's personality and denying the same would be violative of one's dignity.* As a concept, human dignity, is inherent, inalienable and universal in nature; therefore, one is compelled to think how practices like corrective rape and other intrusive therapies against a certain group of individuals continue to not only be practiced but even overlooked and brushed under the carpet!

The court held that *Section 377 amounted to an unreasonable restriction on the right to freedom of expression* since consensual carnal intercourse in an individual's private sphere did not in any way harm public decency or morality and if the impugned provision continued to be on the statute books, it would cause a chilling effect on the right to privacy under Article 19(1)(a). In the light of this observation, one cannot help but wonder why did Eudy Simelane, Aswathi, Anjana or many others like them suffer such inhuman treatment?

Moreover, by holding that the intimacy between consenting adults of the same sex is beyond the legitimate interests of the state and that an adult had complete right to choose a partner of his or her choice, the court upheld the dictum of *individual liberty*.[28]

This judgment was historic as the court emphasised upon the relevance of the principles of *transformative constitutionalism* and *progressive realization of rights* to guide the transformation of the society from an archaic to a pragmatic one, where fundamental rights would be fiercely guarded. Another principle of significance was *constitutional morality* which was seen as necessary to ensure that human rights of the LGBT individuals were protected.

By noting that the purpose of Section 377 was to *efface identities* of the LGBT community, Justice Chandrachud stressed not only upon the adoption of an anti-discriminatory attitude towards same-sex relationships but pointed that *positive steps by the State* were required to achieve equal protection for the members of

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[28] *Shakti Vahini v. Union of India* (2018) 7 SCC 192.

the LGBT community.[29] Hence, the court did not only pass the judgment based on the parameter of human rights but it equally acknowledged that the responsibility lay on the State's shoulders to help end the stigma attached to *being* LGBT.[30]

Meanwhile, the Madras High Court passed yet another significant judgment specifically dealing with the aspect of mental health of the LGBT community members. In *Sushma v Commissioner of Police*[31], the court expressly held that the LGBTQIA+ community had the right to equality under Article 14. The court added that after the judgments in *NALSA v Union of India*[32] and *Naz Foundation v Government of NCT of Delhi*[33], the prohibition against discrimination under Article 15(1) was no longer restricted just to the expressly listed grounds but based on the application of *ejusdem generis*, a principle of interpretation. impliedly included other grounds like gender identity and sexual orientation as well.

In order to protect the LGBT community from a *vulnerable atmosphere*, the court, in the absence of legislative measures, outlined the following guidelines –

1. Directed that the *police* should close complaints for missing persons once they find that they are in a consensual relationship.
2. Encouraged liaison between the Ministry of Social Justice and Empowerment and *NGOs* to help people from the LGBTQIA+ community.
3. Ordered *sensitisation programs* to ensure that their rights under the Constitution as well as the Transgender Persons (Protection of Rights) Act, 2019 are guaranteed.

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29 Global Freedom of Expression, *Navtej Singh Johar v. Union of India,* (Mar. 21, 2023, 08:30 AM) https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/.

30 Frank Mugisha, *India and the Global Fight for LGBT Rights*, (Feb. 26, 2023, 10:00 AM) https://foreignpolicy.com/gt-essay/india-and-the-global-fight-for-lgbt-rights/.

31 W.P.No.7284 of 2021.

32 (2014) 5 SCC 438.

33 WP(C) No.7455/2001.

4. *Prohibited any attempts to medically cure sexual orientation or gender identity.*
5. *Appropriate amendments to academic curricula* to educate students.
6. *Inclusive* hiring policies.
7. Right to *free legal aid*.

The judgment is historic as it bans the unethical practice of conversion therapy based on the medically false pathologization of sexual orientation and gender identity that causes a highly detrimental effect on the psychological and physical health of individuals belonging to the LGBT community. The present judgment shall certainly play a persuasive role in countries where such practices are prevalent in the most heinous forms. Despite an express direction to prohibit attempts to cure the members of the LGBT community, the judgment fell short as it only covered medical conversion therapy and did not extend it to other therapies used in alternative medicine or religious therapies.[34]

An analysis of the growth and development of the jurisprudence related to the LGBT community leads us to the conclusion that despite palpable challenges, the judiciary as an agency of the State has constantly striven to enlarge the scope of the fundamental rights under the Constitution. By taking cognizance of international developments and India's commitments under various UN Conventions, the courts have shown immediate concern over the denial of basic rights to LGBT members and has urged the State to adopt a progressive and facilitative approach towards the community and its interests.

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[34] South Asian TransLaw Debate, *S. Sushma and Ors v. Commissioner of Police, Polie of Greater Chennai and Ors.,* (Apr. 21, 2023, 06:30 AM) https://translaw.clpr.org.in/case-law/s-sushma-and-ors-v-commissioner-of-police-greater-chennai-police-and-ors/.

Part III

A. Towards the Development of an Inclusive and Progressive Jurisprudence

The freedom, equality and dignity are rights that are inherent in all human beings. The nature of human rights is such that they form a web which is universal, inter-dependent, indivisible and inter-related. The facets of sexual orientation and gender identity are integral to every individual's dignity.

Despite tangible progress made by States, through their laws, policies, and judicial pronouncements, *targeted human rights violations* against persons of non-binary sexual orientation or gender identity continues to be of global concern. Incidents of extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities leads to a serious deprivation of human rights for the LGBT community. Factors of race, age, religion, disability, or economic, social or other status, exacerbate the degree of vulnerability of the community members.[35]

The application of the theory of transformative constitutionalism has certainly helped in expanding the conventional ambit of rights and has ushered a more positive and meaningful change in the lives of the marginalized populations yet the absence of a comprehensive legislation has limited the impact of the progressive judicial crusade. As social norms and attitudes lean heavier toward homophobia, there is considerable divergence that is created between the written law and ground reality. The LGBT community has an ever-widening area of questions and concerns and if the State does not step up its efforts at formulating a comprehensive policy or a law to protect their interests, judicial pronouncements shall yield a limited impact. The Transgender Persons (Protection of Rights) Act, 2019 was a landmark legislation in this regard yet the entire gamut of issues concerning the LGBT community have not been reasonably addressed. Secondly, a

[35] Introduction to Yogyakarta Principles, (Apr. 10, 2023, 07:00 PM), https://yogyakartaprinciples.org/.

'rights-based' approach from the State's end is still missing. The issues of the LGBT community are complex and are entwined with the human rights and fundamental rights. A 'rights-based' approach thus requires locating the centrality of specific LGBT rights within the purview of human rights. Thirdly, the State's role alone cannot be expected to yield a long-lasting change in a society that is resistant to embracing inclusivity. The onus of initiating this change lies as much on the State as the citizens of that State. So long as, a grave sense of stigma remains attached to the notion of sexual desire and sexual functioning, LGBT members shall continue to be inhibited by shame. As such, any progressive or inclusive measure adopted by the State will only lead to limited progress.

The complex interplay between geographical, socio-cultural and historical factors has birthed hierarchical social stratifications which has impacted the masculine-feminine interactions in the society, proving consequential for the larger matrix of social relations, making justice elusive for homosexuals. Even though social change is non-linear and proceeds in a circuitous manner, members of a society need to understand and respect the choices of homosexuals. Value modification based on popular culture and communication can certainly be harnessed to dismantle patriarchies locally as well as globally.

For a community that has faced centuries of oppression and marginalization, their undignified existence is compounded by silence and invisibility, of the community members, of the society and of the State.

EVALUATING THE MASS RELEASE OF PRISONERS DURING COVID-19 PANDEMIC: LESSONS FOR FUTURE PUBLIC HEALTH EMERGENCIES

Arafat Ibnul Bashar[*]

Abstract

One of the protective measures prescribed by public health officials to contain the spread of the highly contagious Corona virus was social distancing. And implementing such social distancing measures was even more challenging in prisons. The prisons around the world had been a thriving breeding ground for Covid-19. The prisoners, whose right to health, sanitation, and other human rights are often overlooked during the usual times, were at a heightened risk from Covid-19 outbreaks. Disregarding the safety of the prisons during the pandemic resulted in human rights violations and also significantly impaired the overall containment plans. Courts worldwide resorted to the mass release of inmates either on bail, early release due to shortened sentences, or opting for house arrest/detention to reduce the prison population to allow proper prison administration during the pandemic. Therefore, it is imperative to analyze the policy of inmates' early and mass release during the Covid-19 pandemic as a solution to containing Covid-19 transmission in the prisons and look into how such policy may help in the future in combating public health emergencies. A special emphasis will be given on the measures taken in the prisons of Bangladesh.

Keywords: prisons, prisoners, Covid-19, social distancing, human rights.

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"The degree of civilization in a society can be judged by entering its prison."

\- *Fyodor Dostoevsky*
(in the novel The House of the Dead)

I. Introduction

The Covid-19 pandemic is an unprecedented event in the history of humankind. Although we humans may have seen our fair share of natural disasters, war and violence, pandemics, and other catastrophic events, no other event has managed to affect the whole of humanity like the current pandemic due to unprecedented lockdowns, travel restrictions, business restrictions, school closures, and not to mention the toll on health system. The pandemic was contained with the introduction of vaccines. However, prolonged lockdown dealt a heavy toll on the economy and livelihood, as the governments tried their best to implement social distancing to halt the virus's transmission. But implementing social distancing without a lockdown or even with it was a difficult task. And it was more challenging to implement social distancing in the prisons. Even during the usual times, the health and hygiene of prisoners were often overlooked.[1] Stigmatized due to their actions and considered a pariah by society, the wellbeing and human rights of the prisoners are mostly ignored. But during a public health emergency, such as Covid-19 pandemic, turning a blind eye towards the plight of the prisoners will have grave consequences not only for the prisoners but also for the overall pandemic containment plans of a country. Although prisoners are kept isolated from society, prison is not an isolated establishment. Therefore, it will not be possible to control the transmission of the virus in a particular community unless measures are taken to control the virus in the prisons. Releasing prisoners before their prison terms are over, in great numbers, has been commonly devised in many jurisdictions to control the transmission in the prisons. But putting such a large number of criminals back into society before their reformation is

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[1] See *Addressing the global prison crisis*, *STRATEGY 2015-2017*, United Nations Office on Drugs and Crime (26 April, 2023, 3:45 PM) https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Strategy_on_Addressing_the_Global_ Prison_Crisis.pdf

complete may have consequences. Therefore, it is essential to evaluate these measures and predict the consequences that may follow so that the legal machinery could reconsider the best possible action plan to prevent transmission in the prisons with minimal negative implications.

II. Why is a Prisoner Allowed to have Rights in Prison?

> *"When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing.... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action....."*
>
> \- The Supreme Court of USA in *Helling v. McKinney*[2]

In the older times, the penal system was based on the notions of retribution. The retributive system was based on treating evil with evil.[3]The punishment of a crime was supposed to be as harsh as the crime itself and even harsher, if possible. Capital punishment was a common phenomenon, and rather than being reserved for extreme cases, it was prescribed for even the pettiest of offenses. This retributive idea of penology considered a convicted criminal as an outlaw, i.e., a person without legal rights.[4] Through gradual reformation, the concepts of corrective treatment, reform and rehabilitation became integrated into the administration of justice.[5]But still, the constitutions, the courts

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2 509 U.S. 25, 32, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989).

3 P.K. SEN, PENOLOGY OLD AND NEW 27 *Penology Old and New* (Longmans, Green & Co 1943).

4 Richard P.Vogelman, *Prison Restrictions Prisoner Rights* 59(3) The Journal of Criminal Law, Criminology, and Police Science, 386 (1968).

5 *Id*.

and the laws guarantee more protection to the accused than those already convicted. It goes without saying that when an individual is convicted of a crime and sentenced to imprisonment, that person loses his liberty and some other human rights. Every citizen is under a social contract to follow the laws of the state and in return, the state will protect him and provide him with the rights he needs to survive and live with dignity in society. Thus, when a person breaks the law, the state punishes him by withdrawing some of his human rights. But a convicted offender is not deprived of all of his human rights and can subject to the conditions of the punishment imposed by a court of law, enjoy them similar to any other person.

The reason that a prisoner is not stripped of all his rights is that the present administration of justice is not based on the notions of retribution, at least not in its entirety. The Supreme Court of India in *Mahadeo and others v. State of U. P.,*[6] held that punishment of an offender is intended to achieve the goals of deterrence, prevention, retribution and reformation and this notion is not dissented by any. A prison thus works as a place where a criminal is sent to be punished, deterred from committing further crimes, save society from him (if his crimes possess a pubic threat), and be reformed.[7]At present, the justice system in countries around the world places great importance on rehabilitating offenders. After they have finished the terms of their punishment, they can integrate with society as law-abiding citizens. Therefore, a prisoner is allowed to enjoy some of his rights and is given the hope that if he is reformed, he can resume enjoying those rights which have been curtailed. Again, a prison may also house the accused, who are waiting for their trial or sentence, whose curtailment of rights is still under scrutiny.[8] Therefore, the conditions of the prison may be such as to allow the enjoyment of those rights that have not been curtailed.

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6 AIR 1980 SC 2147; (1981) 1 SCC 107; 1981 (1) SCR 1196; 1980 CRI. L. J. 1440; (1981) 1 SCC (Cri) 112.

7 Office of the United Nations High Commissioner for Human Rights, HUMAN RIGHTS AND PRISONS: Manual on Human Rights Training for Prison Officials (UNITED NATIONS New York and Geneva, 2005) 3.

8 *Id*.

III. Legal Guarantee of the Rights of the Prisoners:

It was considered that prisoners had no legal rights; rather the obligation to be good to them was a moral one.[9] Although the right to life, dignity, equality is equally applicable for a prisoner, these rights subject to the conditions of his imprisonment. The Universal Declaration of Human Rights, in Article 5 ensures protection from torture and cruel, inhuman or degrading treatment or punishment, which is more relevant for the convicted prisoners than others. Article 6 of the International Covenant on Civil and Political Rights discussed the abolishment of the death sentence, while article 7 brings the issue of prohibition of torture and cruel, inhuman or degrading treatment or punishment.[10] But it is article 10 that briefly discusses the rights of prisoners. Under the article, prisoners are to be *'treated with humanity and with respect for the inherent dignity of the human person.'*[11] The provision also talks about segregating the accused from convicted and accused juvenile persons from adults.[12] The provision all sets out the principle that the treatment of prisoners shall aim to *'their reformation and social rehabilitation.'*[13]Article 12 of the International Covenant on Economic, Social and Cultural Rights states that in the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the states shall take steps necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.[14] This provision does not differentiate between prisoners and other people, which imply that policy regarding containment of any disease cannot discriminate against the prisoners. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has provisions that talk about the use of torture and cruel treatment against prisoners,[15]

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9 *Id*. at 4.

10 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

11 *Id*. at article 10 (1).

12 *Id*. at article 10 (2) (a) (b).

13 *Id*. at article 10 (c).

14 International Covenant on Economic, Social and Cultural Rights (signed on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), article 12.

15 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed on 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 10, 11.

while the protection of child prisoners has been illustrated in article 37 of Convention on the Rights of the Child.[16] Many other human rights documents, although do not talk about prisoners and imprisonment, provide rights to prisoners. Even without being prisoner-centric instruments, all these legal instruments set out the basic human rights of a prisoner. Besides, the regional human rights instruments also offer human rights to prisoners, which are usually similar to those set out in the above-mentioned documents.

When it comes to setting a detailed framework for the regulation of prisons and the rights of prisoners, the United Nations Standard Minimum Rules for the Treatment of Prisoners was the first legal instrument in the subject matter.[17] It was initially adopted during the First Congress on the Prevention of Crime and the Treatment of Offenders, held by United Nations in 1955 and later approved by the UN Economic and Social Council in 1957. The rules were revised in 2015, in the United Nations General Assembly, after a five-year revision process and are known as Mandela Rules, in the honor of Nelson Mandela. Although the rules are not binding, modern prison reforms of most countries were made based on these rules.[18] The rules contain provision for dignity and respect of prisoners,[19] non-discrimination,[20] separation of categories,[21] accommodation,[22] healthcare,[23] religion,[24] instruments of restraint,[25] etc. A thorough reading of the rules illustrates that the prisoners are indeed provided a range of human rights. Together with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1988 and the Basic Principles for the Treatment of

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16 Convention on the Rights of the Child (signed on 7 March 1990, entered into force 2 September 1990) E/CN.4/RES/1990/74.

17 United Nations Standard Minimum Rules for the Treatment of Prisoners (signed on 8 January 2016) UNGA A/RES/70/175 (the Nelson Mandela Rules).

18 14 Dr. N.V. PARANJAPE, Criminology and Penology 391 (Central Law Publications 2009).

19 the Nelson Mandela Rules, *supra note* 17, at Rule 1.

20 *Id*. at Rule 2.

21 *Id*. at Rule 11.

22 *Id*. at Rule 12-17.

23 *Id*. at Rule 24-35.

24 *Id*. at Rule 65-66.

25 *Id*. at Rule 47-49.

Prisoners, adopted in 1990, it forms the framework for human rights friendly prison system. Besides the Riyadh Guidelines,[26] the Beijing Rules[27] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty along with the Convention on the Rights of the Child also complement these documents in the context of the imprisonment of a child.

In light of all these documents, the right to liberty and the right to family life[28] are the only rights that are completely curtailed as a result of imprisonment. All other rights such as health, hygiene, clothing, non-discrimination, religion etc. are available for the prisoners based on their sentence and the jurisdiction in which they are located. The assurance of humanity, dignity and respect warrants almost all the basic rights of a prisoner. It is to be mentioned that those who are in prison before the final verdict of their guilt, juvenile offenders and women prisoners are usually guaranteed more rights and privileges than others. Inadequacy in providing human rights for the prisoners thus does not stem from the lack of legal guarantee but instead from the indifference of the policymakers towards the plight of the prisoners. The level of stigmatization of being imprisoned in a particular society is usually reflected in the conditions of its prisons.

IV. Prisons During Covid-19 Pandemic:

Since the start of the Covid-19 Pandemic in 2020, social distancing and lockdowns were put forward as the mechanisms to contain the spread of the virus. Although such measures have been in use for hundreds of years and have been utilized previously in outbreaks of infectious disease[29] the scale on which it was used in

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[26] United Nations Guidelines for the Prevention of Juvenile Delinquency (signed on 14 December 1990) UNGA A/RES/45/112 (The Riyadh Guidelines).

[27] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (signed on 29 November 1985) UNGA A/RES/40/33 (The Beijing Rules).

[28] Many jurisdictions offer the prisoners to have 'conjugal visits,' a scheduled visit in which a prisoner is permitted to spend some intimate time with their legal spouse. However, there are no such provisions in the laws of Bangladesh.

[29] *Scale of China's Wuhan shutdown is believed to be without precedent*, THE NEW YORK TIMES (30 January 2020) https://www.nytimes.com/2020/01/22/world/asia/coronavirus-quarantines-history.html.

the Covid-19 pandemic was unprecedented.[30]Lack of investment in prison health, overcrowding, and rigid security processes have been delaying the diagnosis and treatment of the disease in the prisons.[31] Overcrowding has been a common problem in prisons all around the world, from developed to least developed countries. On top of that, the lack of proper hygiene, sanitation, understaffing, and negligence towards the healthcare of the prisoners are also a very common sight. Prisoners share toilets, dining halls and sleep in either bunk beds or on the floor all crammed together.[32] Such conditions made it almost impossible to implement social distancing measures in the prisons and were ideal grounds for the transmission of an infectious virus like Covid-19. Not to mention, the prison officials, various doctors, nurses, and other necessary workers frequently went in and out of the prisons, which put them, their family as well as the prisoners and the community surrounding the prisons very much at risk of transmission. Many scientists and epidemiologists have even gone on to tag prisons as 'epicenters' for the spread of the virus.[33] World Health Organization recognized the vulnerability of prisoners in this pandemic due to the confined conditions of the prisons.[34]

The first prisoner infected with Covid-19 was in fact, identified as early as February 2020, in Iran.[35]Due to overcrowding and lack of protective equipment, prisons sent prisoners to solitary confinement to contain the transmission, which potentially resulted

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30 *Id*.

31 See Stuart A. Kinner and others, Prisons *and custodial settings are part of a comprehensive response to COVID-19* 5(4) The Lancet (2020), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30058-X/fulltext#%20.

32 See Talha Burki, *Prisons are "in no way equipped" to deal with COVID-19* 395(10234) The Lancet (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7252088/.

33 Christina Maxouris, *Jails and prisons were hit hard by Covid-19 and experts say they need to be prioritized for the vaccines*, CNN (April 21, 2023, 8:45 AM), edition.cnn.com/2021/01/11/us/jails-prisons-vaccine-priority/index.html.

34 See World Health Organization, Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance (15 March 2020).

35 *Coronavirus Spreads in Iran's Prisons*, The Iran Primer (April 21, 2023, 8:51 AM), https://iranprimer.usip.org/blog/2020/mar/03/coronavirus-spreads-iran%E2%80%99s-prisons.

in long-term psychological harm.[36] Prisoners thus did not come forward when they felt sick or began to show symptoms, due to fear of being sent to solitary confinement.[37] In prisons of Argentina, Spain and Canada, prisoners were being isolated in cells for 23 hours a day, were cut off from visitors and were not even provided with soaps.[38] Some of the prisoners in Canada resorted to self-harm and attempted suicide due to deteriorating mental health.[39] Prisoners in Argentina lost access to necessities like food and clothing since they were dependent on visiting family members, whose visits were cut off due to the pandemic.[40] In the USA, it was observed that the risks of incarcerated people being infected are more than five times higher than the overall rate of the nation.[41] Even their death rate (39 deaths per 100,000) was higher than the national rate (29 deaths per 100,000).[42] The number does not properly reflect the severity of Covid-19 in the prisons, due to limited testing. The 14th UN Congress on Crime Prevention and Criminal Justice, which took place in Kyoto, Japan, estimated that more than 527,000 prisoners have been infected in 122 countries.[43] But the numbers are not reliable, since the prisons are not subject to regular testing. The Congress of USA also recognized the risks to prison officers, healthcare professionals, and others working in prisons, due to their close and regular interactions with the prisoners.[44] The situation was similar everywhere as even relatively well-resourced penal systems have been facing troubles mitigating the impact of the pandemic in prisons. And it is far more serious in countries whose prisons are holding 300%, 400%, and even 600% more prisoners than its capacity, but its resources are only limited to its official capacity.

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36 *Prisons: A Petri Dish for COVID-19'*, Northwestern, (22 April 2023, 12:05 AM), https://buffett.northwestern.edu/news/2020/prisons-a-petri-dish-for-covid-19.html.

37 *Id*.

38 *COVID-19 pandemic exposes how little we know about prison conditions globally*, The Conversation (22 April 2023, 12:11 AM), https://theconversation.com/covid-19-pandemic-exposes-how-little-we-know-about-prison-conditions-globally-154225.

39 *Id*.

40 *Id*.

41 *Covid-19's Impact on People in Prison*, Equal Justice Initiative (22 April 2023, 12:15 AM), https://eji.org/news/covid-19s-impact-on-people-in-prison/.

42 *Id*.

43 *Impact of COVID-19 'heavily felt' by prisoners globally: UN expert*, UN News (23 April 2023, 10:00 AM), https://news.un.org/en/story/2021/03/1086802.

44 *Id*.

Again, there are possibilities of discrimination regarding the allotment of these limited resources, as the prisoners from minority and neglected communities may be more at risk of infections and deaths than others. In such conditions, it is hard to envision introducing meaningful infection prevention and control measures.

V. Early and Mass Release of Prisoners to Combat Covid-19:

During the Covid-19 pandemic, countries, such as India, Brazil, and several countries in Africa failed to provide necessary equipment even for the doctors and other health workers who have been in the frontline of this pandemic.[45] It would be absurd to hope that prisoners, the stigmatized and discarded part of society will be able to have access to such privileges. But what is shocking is that, in most of the countries, the authorities could not even take the smallest of measures to increase the level of hygiene, sanitation, and cleanliness to the slightest degree in the prisons during the pandemics. Governments being burdened by the economic downfall due to the continued lockdowns, quarantines, and continued pressure in the health sector could hardly manage to have some cash flow in the prison administration. As stated before, the prisons had to take unorthodox and unscientific measures such as sending prisoners to solitary confinement, measures which would do more harm than benefit. In such circumstances, the courts resorted to deescalate the overcrowding problem of the prisons.

Releasing prisoners has been identified as a possible solution to contain the spread of the disease in prisons.[46]It is estimated that more than 700,000 prisoners were released globally during the pandemic.[47] To curb the continuous inflow of prisoners, the courts issued suspended sentences for crimes that were not serious and by giving emergency release to those prisoners, who

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[45] Global: Health workers silenced, exposed and attacked, Amnesty (23 April 2023, 10:10 AM), https://www.amnesty.org/en/latest/news/2020/07/health-workers-rights-covid-report/.

[46] Joseph J. Amon, *COVID-19 and Detention: Respecting Human Rights*, Health and Human Rights Journal (23 April 2023, 10:15 AM), https://www.hhrjournal.org/2020/03/covid-19-and-detention-respecting-human-rights/.

[47] *UN News*, *supra note* 44.

were more at risk of being infected and those near the end of their sentences.[48] In addition to the existing laws and policies regarding the early release of prisoners, countries also relied upon new legal and executive measures to release prisoners.[49] The countries usually relied on the combination of the following criteria to determine whether a prisoner should be released or not:[50]

(i) the nature of the offense committed: emphasis given to those who committed non-violent or minor offenses,

(ii) the nature or status of the sentence: those who have served a minimum period in prison or are within days or months of their release, and

(iii) whether the prisoner had particular vulnerabilities: those who were particularly vulnerable to COVID-19, due to age or chronic health issues, along with female prisoners, pregnant or breastfeeding prisoners, and mothers with children living with them in the prisons.

Besides releasing prisoners, the courts and law enforcement systems also undertook measures to reduce the inflow of new prisoners in prisons, to keep the prisons from overcrowding. This was done through ceasing arrests for minor offenses, postponing prosecutions, suspension of short-term prison sentences, and reserving pre-trial detentions only for the most serious of cases.[51] Relying on the international standards, courts emphasized more on the non-custodial methods of sentencing, which included measures such as warnings, monetary penalties, restitution, community service orders, probation, home detention, suspended or deferred sentences, etc.[52] Pardons, clemency, amnesty, reprieves, etc. were also practiced as a measure for reducing prisoners. All these different measures of releasing the prisoners were implemented through the orders of a government official, senior public servant,

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48 *Id*

49 DLA Piper, *A global analysis of prisoner releases in response to COVID-19*, 4 (December 2020).

50 *Id*. at 4, 5.

51 *Id*. at 6.

52 *Id*. at 12.

or judiciary.[53] For example, in the UL, due to early release of prisoners coupled with specific guidance to the courts to take prison condition into account in sentencing and as the courts were dealing with fewer cases than normal, the prison population fell.[54]

VI. Release of Prisoners Under the Theory of Punishment:

As stated above, a justice system and sentencing aims to further the notions of deterrence, prevention, retribution, and reformation, with the idea of reformation taking the centre stage. It is not possible to include the elements of all these notions in every sentencing decision, nor is it possible to balance these elements in a single decision. Depending on the nature of the crime, the lawmakers and courts decide which of the elements to give priority. The release of prisoners during Covid-19 is essentially a public health measure that aims to protect the human rights of the prisoners, staff, and also the community at large. Thus, following the strict penal philosophies during this time may result in gross violations of human rights, including the right to life. But from the perspective of theories of punishment, the release of prisoners is indeed reformatory in nature. Early or pre-mature release or postponement of prison sentences aims to reform the prisoners by giving them a second chance amidst certain situations. It is a sign of faith by the authority that in these testing times, the system prefers you spend your time with your family freely in society, rather than being chained to the prisons. Such releases however lack the elements of deterrence, prevention, and retribution. But when these releases are coupled with conditions or alternative measures such as monetary penalties, home detention, it maintains some aspects of deterrence and prevention, though some could argue that the balance is still very much tilted towards rehabilitation.

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[53] *Id*. at 15-19.

[54] See for example Crossey, P., Hardwick, N. and Meek, R., *A Society of Captives Locked Down: A study of Her Majesty's Prison the Mount during the COVID-19 pandemic* 259 The Prison Service Journal 11-20 (2022).

VII. Problems with Releasing Prisoners During a Public Health Emergency:

The initiative of reducing the overcrowding in prisons is the most realistic and feasible way of combating the current pandemic. Although, from an idealistic point of view, one could say increasing the level of sanitation and hygiene, providing more protective equipment, and ensuring the healthcare of the prisoners to be a more appropriate measure. But, during a public health emergency, the government and the healthcare system of a country are already overburdened, along with undue pressure on its economy. The problems that prisons around the world face are not something that could be cured within days or months or through just extra allocation in the prison budget. In such context, releasing prisoners, to reduce overcrowding will not only allow reducing the risks posed to some vulnerable prisoners but will also let the prison administration be more efficient in taking care of those who are still imprisoned. But to think of early and mass release of prisoners as a 'silver bullet' to the problem of containing Covid-19 in the prisons is a faulty one too. If history is taken into account, such measures have not always been successful. The Russian prison amnesties in 1997 and 2001, taken to reduce the problem of overcrowding, were linked to the global re-emergence of tuberculosis, as many prisoners suffered from it.[55] Releasing prisoners without taking precautions could lead to the accelerated spread of a virus in the community. The release of the prisoners has to take place systemically, through proper quarantine or testing. It in turn increases the risks of transmissions in the communities where the prisoners will be returning. Not to mention, traveling long distances in public transportations to reach home also provide ample window for the spread of a virus. Release policies that do not incorporate scientific principles and best practices will surely not usher in great outcomes.

Besides, lack of scientific consistency, releasing measures has other loopholes. Except health risks posed by early and mass release may also result in law and order problems. For example, lack

[55] See Stern V., Sentenced to Die? The Problem of Tb in Prisons In Eastern Europe (International Centre for Prison Studies, 1999).

of oversight and uneven implementation in releasing prisoners may risk corruption.[56] This may usually occur when the releases are done without the oversight of the judiciary. Release and amnesty decisions coming from executives may result in the unjust release of politically connected prisoners convicted of corruption offenses.[57]Another aspect that is being ignored is that, except those who were detained before the final verdict, released prisoners are criminals who have a penchant for breaking the law. Releasing a huge number of these lawbreakers in society prematurely, before their reformation is complete may lead to serious deterioration of law and order. During the pandemic, the police and law enforcement agencies are burdened with the enforcement of quarantines and lockdown, which reduces their capacity to fight crimes. Instilling the criminals back into society in huge numbers may indeed be risky. The equitable application of prisoner releasing policies is another major concern, as white people are twice more likely to get out of prison early than Black people in the USA.[58] Even though Blacks make up the majority of the prison population, the majority of good time restoration goes to white prisoners.[59] Depriving the prisoners of the minority community of release policies is a gross discrimination and a violation of their right to health and life.

VIII. Alternative and Complementary Measures:

As mentioned before, courts have been heavily relying on non-custodial measures to restrict the inflow of prisoners. Non-custodial measures have proved to be a good alternative to the traditional forms of sentencing, even before the start of the pandemic. Not all countries have welcomed the non-traditional methods of sentencing. The ongoing pandemic might be a good opportunity to do so and it is expected to bear great results long after the pandemic has subsided. But it should also be kept in mind that lenient sentences are not given to those who do not deserve it, since the public health emergency does not limit the rights of the victims

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[56] See Victoria Jennett, Emergency Release Of People From Prison Because Of Covid-: A Brief Analysis Through An Anti-Corruption Lens Chr. Michelsen Institute 2020).
[57] *Id*.
[58] *Northwestern*, *supra note* 36.
[59] *Id*.

of crime to justice. For prisoner releasing policies to work properly, prisons must be provided with the minimum level of safety during public health emergencies. Instead of excluding the prisons and detention centers from the start, the government must include them in the plans regarding the containment of the emergency. Introducing measures like universal testing and contact tracing in the prisons during health emergencies similar to Covid-19 might be short-term strategies but will be instrumental in the effectiveness of long-term measures. Increasing the access to sanitary items, providing personal protective equipment for the staff, infrared thermometers, testing capacities, medicines and other necessities for prisoners and staff alike will prove to be pivotal for the success of any containment plans. Even the release of a large number of inmates does not relieve the prison administration of its responsibility towards the rest of the prisoners.[60] Again, the prisoner releases were accompanied by conditions, which included good behavior, supervision by prison or corrections staff, compliance with COVID-19 directions such as quarantining and testing, home detention, and electronic monitoring.[61] Conditional releases could be more effective than unconditional ones since it gives a precaution that their freedom is not unconditional and may be subject to revocation if they return to their old ways. In India, the prisons have resorted to some creative methods, such as shifting prisoners in temporary prisons in case of an outbreak, preparing separate block-wise time table to prevent overcrowding during meal times and other service etc.[62]

IX. Prisoner Release in Bangladesh:

Sixty-eight prisons in Bangladesh houses around 90,000 prisoners, which is twice the original capacity.[63] Prisons in the

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[60] Don Barnes e al. v. Melissa Ahlman et al, 591 U. S. 4-5 (2020) Sotomayor J., dissenting.

[61] DLA Piper, *supra note* 46, at 6.

[62] In Re: Contagion of Covid 19 Virus in Prisons Suo Motu Writ Petition (C) No. 1/2020 (Supreme Court of India) 5.

[63] Md Kamruzzaman, *Bangladesh reports first prison coronavirus case*, Anadolou Agency (24 April 2023, 10:34 AM), https://www.aa.com.tr/en/asia-pacific/bangladesh-reports-first-prison-coronavirus-case/1813716.

country witnessed their first infection in April 2020.[64] Instantly, in order to reduce the prison population, 20,938 adults from pre-trial detention in 10 working days and 343 children from custody in 7 working days, were released through virtual hearings.[65] Emphasizing more in the pre-trial detainees than convicted prisoners is a praiseworthy step by the courts. However whether the released inmates have maintained quarantine before or after release could not be ascertained. Besides the initiatives of the judiciary, the prison administration has done quite a good job in containing the spread of the virus. The measures taken in prisons included mandatory mask-wearing, 14-day quarantine for incoming inmates, setting up isolation and quarantine wards, not allowing prisoners to meet their family members but allowing weekly talks over phone, access to hand sanitizers etc.[66] If a staff member became infected, they were immediately sent home and only allowed to join work after they tested negative.[67] There were separate isolation center for the prisoners, set with the help of the International Committee of the Red Cross (ICRC).[68] The High Court in June, 2021 refused to pass order on a writ petition that sought directives on the government to protect prisoners in jails and prison staff from Covid-19, since there was no urgent situation.[69] According to the bench since the situation was under control in the prisons, there was no need to interfere.[70] Comparing with the official number and rate of infection in the country, the management of Covi-19 in the prisons may be considered as satisfactory, although there is still doubt if the official account of Covid-19 infections in the prisons reflected the actual

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64 *Id*.

65 Justice Imman Ali, *Releasing 20,000+ people from prison in Bangladesh in 10 days – the view from a Judge*, Penal Reform (25 April, 2023, 7:06 PM), https://www.penalreform.org/blog/releasing-20000-people-from-prison-in-bangladesh-in/.

66 Nusmila Lohani, *How prisons in Bangladesh keep Covid-19 in check'*, The Business Standard (25 April 2023, 7:10 PM), https://www.tbsnews.net/coronavirus-chronicle/covid-19-bangladesh/how-prisons-bangladesh-keep-covid-19-check-251437.

67 *Id*.

68 *Id*.

69 *HC refuses to intervene regarding Covid-19 situation in jails*, The Daily Star (25 April 2023, 7:30 PM), https://www.thedailystar.net/country/high-court-refuses-intervene-regarding-bangladesh-covid-19-situation-jails-1914725.

70 *Id*.

number. Through the donation of ICRC and the US Embassy, the prisons managed to increase the number of essential equipment needed to fight the virus in the prisons.[71] Although the data available are quite insufficient to reach a decisive conclusion, it can be stated that the success in containing the virus in the prisons is due to avoiding the over-reliance on prisoner release and more on building the capacity of the prisons to fight the outbreak.

X. Conclusion:

There is nothing inherently evil with the idea of releasing prisoners to contain the spread of the virus in the prisons. But to consider it as an ideal solution might have some repercussions. The entire containment plans must rely on both the release of prisoners and building the capacity of the prisons to fight the virus. Besides, the idea of sentencing keeping in mind the prison conditions is also a feasible policy. Countries, like Bangladesh have long hesitated to rely on non-custodial and innovative methods of sentencing. Such approach may be fruitful, even in the absence of any public health emergency. Beyond the concern of containing the virus, the policymakers should also emphasize the overall improvement of the conditions of the prisons. Response to any future public health emergency must integrate the considerations of the prisons without any fail. Treating people who violate the rights of others through violating their rights is not a productive way of ensuring law, order, and justice in society. Since the vaccination program has started, the prisoners along with the staffs should be included in a preferential basis for the vaccines.

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[71] *Bangladesh: Protection of detainees continues amid COVID-19*, Relief web (25 April 2023, 7:35 PM), https://reliefweb.int/report/bangladesh/bangladesh-protection-detainees-continues-amid-covid-19; *Us Embassy Staff, 'US Embassy Provides Additional Covid-19 Response Equipment to Bangladesh Prison Headquarters'*, Office of the Deputy Assistant Secretary of the Army for Defense Exports and Cooperation (25 April 2023, 7:41 PM), https://www.dasadec.army.mil/News/Article-Display/Article/2309910/us-embassy-provides-additional-covid-19-response-equipment-to-bangladesh-prison/.

ETHICAL THINKING IN FORENSIC IDENTIFICATION OF DRUG ADDICTS

Dr. Deepthi Rodda[*]

"One should always respect the humanity in others, and that one should only act in accordance with rules that could hold for everyone."

– Immanuel Kant.

Abstract

The population who take drugs is a vulnerable one in our society. From a legal and ethical standpoint, their behavior is depraved, but from a medical and ethical standpoint, this group can be categorized as having chronic, relapsing encephalopathy. In the past two decades, there is a transparency of issues with forensics, particularly in the process of forensic identification, have also been growing along with the population of drug abusers. The forensic team is therefore faced with a new worry, namely how this report successfully resolves the relevant legal concerns while emphasizing the ethical issues, that are been facing by this unique group. The present article will be on those rules of professional's conduct that govern all lawyers that in turn, affect the forensic professional. A blind fold of ethics is overwhelmed from describing the root cause through discovery and analyzation of the purpose to follow ethics in forensic identification of drug addicts.

Key words: Forensic Identification; Toxicology; Drug Abuse Population; Ethics; Law; Jurisprudence.

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Introduction

The fundamental rule of stating the truth in forensic science is objectivity, which makes a distinction between subjective and objective truth-telling. The purpose of truth telling is to acknowledge the limitations of the methods used to derive conclusions, whereas subjective truth telling is to state what we perceive to be true. It involves acknowledging the boundaries of our professional and scientific knowledge, from which deductions have been made. In order to employ the explanatory framework that is generally recognized by the scientific community, it is objective to incorporate literature in reports that both supports and refutes our results.[1] The subjective, on the other hand, cannot be recognized by sense organs, whereas the objective phenomena may be distinguished between by any skilled observer and are perceived by our senses. It was said that the expert's honesty is the subjective component of presenting the truth, whilst his knowledge and testimony are the objective component. Similarly, in order to turn up at conclusions, forensic scientists must maintain objectivity. This is achievable through training and adherence to a common ethical code. The goal of the ethical forensic scientist is to draw findings from investigations that are conducted impartially and without going beyond their training or expertise. They must remember that their fundamental quality is objectivity and that they must consider all the factors before drawing a judgment. They must be accountable and unbiased in their studies and evaluations since they have obligations to the public.[2]

Magnitude of Forensics inside the Lawful Prototype

Since forensic science is the descendant of the union of various philosophies, many significant practitioners of this profession have eschewed the influence of the law or avoided the

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[1] P S Appelbaum, *A theory of ethics for forensic psychiatry*, PubMed https://pubmed.ncbi.nlm.nih.gov/9323651/.

[2] Praveen Kumar Yadav, *Ethical issues across different fields of forensic science*, Full Text (July 18, 2017), https://doi.org/10.1186/s41935-017-0010-1.

influence of law in essence. As a result of technological advancement, courts and attorneys are increasingly isolating themselves in laboratories. Similar to other science domains, the criminal justice system serves as a barrier to advancement in forensic science. While science is constantly evolving or it cease to being science, the law rarely changes or it cease to being law. There are constant pressures on laboratories to embrace a legal philosophy because the courts and extensive amounts of law constitute the final stage in the application of forensic science, and it is impossible to fully comply. In situations when forensic evidence is used, the combination of science and law is a compromise on both professions and ideas. A scientist cannot be a lawyer, and vice versa. It is necessary to establish an adversary system of justice so that law and science can coexist.[3]

Regardless of their underlying beliefs, forensic specialists, whether in science, sociology, medicine, accountancy, or other professions, must deal with lawyers at some time in their careers. In the preceding years, the practice of law has evolved in fits and starts. The Bar Associations were established to apparently improve the legal profession's reputation. For nearly half a century, various judiciaries have been active in the development of Model Rules of Professional Conduct. The rules established in this manner by the concerned authorities will be the focus of the majority of the subsequent discussion. When it comes to creating and enforcing these standards, many states take different approaches. The ethical concerns of a professional society for forensic practitioners are most likely to be addressed. Frequently, ethical issues are not moral in nature, but rather take the form of nearly business related constraints such as appropriate advertising or the appropriate fee to be charged. Nonetheless, these standards, which include lawyer professional accountability norms, can be divided into two types: aspirational and enforceable. Unlike the forensic professional rules, the rule is aspirational in that it does not require lawyers to perform charitable activities. The regulation is, nonetheless, enforceable, unlike the forensic professional's rules. Similarly, forensic specialists can

[3] C.K Johari, *Forensic Science – Identification of Finger Prints. Asia Law House.* (1st ed. 2018).

benefit from similar ideas. When it comes to creating and enforcing these standards, many states take different approaches. Similarly, forensic specialists can benefit from similar ideas. The forensic professional must deal with lawyers, and violations of lawyer regulations may result in sanctions. The forensic professional may even have a business relationship with a lawyer, but must still be overseen in terms of the advice given to the eventual client. Professional conduct prohibits lawyers from supporting someone who is engaging in the unlawful practice of law. Receiving legal counsel from a forensic professional without the assistance of a lawyer carries a substantial risk. In the forensic professional's experience, he is more frequently involved in a contractual relationship with a lawyer's participation. When a lawyer demands inappropriate behaviour that should have been avoided but fails to take corrective action, the lawyer is held accountable for the forensic expert's professional actions. As a result, a forensic expert's responsibility within a law firm is to become aware of the lawyers limits, and a good forensic expert will endeavor to adhere to them.

Revealing the Misnomer of drug addiction within ethical approach

Interpreting the activities and consequences of drugs and dangerous substances it is required in knowing what is present and how much is present in, but forensic toxicology is always analytical and this is true. Regardless of whether the query relates to postmortem, human performance, or drug test interpretations. Typically, forensic toxicologists are active in the following areas: Human performance toxicology, postmortem forensic toxicology, and forensic urine drug testing.[4] Human performance toxicology examines later-collected samples to try to ascertain if the person was intoxicated or impaired at a particular period; and sometimes known as behavioral toxicology, also as a branch of toxicology that focuses on driving while under the influence of drugs or alcohol. It also deals with incapacity to perform at work. The first and most important step in any forensic toxicology inquiry is the collection of

[4] Klasson, *Toxicology: The Basic Science of Poisons* (6th ed. 2001).

the proper specimen. Beyond this, the specimen must be examined using a suitable scientific method. Forensic toxicologists must be educated about a wide range of chemical substances, draw on information from other fundamental science fields, and be able to reply to enquiries regarding deaths, illnesses, or other circumstances where a poison or drug is suspected, and work in collaboration with other experts in cases involving their own scientific research or the findings of other scientists, forensic toxicologists are frequently asked to testify in court. In order to effectively serve as an expert witness, a forensic toxicologist must be well-versed in his or her field and present testimony that is based on the facts of the case in a fair, honest, and ethical manner. As long as the legal system strives to administer justice fairly by fusing law with science and toxicology, forensic toxicology services may continue into the future.[5]

In postmortem forensic toxicology, body fluids and organs from cases of death are examined and interpreted. Toxicology examinations are sought in practically every death that remains unexplained following post-mortem examination to rule out poisoning, drug overdose, or therapeutic misadventure. There may be a history or physical evidence of an overdose or poisoning, such as intravenous drug usage and drug paraphernalia at the death scene, the existence of suicide notes, or empty drug containers in some cases.[6] Toxicology testing and interpretation, on the other hand, may be able to answer the difficulty presented when a young or middle aged therapeutic user, a nursing home patient, and a science researcher are discovered dead, all without a history or any physical indications of overdose. The study of postmortem toxicology looks into how drugs and poisons may have contributed to or caused the subjects' deaths. For the interpreting toxicologist, each poses unique requirements and difficulties.

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5 Wexler & Philip, *Encyclopedia of Toxicology.* (3rd ed. 2014).

6 Shafeek S Sanbar. American College of Legal Medicine, et al.Philadelphia. PA : Mosby/Elsevier, 2007. https://www.worldcat.org/title/legal-medicine/oclc/916144200?referer=di&ht=edition

Forensic laboratories utilize a variety of analytical methods to identify and quantify drugs and poisons, although typically use a combination of immunoassay and chromatographic procedures. Immunoassay testing can be used to screen a number of drugs and drug classes in both blood and urine samples. Immunoassay testing is used to detect opiates, amphetamines, barbiturates, benzodiazepines, and cocaine metabolites.[7] Chromatographic methods are utilized for qualitative and quantitative testing of drug and toxin materials. To evaluate the success of the process, forensic toxicologists must be able to appreciate the necessity of validation from the methodologies and processes used to analyse the specimen. To support medico-legal conditions in criminal and civil proceedings, results from scientifically valid methodologies are required.[8] Although forensic drug testing had been employed in the military, the Olympics, and a tiny portion of private industry, it was Reagans executive order and following CBN guidelines that sparked a massive increase in forensic testing. Drug testing at hospitals or clinical reference laboratories is usually done for medical reasons, but when legal issues arise, it may become forensic testing.[9] A first test on the first aliquot must be an immunoassay method because urine is the specimen for testing for the presence of numerous drug classes such as cannabis, cocaine, opiate amphetamines, LSD, and so on. If the initial test is positive, the second aliquot is subjected to a confirmatory test using gas chromatography or mass spectrometry (GC/MS). The laboratory is required to validate both the first immunoassay test and the GC/MS confirmatory test. The regulations provide a cutoff concentration for

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7 Taylor & Francis, *Forensic Science and Law*, Investigative Applications in Criminal, Civ (Dec. 22, 2005), https://www.taylorfrancis.com/books/edit/10.4324/9781420058116/forensic-science-law-cyril-wecht-john-rago.

8 Baselt, R.C. *(1982) Disposition of Toxic Drugs and Chemicals in Man. 7th Edition, Biomedical Publications, California.*, Scientific Research Publishing https://www.scirp.org/(S(351jmbntvnsjt1aadkposzje))/reference/ReferencesPapers.aspx?ReferenceID=1221120.

9 "Jacques Normand, *Under the Influence?: Drugs and the American Work Force*, (Jan. 26, 2017), https://view.ckcest.cn/AllFiles/ZKBG/Pages/564/2118.pdf.

10 Bhushan M. Kapur& Katarina Aleksa. *What The Lab Can And Cannot Do: Clinical Interpretation of Drug Testing Results, Critical Reviews in Clinical Laboratory Sciences.* 2020. 57:8, 548-585. doi: 10.1080/10408363.2020.1774493.

each test to distinguish between a presumptive positive and a confirmed positive result.[10]

The necessity to offer strong evidence of a substance presence is forensic toxicology is the main objective. To acknowledge unambiguous proof in the existence of a chemical compound, traditional gas chromatography (GC), thin-layer chromatography (TLC), or high-performance liquid chromatography (HPLC) would typically not be satisfactory. It is usually necessary to conduct two or more independent tests, or it is frequently preferred to utilize a stronger analytical test like mass spectrometry (MS). The analytical schema is frequently divided into two parts since a thorough analysis is required. The confirmation phase is the second analytical test, whereas the identification stage is referred to as the screening or initial test.[11] The confirmation procedure typically included provides a quantitative evaluation of how much substance was present in the sample, in the event that a further test is required to establish the amount of drug included in the specimen. Analytical consistency must always be maintained across all stages in order to avoid invalidating results. For instance, when codeine is confirmed in a blood sample for codeine identification, an immunoassay positive to opiates is expected to be positive. If two analytical assays are able to identify a drug, and one of them appears to have detected it but the other does not, the drug was not confirmed.[12]

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[10] Bhushan M. Kapur& Katarina Aleksa. *What The Lab Can And Cannot Do: Clinical Interpretation of Drug Testing Results, Critical Reviews in Clinical Laboratory Sciences.* 2020. 57:8, 548-585. doi: 10.1080/10408363.2020.1774493.

[11] Smith ML, Vorce SP, Holler JM, Shimomura E, Magluilo J, Jacobs AJ, Huestis MA. *Modern Instrumental Methods in Forensic Toxicology*. J Anal Toxicol. 2007 Jun; 31(5):237-53, 8A-9A. doi: 10.1093/jat/31.5.237. PMID: 17579968; PMCID: PMC2745311.

[12] *Analytical Procedures and Methods Validation for Drugs and Biologics*, (July 22, 2015), https://www.fda.gov/files/drugs/published/Analytical-Procedures-and-Methods-Validation-for-Drugs-and-Biologics.pdf.

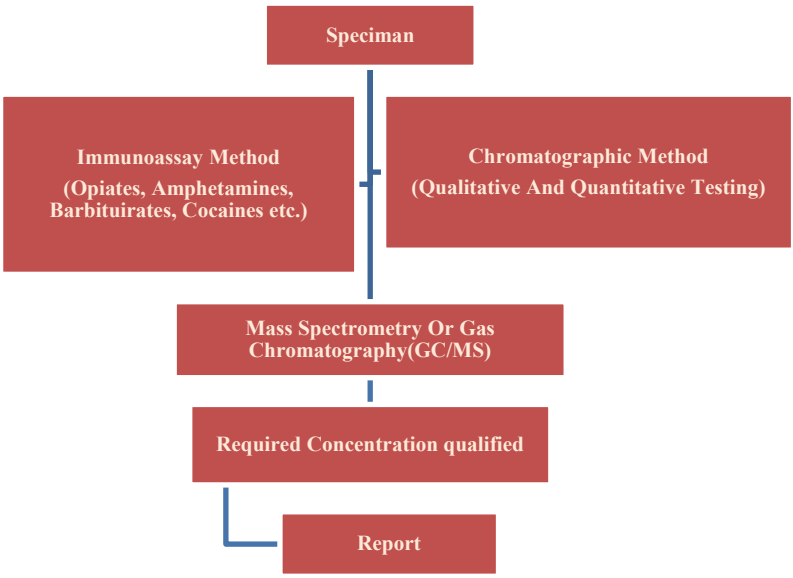

Fig.1. Process in Forensic Toxicology for Identification of drugs

Unattended urine drug testing is used in nearly all occupational drug tests. As a result of multiple attempts to obstruct the testing process, there have been some issues. The temperature of freshly collected samples is monitored during the collecting procedure. Adulterants are a class of products that can be added to urine to obstruct testing in situations when some substances are difficult to detect. In addition, the intention to beat the test results by diluting it with water prior to the test. However, there are some recommendations that allow authorized laboratories to test urine samples for dilution, substitution, and adulteration using creatinine and specific gravity, as well as adulteration using pH value. The addition of an oxidizing agent to urine is a common method of adulteration.[13]

Other samples are being tested for indicators of drug use in addition to urine. Hair is used by several private companies for testing purposes. Oral fluid testing can also be used to detect illegal

[13] Fu S. (2016). *Adulterants in Urine Drug Testing. Advances in clinical chemistry*, *76*, 123–163. https://doi.org/10.1016/bs.acc.2016.05.003

drug use. These alternative specimens are being researched as possible urine drug testing alternatives. The ethical concerns of a professional society for forensic practitioners are most likely to be addressed. Frequently, ethical issues are not moral in nature, but rather take the form of nearly business related constraints such as appropriate advertising or the appropriate fee to be charged. Nonetheless, these standards, which include lawyer professional accountability norms, can be divided into two types: aspirational and enforceable. The rule is aspirational in that, unlike forensic professional norms, it does not require lawyers to perform charitable work. The regulation is, however, enforceable, unlike the forensic professional rules. Since re-collection is rarely a possibility, it is imperative that the pertinent specimens be collected whenever it is practical. Naturally, the ideal samples for forensic toxicology collection will depend on the circumstances of the case. Although collections like urine can be beneficial for screening and to check for drug usage two or more days previous to sampling, a blood sample is typically the minimum needed. [14]

Hair can provide an even longer memory of drug use, lasting up to several months, depending on the length of the hair. When a root externalizes from the skin, drugs are typically integrated into the roots growth process and manifest in the hair shaft as a band. As a result, this procedure can offer a timeline of instances of medication or toxic exposure. The extent to which a substance gets integrated into hair will depend on its physiochemical qualities, but most medications and poisons are acidic medications that are frequently present in lower amounts than basic drugs, thus rather than metabolites, the original drug is always present.[15] For instance, cocaine and the heroin metabolite 6-monoacetylmorphine are more likely to be found in the hair of cocaine and heroin users than their similar metabolites found in blood and urine (benzoylecgonine and morphine). Unfortunately, skin secretions close to the hair follicles or even external contamination might cause some medications to be

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[14] *01-Fisher.qxd*, (May 6, 2003), https://www.sagepub.com/sites/default/files/upm-binaries/3517_Fisher_Chp1.pdf.

[15] Shima N, Sasaki K, Kamata T, Miki A, Katagi M. *[Hair Testing for Drugs in the Field of Forensics]*. YakugakuZasshi. 2019; 139(5):705-713. Japanese. doi: 10.1248/yakushi.18-00166-4. PMID: 31061339.

absorbed into the hair. The amount of a drug in hair will also depend on how well it is maintained and coloured, including how frequently you wash it, if you use dyes or bleach, whether you have white hair or black hair, etc. Therefore, any examination of the drug content in hair must take these factors into account.[16]

Concerns about the Confidentiality of Information Gathered Throughout the Forensic Process

The term confidential information is deceptive in legal terms. Previously, lawyers were only required to keep secret of confidential material that was explicitly supplied to them with the intention that it would be kept secret. For more than a quarter-century, that requirement has been expanded to cover all information learned during the course of a representation, whether confidential or not. Even material that is well known or has been published cannot be commented on or mentioned by a lawyer if he learns about it while representing a client. The purpose of the information confidentiality rule is to encourage unrestricted communication among lawyers, as well as many other professionals who follow the same ethical guideline, even when dealing with humiliating or, in this case, legally harmful subject matter. This requirement extends to information learned during the course of representation in terms of the existence of the representation itself, but there are some instances in which information learned during the course of representation may be revealed at the lawyer's discretion and impliedly by the forensic professional. In any case, the debate about secrecy vs. forensic science will rage on for a long time. In the current scenario, however, a scientist's participation in the representation of a lawyers client renders him deafeningly silent unless the client consents.[17]

State restrictions regarding a lawyer ability to disclose material without the client's permission to prevent harm vary

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[16] *Justice K.S.Puttaswamy(Retd) vs Union Of India And Ors*. 2017.WRIT PETITION (CIVIL) NO 494 OF 2012.

[17] Christoffel Hendrik Van Zyl IV, Jo-Marí Visser, *Legal Ethics, Rules of Conduct and the Moral Compass – Considerations from a Law Student's Perspective*, https://perjournal.co.za/article/view/795.

widely. In some governments, the ability to publish such information if it will cause severe economic harm strengthens this exception. Permissive material disclosure is also an option for obtaining guidance on professional conduct regulation compliance. Apart from the rule of last responsibility of safeguarding the information, the information may be published in actions against the lawyer, exactly as it is in a forensic procedure in a dispute between the lawyer and the client, in addition to complying with a special legislation or court order. As a result, unlike the attorney-client privilege, which is actually held in confidence, this rule of ethics applies to both the lawyer and the forensic specialist who works with the lawyer. One of the most challenging interactions in the rules of professional behaviour in general is the responsibility of information secrecy and the obligation of transparency toward the tribunal. If a lawyer just believes the evidence is false, he has the option of allowing it to be heard or not.[18]

The need to safeguard sensitive data is certainly wide. It applies to forensic professionals and lawyers in current employment issues, and it necessitates the safeguarding of confidential information regarding previous employees. As a result, forensic specialists should be aware of their contractual obligations to maintain confidentiality in their contacts with lawyers, both now and in the future, with respect to information gained during the representation. Furthermore, the forensic professionals firm should have mechanisms in place to ensure that the legal rules demand if confidentiality is met. This obligation could include contracts or other forms of writing that make it clear to forensic professional's employees and such information must be kept private.[19]

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[18] Franjic Sinisa. *Legal aspects of Forensics.* Forensic Sci Today. 2018.04, p.9-17.doi =10.17352/fst.000011.

[19] Basavaraju V, Enara A, Gowda GS, Harihara SN, Manjunatha N, Kumar CN, Math SB. *Psychiatrist in Court: Indian Scenario*. Indian J Psychol Med. 2019 Mar-Apr; 41(2):126-132. doi: 10.4103/IJPSYM.IJPSYM_53_19. PMID: 30983659; PMCID: PMC6436416.

Conflicts of interest in the report

The scientist has an ethical obligation to distribute information gained during a scientific inquiry in order to have further general scientific understanding and growth. Similarly, it is impossible for a scientist to believe that their research is just for the benefit of a single client. Perhaps restrictions prohibiting advocacy based on a conflict of interest are impeding the accomplishment of the general scientific goal of knowledge advancement. Regardless, the forensic professional will be bound by the ethical limits imposed by lawyers in this area. Lawyers are prohibited from representing opposing interests due to ethical considerations. A conflict of interest exists when the lawyer commitments to another client, a former client, a third party, or the lawyer's personal interests materially impair their ability to represent one or more clients. A further conflict of interest arises when one client's representation is directly antagonistic to that of another client.[20]

The challenge for the forensic professional becomes more complicated as the professional grows more complex, as the professional may defend the plaintiff's interests in one case with regard to a forensic conclusion while also being sought to support the defense position at another time. However, it's important to keep in mind that not all disagreements can be settled; only those in which both sides may be fairly represented and their points of view aren't excessively divergent can. The question for forensic professionals is how these rules will affect their work. When working with lawyers, forensic professionals are obliged by legal ethics. The revealing of that information would be a breach of the duty to keep secrets.[21] As a result, the most important consideration in assessing whether a conflict of interest exists is whether knowledge gained while representing one client would be valuable in representing the other client. Lawyer's ethical obligations do not allow him or her to use indicatory methods. However, the

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[20] *Rule 1.7*, Casetext Search + Citator https://casetext.com/rule/maine-court-rules/maine-rules-of-professional-conduct/client-lawyer-relationship/rule-17-conflict-of-interest-current-clients.

[21] *Strengthening Forensic Science in the United States: A Path Forward*, (Aug. 20, 2009), https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.

distinctions between the rules of professional conduct are not always clear. The main goal is to make forensic professionals aware that while dealing with lawyers, the lawyer's code of conduct will place limitations on how the forensic professional can perform. Understanding these responsibilities is critical to becoming a qualified and effective forensic professional.[22]

Forensic identification, like any other medical process, involves much private information about the client, including genetic medical history, surgical history, drug history, etc. Among them, the more sensitive and special service target is forensic identification of drug use people. At the same time, the current identification system and related ethics in the imperfection of academic legislation and rules leads to a decrease in the efficiency and quality of identification, and it is important to have more re-evaluation and that has increased the burden on the parties and judicial work. Therefore, how to pay more attention to this special population while solving legal problems in the ethical issue of the forensic medicine is a new problem faced by forensic medicine practitioners.[23]

Progress of Ethics in Forensic Identification

Forensic science in the application of medicine, biology, physics, chemistry and other theoretical and technical study of natural sciences and the study of related problems in essence, it serves legal services and is closely related to the humanistic and social environment related natural sciences. With the development and progress of society, the increasing judicial practice provides a broad field for forensic science, modern medicine and its achievements in the natural sciences provided new technical tools for the development of forensic science. The original single forensic science has gradually formed a comprehensive multi-branch discipline. Applied science, a very important branch of which is forensic ethics, an important task in the practice of forensic

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[22] William Glenn Steiner, *Drug use | Recreational Drug Use, Drug Abuse, & Psychotropic Drugs*, Britannica (June 16, 2023), https://www.britannica.com/topic/drug-use.

[23] Supra 2.

medicine is to examine the human body (cadavers and living body) to conduct tests to clarify the cause of death, infer the time of death, and equipment, identification of injury, degree of incapacity to work, identification of mental illness (capacity of conduct and responsibility), etc. inevitable in this process. It is necessary to deal with the parties and their families, case handlers and all sectors of society, whether be able to obtain the cooperation and trust of the parties and obtain good results, the forensic engineer inevitable in this process with the parties and their families, case handlers and all sectors of the community to deal with, forensic engineer authors attitude, moral conduct, Code of Conduct, oral expression ability, to obtain good results, therefore the nature of forensic work determines that ethical knowledge is a basic knowledge necessary for forensic workers.[24]

The Particularity and Characteristics of Drug Addicts

According to the 2021 World Drug Report published by the United Nations Office on Drugs and Crime (UNODC), over 36 million people worldwide experienced drug use disorders as of that year. Additionally, there was a besieged situation due to an increasingly major international drug invasion.[25] Drug trafficking shows multiple territory entries, drug proliferation shows a trend of penetration across the board. Scholars now believe that drugs dependence results from substance abuse interacting with the brain reward system– chronic kind, recurrent encephalopathy with complex genetics, Psychology and society factor mainly manifested as compulsive medication and persistent craving state. Long-term substance abuse seriously affects individual social ability and mental health level parallel to withdrawal syndrome and compulsive drug seeking behavior withdrawal is very difficult followed by increasingly serious social problems. Addiction often make to take

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[24] Borysenko, Igor, Bululukov, Oleg, Pcholkin, Valeriy, Baranchuk, Vasyl, Prykhodko, Vladlena. *The Modern Development of New Promising Fields in Forensic Examinations*. Journal of Forensic Science and Medicine. 2021. Volume: 7: 4 | P. 137-144. doi - 10.4103/jfsm.jfsm_66_21

[25] *Strengthening Forensic Science in the United States: A Path Forward*, (Aug. 20, 2009), https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.

extreme measures to harm others or society as they do not get enough amount they need of as for drug money.[26]

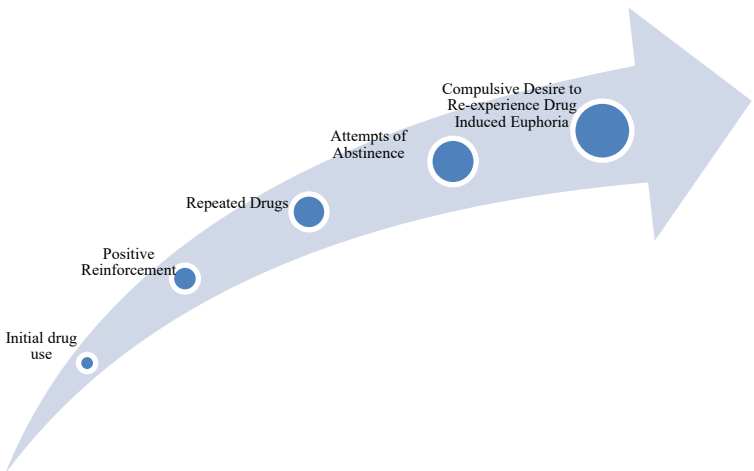

Fig. 2. Mannerism resulting finally to a relapse stage that make a drug addict.

Drug addicts are a marginalized group far from the mainstream of society, the legal analysis of drug use behaviour is of course - an illegal act but analysis from a medical and ethical point of view, drug addicts are species with chronic patients with recurrent encephalopathy. Physical symptoms and organ function of drug addicts, daily life function and physical activity function are damaged to varying degrees. It shows drug addicts under the influence of physical illness and evidence for comparisons between general populations, drug addict happiness, low self-esteem, anxiety and inability to communicate high sense of meaninglessness, depressed positive emotions, severe negative emotions, recognition of impaired cognitive function, difficulty in role activities and social adjustment, often resorting to surrender coping strategies, not

[26] Gauvin, D.V., Cheng, E.Y., Holloway, F.A. (1993). *Bio behavioural Correlates. In: Galanter, M. (eds) Recent Developments in Alcoholism. Recent Developments in Alcoholism,* vol 11. Springer, Boston, MA. https://doi.org/10.1007/978-1-4899-1742-3_16

actively seeking social support.[27] Thus forensic work attitude questioning, identification in behaviour becomes unusually sensitive. With this it is easy to generate a sense of distrust, resulting in inaccurate or repeated identification results. At times, the staff should prevent subjective assumptions and follow uniform and typical processed and programmed identification. [27]

Forensic identification areas often involved in drug addicts and the ethics they face in learning problem

Forensic areas often involved in drug addicts in clinical forensic identification, for the degree of injury, loss of working ability. The correct assessment of the degree of loss requires the forensic expert's confidence in the client, comprehensive understanding including past medical history, surgical history, etc. for long-term drug use patient. Drug use is socially unacceptable and may affect the basal metabolic level and the abnormal levels of various indicators in the blood, changes in people at the cytological level ,reduce body immunity, after injury slow wound healing, high risk of multiple infectious diseases incidence, thereby affecting the clinical identification of the degree of injury, injury time inferred; on the other hand, drug users often do not provide a medical history to determine their subjective impressions information on this. The harm of drug use to people is not only because of their physical dependence withdrawal symptoms, more serious is the mental dependence caused by it.[28]

Similar to alcoholism, drugs can also seriously affect people perception of their own behaviour recognition and control. How to correctly assess mental disorders caused by drug use within the criminal capacity, has also received increasing attention from academia, therefore appraisers need to be objective in the context of past medical history. Precise to assess the injury and the

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[27] Pereira, Margaret; Carrington, Kerry, *Irrational Addicts and Responsible Pleasure Seekers: Constructions of the Drug User*. Critical Criminology, Vol. 24, Issue 3.September 2016.pg. 379-390. doi: 10.1007/s10612-015-9298-z.

[28] Peter J Belton, *Civil Commitment of Narcotics Addicts in California: A Case History of Statutory Construction*, (Feb. 5, 2018), https://core.ac.uk/download/pdf/230109868.pdf.

development of the disease course, and make an accurate identification in this respect, the personal privacy of the appraiser, have a good working attitude, and be good at working skills of listening and communication, and a standardized degree of identification will greatly enhance and helps to improve the quality of identification. When it comes to forensic pathology, forensics infer from the examination of cadavers cause of death, time of death and injury. Identification results depend on cadavers change. Due to the pharmacological effects of drugs, the body is in a pathological balance condition, sensitivity to drugs increased tolerance, manifested in vivo a different phenotype from normal individuals. Similarly, after death the corpse changes in superior levels, the performance of drug addicts is also very different from that of normal dead individuals such as: loss of subcutaneous fat, toxic damage to liver and kidneys, brain vacuolar like changes, etc. If there is no sufficient in knowing the client drug use history may lead to wrong identification and conclusions affecting legal justices.[29]

The conflict involving the right to privacy and the right to know in the identification process

The ultimate goal of forensic identification is to provide judicial organs in the investigation and trial with true and reliable evidence in the process of adjudicating a case. For the identification of the party past medical history, the right to know personal privacy such as injury history, genetic history, etc. is the state's right to know endowed with special public rights and interests of appraisal agencies, whose purpose is to serve the judiciary to provide justice, reliable judicial evidence.[30]

There is bound to be a conflict between the right to privacy and the right to know as required by justice during this process. How to respect the personalities of the parties on the basis of ensuring the full right to know personal privacy is the question of fact in the present work. It is a common problem faced in the process of

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[29] *Theories on Drug Abuse - Selected Contemporary Perspectives, 30*, (Sept. 16, 2002), https://archives.nida.nih.gov/sites/default/files/monograph30.pdf.

[30] Barrett, Richard J. *"The Right to Privacy." Law & Justice* - The Christian Law Review, 136. 1998. pg. 39-57.

forensic identification. In relation to its past drug history, drug use, etc. often avoid some sensitive issues, bully cheating attitude, lead to inaccurate identification. Therefore, follow a system of procedural identification procedures standardization. Improve the identification of identification data and the confidentiality management system; Improve the service quality and staff of the window unit with good communication skills can help increase the client's trust. Verify and save the accuracy of the identification results.[31]

Suggestions on Improving the Ethics Level of Forensic Practice

Conduct ethical knowledge training

At present, most of the countries forensic medicine education system does not incorporate ethics as a separate taught in one sub-discipline, but dispersed in different, within the discipline. This kind of education system also can easily lead to the ethics of forensic experts. The lack and fragmentation of scientific knowledge often ignored in practice of ethics as there is an important gap of knowledge science in forensic identification and communication. Therefore, strengthen pre-employment and post-employment ethics knowledge as because learning is a training course that should be carried out routinely by major appraisal institutions. Right forensic practitioner training is a basic ethical knowledge right.

Forensic practitioners are trained in basic ethical knowledge, including: scientific, Humane, advanced and noble ethics. To understand domestic and international ethics, the laws, regulations and principles of science; the identification work for different special groups and communication skills to help staff and clients prevail to relax and trust each other. Under the circumstance of colored glasses, carry out identification work, and improve the quality of identification results to serve society.

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[31] Knoppers B. M. (2014). *INTRODUCTION: From the Right to Know to the Right Not to Know*. The Journal of law, medicine & ethics : a journal of the American Society of Law, Medicine & Ethics, *42*(1), 6–10. https://doi.org/10.1111/jlme.12113

Establish a standardized forensic identification system

The standardization of the forensic identification process directly affects the identification efficiency and quality that lead to the success or failure of the case. The canonical identification procedure is a set of science where democracy and convenience are integrated, and can reflect the modern litigation that takes fairness and convenience into account with spirit of efficiency.

A sound identification procedure should include the following:

The prescribed start-up procedure should include the implementation procedure of the appraisal, the standards for the inspection of materials, department supervision mechanism of the legal authority, the review procedure for the submission of the appraisal conclusion, the supplementary appraisal determination and re-qualification procedures. However, modern legislation in many countries has a very few unified regulations, and it is even more important in the actual application process both in random and local. Therefore, it is necessary to formulate a unified and standardized identification system as the only way to forensic identification.

Conflict of interest

The author declares that the work reported in this publication was not influenced by any known conflicting financial interests or personal connections.

Conclusion

There are many different methods that have been proven effective for identifying and/or quantifying drugs. There are numerous advantages and disadvantages to each of these methods that need to be taken into account. There are many contentious ethical issues in forensic science, and these issues frequently encircle forensic experts. Because there is still an arbitrary distinction made between ethics and morals, they are able to dodge a number of ethical dilemmas. Personal ethics or morality in the context of forensic science refers to a forensic scientist's concerns

that are based on personal ethics or religious considerations and are independent of their professional and/or scientific functions. Professional ethics, as opposed to personal ethics or morality, refers to more fundamental standards of conduct for professionals and scientists. The purpose of ethics continually baffles scientists and researchers. Research and ethics frequently come into contact. Any profession's ethics are its heart, and without them, a profession loses much of its purpose. The establishment of the profession's quality, legitimacy, and authenticity is aided by ethics as although what is moral for one person may not be moral for another, ethical standards must be upheld. Legal issues are addressed by forensic science, which may be utilized to prove an accuser's innocence or demonstrate their guilt. Therefore, every forensic organisation needs to have an ethical code that instructs forensic scientists on how to perform their tasks with integrity and zeal. A minimum set of ethics must be mandated, especially in the field of forensic science, even though the definition and restrictions of adhering to ethical standards can vary from person to person.

DISPLACEMENT OF PEOPLE: AN ADVERSE REPERCUSSION OF CLIMATE CHANGE

Rishabh Bhandari[*] *& Muskaan Dargar*

Abstract

The meteorological impact of climate change has been discussed in various studies numerous times, but the problem of displacement, migration, and refugees due to climatic changes has been collectively and successfully ignored at national as well as international level. Movement of people because of climate change, be it due to rise in sea level, desertification and scarcity of water or natural disasters, floods, hurricanes, earthquakes etc., has increased immensely and faces its own challenges, such as the recognition of displaced and migrated people who have not been supported by any international and/or national laws.

The movement of people either nationally or internationally causes certain form of un- adaptive hindrance and developmental implications to the society and people. This paper focuses on such forms of challenges faced by various nations, leading to the state of "no home" for climate migrants. It seeks to discuss "pull" and "push" factors leading to such movement of people.

Seeing the causative relation between climate change and migration that poses a troubling problem to most of the nations, this paper discusses various international and national legal regimes for such people. The authors try to end the paper with various suggestive notes that can be undertaken for the development of policies to secure the rights of people who end up being displaced, migrated or refugees due to climatic conditions.

Keywords: Climate Change, Internally Displaced Persons (IDP), Climate Migration and Climate Refugees

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Introduction

Environmentalists have recognised the movement of people as a stimulus effect of climate change. It has been predicted by various authorities that due to climatic conditions, approximately 200 million people will need to migrate or get displaced by 2050.[1] The Intergovernmental Panel on Climate Change (IPCC) in 1990 had warned that climatic conditions could be one of the major causes of migration.[2] The movement of people can be majorly triggered in four ways:

A. Intensification of natural disaster (also known as sudden onset condition),

B. Increase in temperature and draught condition (also known as slow onset environmental degradation),

C. Rise in sea level,

D. Depletion of natural resources.[3]

I. Classification of IDPs, Migrants and Refugees

Further, the movement of people can be either internal movement or international/ cross border movement. Internal movement is usually termed as internal displacement of people, where people are forced to flee their homes for the same reasons as refugees, but do not cross international border. IDPs often relocate several times over within their own country before they go on to become refugees. While 'Internally displaced person' is an explanatory term, a 'refugee' is a legal one, thereby making it mandatory to aid refugees, which is not binding for internal displacement. Due to this, even though IDPs essentially have rights like those of refugees, including a broad range of economic, social, cultural, civil and political rights, the right to basic humanitarian assistance such as food, medicine, shelter, the right to be protected from physical violence, the right to education, freedom of

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1 Stern, N., (Ed.), 'The Economics of Climate Change' [2006] The Stern Review, Cambridge University Press, Cambridge 3

2 Oli Brown, 'Migration and Climate Change Migration' [2008] IOM 11

3 Clionadh Raleigh, 'Assessing the Impact of Climate Change on Migration and Conflict' [2008] World Bank Washington, DC.

movement and residence, political rights such as the right to participate in public affairs and the right to participate in economic activities, yet some governments are unable or unwilling to honor those rights.

International or cross border movement happens in two ways, i.e., "climate migration" and "climate refugees"[4]. In the former case, people voluntarily move from one country/region to another, in search of better livelihood, among other personal reasons. In the latter case, people are forced to move due to compelling climatic conditions.

II. Environmental Migration

The idea of "Environmental Migration" is a controversial and difficult concept to anticipate and understand. Despite the fact that Essam El-Hinnawi of the UN Environment Programme drafted a comprehensive definition of the expression "environmental refugees" in 1985, as "those people who have been forced out of their traditional habitat, temporarily or permanently because of marked environment disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life."[5], since then, the international legal system has done little to capitalize on this activity. Because of the static understanding of a refugee as elucidated in the 1951 Refugee Convention, the use of the term "refugee" in relation to environmental disorder or climate change is deemed problematic. The convention defines refugees as "people who move outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and, as a result, require international protection."[6] This limited definition of refugees is considered to be one of the major backlashes on recognition of "environmental or climate refugees".

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4 Oli Brown, 'Migration and Climate Change Migration' [2008] IOM

5 Jane McAdam, 'Climate Change and Displacement: Multidisciplinary Perspectives' [2010] 158

6 United Nation's Convention Relating to the Status of Refugees 1951, See also 1951 Convention and law relating to the status of Refugees and its 1967 Protocol.

The second biggest challenge that climate migrants face is that there are no criteria to determine the difference between voluntary and forced movement, leading to non-recognition of the status of climate migrants across globe.

It is usually debated that cross-border movement of people due to compelling climatic conditions should be termed as "climate migrants" rather than "climate refugees", in which such climate migration can be classified as short term and long term. Under short term climate migration, the climate conditions are at their worst, and it is impossible for human inhabitant to survive there. But gradually, when things settle down and the environmental conditions are resorted, people are willing to return to their homeland. Long-term migration, on the other hand, which is also known as permanent migration, is when a person tends to settle elsewhere other than their homeland even after the environment is restored. And, cases of rising sea level, temperature increase, draught and salinisation of underground water or increased occurrences of natural calamities, lead to forced permanent or long-term migration.

Moreover, under international law, the application of the terminology "refugee" does not include such people who migrate due to environmental constraints. The UN Convention, 1951, along with 1967 Protocol on the Status of Refugees poses a lucid picture in confining the ambit of the given word to people escaping persecution: "A refugee is a person who is outside his country of nationality because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and is unable to or unwilling to avail himself of that country's protection because of that fear.".[7]

Classification as a refugee necessitates crossing an internationally recognized border. Thus, a person who is internally displaced is known as an "internally displaced person" (IDP). Seeing that the majority of people who get displaced due to climate change often tend to stay within their own country's borders, confining the connotation of the given word to those switching

[7] The United Nations General Assembly, 1951, Resolution 429 <http://www.cas/com/discoveryguides/refugee/review2.php>, accessed 14 May 2022.

international borders shall remarkably underrate the issue. Secondly, the moment persecution that prompts the original departure ends, the term "refugee" implies a right of return. Of course, in a scenario where we see a rise in sea level, this is not possible, and thus, the term destroys the very nature of the situation. Thirdly, it is apprehended that increasing the ambit of the meaning of a refugee beyond political persecution, to include environmental burden, could adversely affect the international institutions and facilities available for helping the present refugees. Agreeing to the term refugee shall force developed countries to offer the same protections as political refugees, a norm that no government might want to perpetuate.

At the same time, international organisations that are responsible for helping refugees, namely the UNHCR, already have too much on their plate and find themselves unable to provide for the existing "stock" of refugees. Thus, the UNHCR resists any further expansion of its mission because it takes on a larger role for providing care to IDPs.[8]

Despite the usage of the word ‘climate refugee’ being unsatisfactory, it is used because of lack of better options. For instance, the term ‘climate evacuee’ refers to a short-term movement within national borders.[9] And, the term ‘climate migrant’ implies a "pull" from the destination rather than a "push" from the source country, and it holds an undesirable meaning that reduces the international community's implied responsibility for their well-being. However, by virtue of there being no proper definition under international law, these migrants end up being unrecognised by the international system, and no institution takes on the responsibility for collecting data on their count or providing them with basic services. Since they cannot demonstrate political persecution in their home country, the asylum law does not help them.

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8 Lonergan S., “The role of environmental degradation in population displacement” [1998] Environmental Change and Security Project Report, Issue 7.

9 Katrina evacuees called ‘climate refugees’ (NBC News, August 17, 2006) <https://www.nbcnews.com/id/wbna14382870> accessed 15 May 2022

Meanwhile, the International Organization for Migration (IOM) gives the following definition, "Environmental migrants are persons or groups of persons, who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad".[10] It essentially uses the term "forced climate migrant" with the knowledge that it is not accepted by everyone, but it hopes that it portrays a clear idea of the increasing phenomenon of non-voluntary population displacement that is a potential consequence of climate change.

III. Stages of Migration

Migrants can react in two ways, spontaneously or in a pre-planned manner of migration. Planned migrations consist of three stages[11]. Firstly, in pre-migration stage, people involve measures of prevention and management of disaster.[12] For example, in Japan, people have strong disaster management units to cope up with frequent earthquakes and floods. This stage helps in rehabilitating the people within the boundaries of their nation. In the second stage, movement of people happens because of failure in first phase by the home country. The third stage is that of settlement or return, wherein the host country must either develop policies for better rehabilitation of the migrants or introduce proper schemes that will help them to return to their home country.

V. "Push" & "Pull" Factors of Migration

It can be clearly sensed that environment change is not the sole factor that inflicts movement of people. Environmental migration is triggered by various "Push" and "Pull" factors. "Push factors" entail such circumstances due to which a person is forced to move out of a place. For instance, they can be lack of proper

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[10] Discussion note: Migration and the Environment: Ninety-fourth session, [2007] IOM1

[11] Agnes Toth-Bos, Barbara Wisse, Klara Farago 'Goal pursuit during the three stages of the migration process'[2019] IJIR

[12] Susan Martin, 'Climate change migration and governance' [2010] Global Governance International Migration 397

infrastructure, lack of job opportunities, lack of resources, etc. These factors along with environmental challenges aid in encouraging the motion of people from one place to another.

"Pull factors", are those opportunities which attract people to move from their own place to somewhere else, in demand of better livelihood. Some of the examples can include better educational facilities, better infrastructural facilities, job opportunities, resource availability, etc. These factors, along with climate instability, encourage the movement of people. Mostly, for the purposes of internal displacement, people switch from rural areas to urban areas due to the presence of better conditions and opportunities of livelihood. One of the major reasons for such movement is unplanned development strategies in the country, where a country's one part is more developed than the other. The difference between distributions of resources creates a huge gap and is often widened with adverse climatic conditions. This further leads to increase in the gap between the two people living within the same country, hence impacting the demographic composition of the country at a larger level.

VI. Lack of International Legal Framework

There is no specific international instrument that covers the migrants arising out of climate changes. But there are certain human rights that are enjoyed by all the migrants, namely "right to life", "right to liberty and security"[13], and "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", etc.[14]

Under International Labour Organisation, rights of migrant workers are embodied like non-abusive conditions of work, promotion and equality of opportunity, etc[15]. But there is no such measure particularly for climate migrants. One of the major reasons for being unresponsive towards this situation is that there is no study that indicates a direct proximity between movement of people and

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[13] Universal Declaration of Human Rights 1948, Article 3
[14] Universal Declaration of Human Rights 1948, Article 5
[15] International Labor Law Conventions, Forced Labour Convention, 1930

climate conditions. There are always some additional grounds attached to climatic conditions like loss of employment, lack of resources or lack of infrastructure facilities, due to which climate conditions are not considered the sole or primary reason for the same. There have been many instances that have been acknowledged as people moving from one place to another. However, due to lack of certain evidential value and a massive set off, it has failed to attract the attention of majority of the nations.

Certain countries provide temporary protected status to the migrants, but such laws do not provide recognition and all protective services. At the level of the European Union, temporary protection directive is termed as 'mass influx', in which huge chunks of people are spontaneously displaced and it is inconvenient to treat them on an individual basis.[16] Even in USA, along with basic rights of life, a temporary protection cell is provided to the people of the neighbouring countries, but they are not welcomed for permanent residential settlement.

One of the major threats that international organizations face in recognising the status of environment driven migrants is the fear of protection of their sovereignty and security related threats. It is felt that when a migrant is given an equal opportunity to participate in the state as a national, it distorts the sovereign integrity of the nation. People usually feel that by recognising all form of migrants and refugees through international conventions and agreements, they will feel loss of control over their functioning as a state and will be subdued by the international powers.

As for the security threat, it has been seen by UN Secretary General, Kofi Annan, in the General Assembly of his Millennium Report, that "resources depletion and severe form of environmental degradation could increase potential social tension in unprecedented

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[16] Vikram Kolmannskog, 'Climate Change-related Displacement and the European Response' [2009] International Review of the Red Cross 714. See also Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the scenario of a mass influx of displaced people and on measures promoting a balance of efforts between Member States in receiving such people and bearing the consequences thereof, Article 2(c)(i).

and dangerous ways".[17] In the late 1980's and 1990's, the environmentalists had predicted that environmental degradation could contribute to instability, disruption of legitimised and authoritative social relation[18], civil turmoil and outright violence[19]. A security threat is caused to a nation only when it is declared and proven, and there is a relevant audience who can measure extraordinary conditions and plans to cope up with them. Security threats created in North-Eastern States in India due to Bangladesh migrants can be considered as a good example of the same.[20]

At present, addressing the adverse repercussion of climate-induced displacement requires coordinated global efforts. Countries must work together to implement climate change mitigation strategies and adapt to the changing environment by investing in resilient infrastructure, disaster preparedness, and reduce the displacement of vulnerable communities.

VII. Challenges of Climate Migration

Environmental changes and disasters create a chaotic condition both during and even after their occurrence. Developing nations such as India, Sri Lanka and Bangladesh face a lot of problems in redevelopment and rehabilitation. It sometimes takes years of work to restore the place as it was like before and make it safe for human habitants. Also, countries like Pakistan and Bangladesh, which have lesser territorial area and large population, find it difficult to accommodate people within their national boundaries. Moreover, displacement caused by climate refugees and climate migrants has profound social, economic, and political ramifications. Communities that are uprooted from their homes often face difficulties in adapting to new environment, integrating

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17 WAV Clark, 'Environmental Induced Migration and Conflict' [2007] WBGU 15

18 TF Homer Dixion, 'On the Threshold: environmental Changes as Cause of Acute Conflict' [1991] VOL. 16 NO.2 International Security available at JSTOR, www.jstor.org/stable/2539061. Accessed 2 May 2022.

19 Myers, Norman. 'Environment and Security' [1989] Foreign Policy, No. 74, available at JSTOR, www.jstor.org/stable/1148850. Accessed 2 May 2022.

20 Illegal Migration as a threat to India's internal security (VIF India, August 6, 2012) <https://www.vifindia.org/article/2012/august/06/illegal-migration-as-a-threat-to-india-s-internal-security> accessed 13 June 2022

into existing communities or accessing essential service and resources, and they bring with them the challenge of economic instability in the host countries. This can lead to social tension and exacerbate existing inequalities. Furthermore, the influx of displaced population into host communities can strain local infrastructure and resources, creating challenges for both migrants and host populations.

There are two schools that govern the economic impact of displacement of people namely, the Maximist school, which believes that the sole purpose of movement of people due to climate change is mostly encouraged by the sudden onset of disasters and loss of living conditions in the area. People living in the adverse climate areas are for a short period economically affected and have to move to other places to earn their basic livelihood, and they have intention to return back to their home country. On the other hand, the Minimalist school believes that climate challenges bring along with them additional changes like loss of infrastructure, loss of employment, scarcity of resources, etc., and according to them, people move because of these conditions, serving environmental conditions as secondary. Usually, this school believes that people tend to move because they see various opportunities in a foreign land and hence they want to settle down in such a land and do not will to return.[21]

In case of Maximist and Minimalist schools, people face an urgent need of resources like food and shelter, which immediately creates a burden on the host country to accommodate such large influx of people.

Additionally, with movement of people there is the problem of altered ethnic composition within the state, which increases instability and conflict. The host country may face increased sensitivity at cross border areas. It has been seen in various studies that migration leads to increase in crime rate of the host countries and lack of opportunities for their own nationals. The destination

[21] James Morrissey, 'Rethinking the 'debate on environmental refugees': from 'maximilists and minialists' to 'proponents and critics',' [2012] Journal of Political Ecology, 19, No. 1

country is usually unequipped with infrastructure to accommodate people and prevent various societal and political conflicts.[22]

Some nations even fear that climate change is used as a tool for military oppression.[23] It has been seen in various cases that climate change threats are used as a political agenda rather than a humanitarian step to protect the lives of affected people, and that people in need of help are not given the benefits.[24]

VIII. India's Approach

India has not specifically under any law declared or accepted the climate/ environmental migrants. But there are certain laws that can be used to protect the rights of the people in general. In case of Internal Displacement of people due to any of the above-mentioned causes, the law under the Constitution favours the movement of people from one place to another.[25] It allows and gives every citizen a fundamental right to move within India for better job and livelihood opportunity. In cases of migrants from neighbouring countries, especially Bangladesh, Nepal, Bhutan, Pakistan and Sri Lanka, people do often cross the borders because of environmental issue. India is one of the largest and most favoured countries towards the migrants in South-Asia. Thanks to the geographic composition and availability of resources, India has better capabilities than its neighbouring countries to help and restore climate migrants.[26]

Under the Indian Constitution, Articles 14 and 21 are available to all the people except the enemy state. Article 14 grants "right to equality" and Article 21 grants "right to life", which is also available to non- citizens, meaning that it could be applied to protect the rights of climate migrants. Furthermore, Article 3 of the Convention Against Torture (CAT) states that, "No state party shall

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22 Shweta Jayawardhan, 'Vulnerability and Climate Change Induced Human Displacement' [2017] Consilience Columbia University, 103

23 Louise van Schaik 'Fears for militarisation of climate change Should we be concerned?' [2020] Clingendael Institute

24 Ibid

25 The Constitution of India 1950, Article 19(1)(D)

26 Report 2014, The UN Refugee Agency (UNHCR).

expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture".[27] Thus, even though there are no explicit laws and measures aiding the climate migrants, there are certain rights that are granted to protect non- citizens including migrants.

Furthermore, there are some broader policies and initiatives that may indirectly address climate-induced displacement, including:

1. National Action Plan on Climate Change (NAPCC)[28]: India's comprehensive plan to combat climate change, which includes strategies for adaptation, mitigation, and capacity building.

2. National Disaster Management Plan (NDMP)[29]: This plan incorporates measures to address the impact of natural disasters, including those linked to climate change, on vulnerable communities.

3. Climate Resilient Agriculture Initiatives (NICRA)[30]: India has been implementing programs to promote climate-resilient agriculture practices to protect livelihoods and prevent displacement in rural areas.

4. Afforestation and Forest Conservation: India is focusing on conservation and reforestation as they are vital for maintaining ecological balance and protecting communities from climate-related disasters.

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[27] Convention Against Torture and other cruel, inhuman or degrading treatment or punishment 1987, Article 3

[28] National Action Plan on Climate Change (NAPCC) (December 01, 2021) <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/dec/doc202112101.pdf> accessed on 06 August 2023.

[29] National Disaster Management Plan 2017 <https://www.mca.gov.in/Ministry/pdf/DisasterManagementPlanMCA.pdf> accessed on 08 August 2023

[30] National Innovations on Climate Resilient Agriculture (NICRA) 2011 <http://www.nicra-icar.in/nicrarevised/index.php/home1> accessed on 08 August 2023

One of the major threats that climate migrants in India face is the threat of security. Seeing the historical formation and development of India, including its partition from Pakistan and Bangladesh, which has led to continuous disturbances at the borders, it faces a fear of insecurity.

Secondly, the development in India has been unplanned, leading to movement of people from rural India to Urban India. And the lack of resettlement/ accommodation capacity of the nation further leads to internal conflicts. India is a land of diverse beliefs where people have the right to follow the religion of their choice.[31]The movement of people leads to various socioeconomic and ethnic conflicts that can give rise to riots and violence. The scarcity of resources leads to an increased gap between rich and poor and sometimes, contributes towards crime commission, as well.

Lastly, even though the disaster management department has shown a lot of development in past decades, it still faces problem in effective implementation and rational distribution of profits to people in need. Thus, checks and balances need to be put up for proper implementation of the law.

IX. Conclusion

The problem of environmental migrants is well recognised at national and international level, but very few steps have been taken to cope up with the same. And it has been conveniently overshadowed by the nations under the threat of sovereignty and security. Many people believe that environmental migration is a mixture of various "Push & Pull factors" associated with it. The climatic migration brings along with it its fair share of challenges like unauthorised movement of people under the veil of environmental conditions, scarcity of resources, cross border tension, socio-economic and ethnic conflicts, increased crime rate, etc.

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[31] The Constitution of India 1950, Article 25

India, being a democratic country, allows movement of people within the territorial borders of the country, subject to reasonable restrictions. Though, internal displacement is not a legal issue, it has its own implication, both socially and economically. There are no separate laws made to deal with the problem of environmental migration, but there are certain fundamental rights provided by the state to all the non- citizens including the environmental migrants.

There is presently no legal framework that necessitates the implementation of rehabilitation and relocation measures to tackle internal displacement caused by environmental factors. The government must enact a policy paper that targets goals for potentially decreasing, if not reversing, such internal migration by exploring the prospect of reconstructing ecologically vulnerable areas. Here are some suggestions to consider:

1) Invest in Climate Resilience: Enhance infrastructure and urban planning to withstand the impact of climate-related events, such as floods, storms, and droughts. This can reduce the need for immediate displacement and support communities in adapting to changing environmental conditions.
2) Promote Sustainable Development: Encourage sustainable practices in sectors like agriculture, forestry, and industry. This will minimize environmental degradation and reduce the likelihood of displacement due to resource depletion.
3) Early Warning Systems: Implement early warning systems for extreme weather events, providing communities with timely information to evacuate and protect themselves before disasters strike.
4) Protect Natural Ecosystems: Preserve and restore natural ecosystems, such as wetlands, mangroves, and forests, which act as natural buffers against climate impacts and help reduce the intensity of disasters.
5) Climate-Resilient Housing: Support the construction of climate-resilient housing for vulnerable communities in disaster-prone areas to minimize damage and displacement during extreme events.

6) Climate-Induced Migration Policies: Develop policies that recognize climate-induced migration as a potential consequence of climate change. These policies should ensure the protection of rights of displaced populations and provide support for relocation and adaptation.
7) Public Awareness and Education: Raise awareness about climate change and its potential impacts on displacement. Educate communities on adaptive measures they can take to reduce vulnerabilities and minimize the adverse effects of climate change.
8) International Cooperation: Foster international cooperation on climate change adaptation and mitigation. Collaborate with other nations to share knowledge, resources, and best practices for addressing displacement challenges.
9) Financial Support: Allocate sufficient funds to support climate change adaptation and mitigation efforts, including assistance for communities affected by displacement.
10) Inclusive Decision-Making: Involve local communities and vulnerable populations in the decision-making process for climate change policies and projects to ensure that their unique needs and perspectives are considered.

No single solution can fully address the complexity of climate-induced displacement. A combination of these strategies, along with ongoing research and adaptive approaches, can contribute to minimizing the adverse repercussions of climate change on displaced populations.

THE RIGHTS OF STRAY 'COMMUNITY' DOGS: JUDICIAL AND LEGISLATIVE PERCEPTIONS

Varun Dhond[*]

Abstract

Conflicting recent decisions of the Bombay High Court have re-ignited the controversy over feeding of stray dogs. The issue of organised feeding of stray dogs by dog lovers is an emotive topic, which brings to the fore very radically different schools of thought. On the one side are dog lovers. Typically, they are a sub-set of animal lovers generally, although sometimes the affection can be 'canine centric'. Their beliefs can widely range from (illustratively) (i) all living beings are a manifestation of God and dogs are only one such form; (ii) dogs have a divine connect; and (iii) dogs are the most loyal companion and a man's best friend. One the other end are persons who regard dogs as dirty; aggressive; dangerous; a potential source of bites/rabies. Some of them have been bitten or experienced someone else being bitten and have developed a fear or paranoia. A small section of them believe that stray dogs should be put down/destroyed. Many of them believe that good Samaritans who feed and/or attend to and/or look after strays are accessories to this nuisance and are, themselves a nuisance. As the conflicting viewpoints of judges of the Bombay High Court, in the cases referred to below, show, judges are no strangers to this dissonance of views. The conflicting views expressed in the decisions of the same court, discussed below, therefore provide interesting scope for analysis. This article finally conceptualises whether this dissonance will finally be laid to rest by recent legislative changes.

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Conflicting approaches of the Bombay High Court:

The latter point of view appears to be the basis of the Nagpur Bench of the Bombay High Court in the case of *Vijay Shankarrao Talewar v. State of Maharashtra*[1]. It was hearing a Petition seeking intervention by a person claiming to be a *"sufferer of the menace of the stray dogs"* to find a solution to the menace created by stray dogs. While considering this request, the not so thinly disguised view in favour of *"elimination of stray dog menace"* was quite apparent. While prohibiting feeding of stray dogs, the Bench passed a strange direction that if any person was interested in feeding them, he was first required to adopt them, bring them home and register them.

Predictably, this decision (and more so the choice of words used therein[2]) triggered an uproar. It received wide coverage in the print media and even wider dissemination on-line. To animal lovers, this decision presaged the ultimate end of destroying stray dogs. They rushed to the Supreme Court, where, fortunately for them, a Bench of Khanna & Maheshwari J.J. granted a stay[3]. Some sanity appeared to have been restored.

The adage 'let sleeping dogs lie' was unfortunately not followed. Good Samaritans feeding strays were once again troubled. This time in Mumbai. Expectedly, litigation followed and two Division Benches of the Principal seat of the Bombay High Court had to step in. The first of these cases involved demarcation of feeding areas in a residential complex. This was heard by a Division Bench of Patel & Gokhale J.J. The second case involved a housing society instructing security personnel (bouncers) to restrain feeding of stray dogs and scare dogs with sticks etc. This was heard by a Bench of Kulkarni & Laddha J.J. Both these cases however had a common feature. They involved the same divergence of views, this time, at the level of what is typically regarded as the smallest unit

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1 2022 SCC OnLine Bom 4055.

2 A few notable phrases in the judgment are: "*elimination of stray dog menace*"; dog feeders being unmindful of the *"great harm that they are doing to the society"* and *"the disastrous consequences of their charity"*.

3 *Swati Sudhirchandra Chatterjee v. Vijay Shankarrao Talewar* 2022 SCC OnLine SC 1780.

of regulated co-habitation – namely a Co-operative Housing Society. The issue being "to feed or not to feed".

The former decision[4] emphasised the need of evolving a mechanism for dog feeding and sought the assistance of groups working towards the welfare of stray dogs, in this behalf. Relying on the framework created by the recently notified Animal Birth Control Rules, 2023[5] the bench concludes that the issue of feeding stray dogs has already been optimally answered. These Rules, according to the Bench filled the legislative vacuum which previously existed, and now conferred rights, leaving only issues of management, to be settled in accordance with the Rules. The latter decision[6] held that hating stray dogs and treating them with cruelty wasn't an acceptable approach. Newspaper reports have quoted the Bench as having emphasised[7] "constitutional ethos and statutory provisions"[8]. The author believes that orders passed therein were passed by judges who could not be unmindful of the looming shadow of the Nagpur Bench decision and possibly, even an attempt at doing a fine balance of judicially permissible collateral course correction.

Rights based approach of the Delhi High Court:

The two decisions of the principal (Bombay) Bench of the Bombay High Court accord with the approach of the Delhi High Court in the case of *Maya D Chablani v. Radha Mitta*.[9] In this case the Delhi High Court adopted the Rights of Animals, based approach. After considering the extensive research of the amicus it

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4 *Sharmila Sankar v. Union of India* 2023: BHC-AS:8934-DB.

5 CG-DL-E-17032023-244432 [Notified on March 10, 2023].

6 *Paromita Puthran v. Municipal Corporation of Greater Mumbai*, 2023 SCC OnLine Bom 928.

7 Omkar Gokhale, *To hate stray dogs, treat them with cruelty can't be an acceptable approach: Bombay HC*, The Indian Express (April 3, 2023), https://indianexpress.com/article/cities/mumbai/stray-dogs-cruelty-unacceptable-approach-bombay-hc-8523757/.

8 Swati Deshpande, *To treat stray dogs with cruelty is unacceptable in civil society: Bombay HC*: Mumbai News - Times of India, The Times of India (Mar 29, 2003), https://timesofindia.indiatimes.com/city/mumbai/to-treat-stray-dogs-with-cruelty-is-unacceptable-in-civil-society-bombay-hc/articleshow/99073937.cms.

9 2021 SCC OnLine Del 3599.

had appointed and the suggestions made by the Animal Welfare Board, the Delhi High Court noted the misplaced beliefs that make humans resort to baser instincts, wherein retaliatory measures are called for in response to incidents involving stray dogs. The Delhi High Court also took a pragmatic approach by laying down guidelines identifying various factors to be taken into account when designating feeding spots for dogs. Moreover, rather than taking "stern action" against feeding of dogs (approach of the Nagpur Bench), the Delhi High Court required law enforcement agencies to ensure that dog-feeders aren't harassed. The Supreme Court of India initially stayed the Delhi High Court order but subsequently vacated the stay.

The author submits that the approach of the decision of the Delhi High Court and the two decisions of the Principal Bench of the Bombay High Court are both judicially correct and progressive. They advocate against any retaliatory measures based on 'fear-mongering'. They follow the 'animals also have rights'-based approach and a need for humans to treat animals without cruelty. They emphasize the scope of the duty of "reasonable care", rather than calling for elimination of stray dogs menace, and highlight the place of dogs in society, as a part of the community. It is respectfully submitted that, per contra, the decision of the Nagpur Bench of the Bombay High Court feeds into these very instincts and has the effect of seemingly judicially legitimizing them.

Predictably, challenges to the Nagpur Bench Pronouncement found their way to the Supreme Court of India, which granted a stay[10] and clubbed them with pending cases dealing with feeding of stray dogs. While the Supreme Court will be the final arbiter of the law on this point, it may be instructive to trace the historical development and the jurisprudential construct of the legal framework governing animals and stray dogs in particular.

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[10] *supra* at 3.

Historical Evolution of the Law

The protection of animals in India can be traced to common law, under which animals were treated as property to which the owner of the animal had absolute right of ownership. In Chapter XVII of the Indian Penal Code, 1860 dealing with "offences against property", Sections 428 and 429 made the killing or maiming of animals as a punishable offence. The rigor of the sentence varied depending on the value of the animal. Two important facets of this were (i) an animal did not have any rights independent of its owner; and (ii) the value of the animal was judged purely in monetary terms. The concept of any special value flowing from it being a 'pet' or the subject or object of any form of attachment, was absent.

It is 3 decades later that the concept of animal rights (independent of any human connect) emerged in the form of The Prevention of Cruelty to Animals Act, 1890 ("PCA 1890") As its title itself indicates, PCA 1890 introduced several provisions for "prevention of cruelty to animals". These included provisions for preventing cruelty while the animal was alive (overloading, overdriving, abandoning, beating or otherwise subjecting it to un-necessary pain or suffering) and for killing with "unnecessary cruelty".

The Prevention of Cruelty Act, 1960 ("PCA 1960") replaced PCA 1890. PCA 1960 marked a significant advancement in 'animal rights' in the true sense. It sought to address several judicial decisions interpreting (what the courts considered as) restrictive language of PCA 1890. PCA 1960 extended 'animal rights' by introducing 'human duties'. The very first substantive provision of PCA 1960 (section 3) imposed a 'duty' on every person in charge of an animal to take all reasonable measures to (i) ensure the well-being of such animal; and (ii) to prevent the infliction upon such animal of unnecessary pain or suffering. PCA 1960 also introduced a body (Animal Welfare Board) whose function was to take measures for promotion of animal welfare generally and for the purposes of protecting animals form being subjected to unnecessary pain or suffering. PCA 1960 also introduced provisions for regulating 'animal experiments', 'performing animals' etc. PCA

1960 also (a) shifted focus from 'owner' to 'possessor'; and (b) totally did away with equating an animal with its monetary value.

A particularly important development in the extension of animal rights is the Bill to amend the PCA 1960. The Bill introduces far reaching amendments to PCA 1960 and the concept of animal rights. The Bill (i) prescribes enhanced penalties linked to the severity of cruelty; (ii) introduces the concept for "community animals" (defined as those born to a community with no claimed ownership); (iii) places the responsibility for looking after community animals on the local government. Most importantly, it articulates "Five Freedoms" (Freedom from thirst, hunger and malnutrition; Freedom from discomfort due to environment; Freedom from pain, injury and diseases; Freedom to express normal behavior for the species; and Freedom from fear and distress) and imposes a duty on every person having charge of an animal to ensure that the animal in his care /under his charge, enjoys these. While doing so, the Bill also seeks to address some of the underlying concerns about stray dogs that have vexed courts.

In the particular context of stray dogs (or community animals) the recent Animal Birth Control Rules, 2023[11] formulated by the Central Government (notified on March 10, 2023), inter-alia, seek to provide a statutory framework to address the issue of feeding strays (referred as community dogs). These Rules place responsibility for designating procedure for feeding stray dogs and provide a framework for resolving disputes, on local representatives.

Apex Court Judgements – One step forward, two steps behind Nagaraj

Whilst the legislature extended the scope of animal rights through legislation, a major judicial step forward was the landmark decision of the Supreme Court in the case of *Animal Welfare Board of India v. A. Nagaraj*[12] ("Nagaraj") The challenge in "Nagaraj was the legal sanction to the sport of bull-fighting ("Jalikkattu"). Prior

11 *supra at* 5.
12 (2014) 7 SCC 547.

to Nagaraj, animal rights, at a constitutional level were premised on the basis that while citizens have the right to life, including a healthy environment, this right was accompanied by a corresponding duty, to protect the environment and show compassion towards animals [Article 51A(g) inserted in 1976]. "Nagaraj" widened the scope of animal rights at a constitutional level. It held that animal life could be included within the ambit of the right to life under Article 21 subject to the extent that human rights were not harmed. The term 'life' was interpreted to have a wider meaning and include all forms of life, including animal life, not because it was the property of human beings but as an equal partner who can avail constitutional protection as legal persons. Nagaraj was therefore a watershed moment since it experimented with a language of rights for animals, rooted in the constitutional ethos. Equally significant was the fact that the Court's approach was guided by concerns for animal rights taking precedence over the aspects of 'culture' and 'tradition' espoused by the State of Tamil Nadu.

Constitution Bench decision in Animal Welfare Board

The genesis of the decision of *Animal Welfare Board v. Union of India*[13] was the Notification issued by the Ministry of Environment, Forest and Climate Change ("MoEF&CC") under S. 22 of PCA, 1960. This was believed to be a step towards undoing the Jalikattu ban. This Notification, while prohibiting the exhibition of bulls as training animals, carved out an exception for *inter alia* Jalikkattu, based on customs traditionally practiced, which formed part of culture. Similar amendments were carried out by state governments to the PCA 1960. The legality of these were challenged before the Supreme Court.

While deciding this challenge, the Constitution Bench dealt with the contentions of animal rights activists, who contended that the issues/concerns flagged by Nagaraj hadn't been addressed and the exception created for jalikkattu was an attempt to override a judicial verdict without addressing the grounds on which jalikkattu was originally outlawed. Relying on the rights-based regime, they

[13] 2022 SCC OnLine 661.

aspired to interweave Articles 14, 21, 48 & 51-A(h) & (g) to contend that sentient species must be accorded protection under the umbrella of Article 21 i.e., the natural right to be treated with dignity and without cruelty. The Constitution Bench however considered Nagaraj and taking a 'textualist reading' held that fundamental rights haven't been conferred on animals, and that Nagaraj only framed a judicial advisory for the legislature to elevate statutory rights of animals to the realm/stature of fundamental rights. It commented upon the rights-based regime envisaged in *Nagaraj* by holding that attempts to bring bulls within the protected mechanism/umbrella under/of Article 21 rights was "venturing into judicial adventurism". What is also significant is that while interpreting the provisions of PCA 1960, the Constitution Bench held that PCA 1960 was based on a 'perceived human necessity' approach. The approach of the Constitution Bench also marks a significant shift of focus from 'causing pain' to the 'degree of pain caused to animals in activities that are perceived to be 'necessary to humans'. Crucially, the Constitution Bench declined to take up a 'balancing exercise' in its decision, leaving it to the legislature to do what it considered appropriate.

Legislative Solution: Stray Dogs as Community Animals

The Prevention of Cruelty to Animals Act, (Amendment) Bill, 2022 provides a legislative framework for addressing the issues of feeding of stray dogs. It does this by inserting sub section (O) in Section 2, which defines "community animals" as those animals born to a community, with no claimed ownership. It then inserts a new provision (S. 3A) which placed the responsibility of community animals on the competent local government. Significantly, it expressly enumerates 'five freedoms' to animals, which animals are entitled to, and imposes a corresponding duty on every person, in whose charge or under whose care, the concerned animal is. One of these five freedoms is a freedom from thirst, hunger and malnutrition. The Bill therefore legislatively endorses a right of 'community animals' to be fed.

This Bill furthers the letter and spirit of the PCA, 1960. It takes active steps to ensure smooth functioning and collaborative functioning of communities[14], with the rights of animals being the focal point.[15] The Author concludes that the approach of the Delhi High Court as well as the Principal Bench of the Bombay High Court is based on the letter and spirit of a welfare legislation and the Draft Amendment is rooted in a similar approach, providing legislative sanctity which will hopefully settle the dissonance.

[14] Norma Alvares, *Stray dogs: From 'ownerless' to 'community owned, The Leaflet* (Apr 26, 2023), *https://theleaflet.in/stray-dogs-from-ownerless-to-community-owned/.*

[15] Alokparna Sengupta and Shreya Paropkari, *Will India finally update its prevention of Cruelty to Animals Act?*, The Leaflet (Jul 18, 2023), https://theleaflet.in/will-india-finally-update-its-prevention-of-cruelty-to-animals-act/.

CAN WE EVER TAKE A 'MIDDLE COURSE' IN INDIA? CONTEXTUALISING THE COMPARATIVE ASPECTS OF A NATIONAL JUDICIAL APPOINTMENT COMMISSION AND THE DIVERSITY DEBATE

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Abstract

In the wake of judicial reform, judges' appointments have been at the center stage of debates in many countries. The usual discord is based on the separation of power among the organs of the government, which has become the fulcrum of every constitutional deliberation. India has not been far behind. Between the usual power grab of judiciary and executive, the true constitutional obligation of enhancing judicial independence has been unable to take a "middle course". In a half-hearted effort, a national judicial appointment commission was formulated seven years ago which monopolized the 'appointment' function but did not deliberate on the issues of transparency, accountability, and diversity. The function of a commission is not just about appointing suitable judges on merit alone, it involves many complex intersectional functions of finding the right candidate through a transparent accountable process. The process should not only include the elites of the government and judiciary but also have the tenacity to accommodate and endure the participation of public who are the major stakeholders in the justice delivery system. This paper briefly nudges the debate of commission through a comparative lens, with a cautious understanding of what people should expect from this commission if at all it comes back from its own ashes.

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Keywords: Judiciary, appointment, gender, diversity, transparency

Introduction

In recent times, many commonwealth countries have shifted from a closed-door process to a more participatory process of appointing judges or at least are contemplating for that.[1] Why has it become important to change course in bringing transparency in the appointment process? The answer lies in the relationship that common people share with the judiciary, which is another limb of government that has the capacity to affect millions of lives. This relationship is not exactly what people share with their chosen elected representatives rather it is more like that of a trustee, which runs on a belief system of faith. It is this fear of loss of faith in the system that can lead to 'backlash', which if happens, will fundamentally alter the rule of law and lead to a serious destabilization of state.

Increasing the efficacy of courts, therefore, has become a priority and 'transparency in process' is the big stick. While writing a concurring opinion in Swapnil Tripathi v. Supreme Court of India, Justice Chandrachud referred to Bentham's concept of 'open justice'[2] and how every public establishment should open up to public, subject to certain restrictions.[3] The Draft Model Rules for Live-Streaming and Recording of Court Proceedings are a welcome step to ensure that justice is not only done but is also seen to be done.[4] Supreme court has been supportive of the concept of open

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1 Jan Van Zyl Smit, *Judicial appointments in the Commonwealth: Is India bucking the trend?, UK Constitutional Law Association (Mar. 7, 2016)* (last accessed July. 23, 2023 10AM). https://ukconstitutionallaw.org/2016/03/07/jan-van-zyl-smit-judicial-appointments-in-the-commonwealth-is-india-bucking-the-trend/

2 Jeremy Bentham, Rationale of Judicial Evidence 524 (Hunt & Clarke 1827) – "Without publicity, all other checks are insufficient: in comparison with publicity all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks."

3 (2018) 10 SCC 639.

4 Dr. P Sree Sudha, *Live Streaming Of Court Cases – A Quest For Ensuring Transparency In Justice Delivery System*, 8:1 NALSAR L. REV, (2023). https://nalsar.ac.in/images/NLR%20Vol-8_Final%20Book.pdf

court pertaining to its judicial function[5], but it has been not that decisive when it comes to its administrative functions. The decision in Subhash Chandra Agarwal[6] though rendered that 'transparency' will not hamper 'independence' yet, it kept the question of disclosure of information related to judiciary to be decided on a case to case basis at par with public interest claim. It is quite interesting to note the journey of this case, which started in November 2009 and has kept the judiciary befuddled, for the next ten years, with the difficult question of judicial transparency. A two-judge bench in November 2010 framed the central issues and referred it to a three judge bench, which in 2018 referred it to a constitution bench on the grounds of competing interests of separation of power and privacy. The applicant Subhash Chandra Agarwal sought access to correspondences, between the Collegium and the government regarding the appointment of few judges, from CIC (Central Information Commission) which they agreed to share, was taken up in appeal by the Secretary General, Supreme Court. The issues framed by the Supreme court in 2010 were:

1. Would disclosing the information requested by Subhash Chandra Agarwal interfere with the independence of the judiciary? Is it therefore *not* in the public interest to disclose this information?
2. Would disclosing the information requested erode (i) the credibility of the Collegium's decision and/or (ii) curtail the future "free and frank expression" of Collegium members, when appointing judges to the Supreme Court?
3. Does Section 8(i)(j) of the RTI Act, exempt the CPIO from providing the requested information? Section 8(i)(j) exempts the disclosure of "personal information" that has "no relationship to any public activity or interest".

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5 *Naresh Shridhar Mirajkar v. State of Maharashtra,* (1966) 3 SCR 744. Chief Justice Gajendragadkar, speaking for the majority observed: "para 20... It is well settled that in general, all cases brought before the courts, whether civil, criminal, or others, must be heard in open court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice".

6 Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, 2019.

The above issues reeks of a self-protective attitude of the court which instead of enhancing public confidence forces to question the secrecy around it. Credibility of collegium's decision can be enhanced with a transparent disclosure of correspondence shared between the executive and the judges. To think otherwise would be an anathema to questioning the decision-making authority of both judiciary and executive. As far as curtailing the free and frank expression of collegium is concerned, aren't judges to function in a fearless manner? Why the judiciary is so fearful of public scrutiny? Five years later, in 2015, in another case Supreme court made it clear, on weak grounds of 'judicial primacy' why it does not want any sort of interference in its autonomous functioning.[7] How can valid query of citizens about the highest judicial office be called "unnecessary litigative debates by third parties"?[8] If nothing else, this just proves that judicial appointment is only a closed-door concern of just two parties – executive and judiciary – whereby people of India should not have a say in. Surprisingly, Helen Suzman[9] had already arrived when Subhash Chandra Agarwal was being decided. A comparative analysis of these two judgments reveals the constitutional supremacy attributed in South Africa is well above than what is accorded in India in terms of judicial independence. The sheer guts of constitutional court of South Africa in putting the constitutional obligations over and above the reputation of its own judges speaks volume about judicial integrity. The rigor of their interview process of judicial candidates gives the public a glimpse of the gravity of their position and asserts that it is not for faint hearted candidates who cannot handle pressure.

The purpose of a comparative analysis of different jurisdictions rests on the logic to find where a country stands in terms of global standards and perhaps also to do a self-assessment of its own

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7 *Supreme Court Advocates-On-Record Association v. UOI* (2016) 5 SCC 1 (NJAC judgment).

8 Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal 2019. (Para 7 Justice Chandrachud's concurring opinion).

9 *Helen Suzman Foundation v. Judicial Service Commission,* 2018 (7) BCLR 763 (CC) 8. See, Nomthandazo Ntlama, *The implications of the decision in Helen Suzman Foundation v Judicial Service Commission 2018 (7) BCLR 763 (CC) 8 on the functioning of the South African Judicial Service Commission*, 24:1 J. Law Democracy & Development (2020) https://www.ajol.info/index.php/ldd/article/view/213840

systems and process. The eternal struggle of establishing that judicial accountability does not destabilize judicial independence has presented India with unique set of problems that defers us from taking a "middle-course" as originally envisaged by framers of the constitution.[10] When NJAC was being declared unconstitutional, the court had an opportunity of deliberating on other foreign jurisdictions. The magisterial dissenting opinion of Justice Chelameswar opens with the rhetorical of judges developing an "alternate constitutional morality that emancipates them from the theory of checks and balances". It is on this line that paper builds arguments by referring to UK. Apart from a shredded colonial past, India shares her legal system with UK, which has struggled for centuries in applying the theory of separation of power. The structural changes brought in by the Constitutional Reform Act 2005 (CRA) have interjected more visible separation of powers within which the judicial branch has emerged as both stronger[11] and institutionally independent of its elected counterparts.[12] Despite that, UK has adopted a judicial commission that takes care of the appointment function. This article is divided into three parts. Part 1 analyses the Indian version of judicial independence to determine the validity of judicial supremacy in appointment system. Part 2 examines the appointment process in UK post CRA to establish that judicial reforms in UK were not solely based on separation of power, but the larger goal was diversity and transparency. Part 3 briefly analyses the post-CRA impact on the cause of diversity. The paper concludes that in post-CRA UK, 'diversity' has gained nothing and why that is a reason of trepidation for India.

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[10] Constituent Assembly Debates VOL. VIII (May 24, 1949). B. R. Ambedkar "The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort." https://www.constitutionofindia.net/debates/24-may-1949/

[11] Roger Masterman & Se-shauna Wheatle, *Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the United Kingdom Constitution*, *Public law*, 469-487 (Jul. 2017) https://dro.dur.ac.uk/21268/.

[12] *Id.*

1. Judicial Appointment Process in India

Indian parliament enacted the Constitution (Ninety-ninth Amendment) Act 2014 and the National Judicial Appointment Act 2014 (NJAC) in an initiative to reform the existing judicial appointment process that has existed post-collegium creation era. By virtue of Article 368, Parliament (the BJP won the general election in 2014 and came to power) passed the 99th Amendment Act and the NJAC in a jiffy with the help of voice voting.[13] The major changes that it brought in, if read cumulatively, bends towards substituting "judicial primacy" with "executive primacy".[14] The 99th Amendment Act replaced the word "consultation" with "on the recommendation of the National Judicial Appointments Commission referred to in article 124A" that has, earlier, been known notoriously for the confusion created over decades and has been the premise for setting up of the collegium system. By a single stroke it took away the ambiguity regarding the appointment and transfer of judges and separated the administrative function of the judiciary. But the word "Consultation" again comes back in revised Art 224.[15] However, the composition of six-member-commission with a no questionability clause[16] made the judiciary claustrophobic of the plausible aftermath in case of a deadlock in decision. Moreover, the way diversity clause was being inserted in the composition of the commission was nothing different the way it is usually handled. "Women" always features at the end of the line

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[13] *Supreme Court Advocates-On-Record Association v. Union of India,* Writ Petition (C) 13 of 2015 https://www.livelaw.in/pdf_upload/pdf_upload-383461.pdf

[14] Indira Jaising, *National Judicial Appointments Commission: A Critique*, 40:35 EPW (Aug. 30, 2014) https://www.epw.in/journal/2014/35/commentary/national-judicial-appointments-commission.html

[15] Indian Constitution (99th Amendment) Act, 2014 Section 8. In article 224 of the Constitution,
(*a*) in clause (1), for the words "the President may appoint", the words "the President may, in consultation with the National Judicial Appointments Commission, appoint" shall be substituted;
(*b*) in clause (2), for the words "the President may appoint", the words "the President may, in consultation with the National Judicial Appointments Commission, appoint" shall be substituted.

[16] Indian Constitution Article 124A (2) amended by Constitution (99th Amendment) Act, 2014.: No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

after "Scheduled Caste, Scheduled Tribes, Other backward classes". Out of the six members five are almost fixed and by ample permutation the chances of seeing a balanced commission in terms of gender does not cross the barrier of tokenism. Women must compete against a person of SC, ST and OBC for a single post to get to a position to decide appointment and transfer of judges, the chances of which are very bleak. While setting out the functions of the commission, Article 124B (c) mandates the duty to "ensure that the person recommended is of ability and integrity".[17] It does not elaborate what these "abilities" are going to be. Even the NJAC Act, u/s 5 does not specify the selection criteria and keeps it very vague by stating " on the basis of ability, merit and any other criteria of suitability". It made criteria a subject of subsequent guidelines.

*1.1.**NJAC judgment***

International commitments[18] plus internal tug of war behind "committed judiciary"[19] set the ball rolling for a separate commission to handle the judicial appointments and transfers. NJAC was set up as a response to the criticism of collegium system of judicial selection which brewed nepotism, opacity, and a powerful uncontrollable hegemony. The Supreme Courts Advocates on Record Association filed petition before the supreme court challenging the constitutionality of both the above-mentioned legislations. On 16th October 2015, the five-judge constitution bench with a 4:1 majority passed their verdict in a little over 1000-page judgment. It is not the objective of this article to provide a critique of the entire judgement rather the aim here is to investigate

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[17] Indian Constitution Article 124B amended by Constitution (99th Amendment) Act, 2014. It shall be the duty of the National Judicial Appointments Commission to:-
(*a*) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
(*b*) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and
(*c*) ensure that the person recommended is of ability and integrity.

[18] Goal 5, Sustainable Development Goals adopted in 2015; The UN Basic Principles on the Independence of the Judiciary 1985; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (the Beijing Principles) 1995.

[19] T.R. Andhyarujina, *A Committed Judiciary: Indira Gandhi and Judicial Appointments*, in Appointment of judges to the supreme court of India, ed. Arghya Sengupta & Ritwika Sharma (OUP, 2018)

the validity of "judicial primacy", compare it with UK and see how the judicial primacy in a 'sheltered' appointment process affects Gender diversity of the bench.

The NJAC judgment banked on two points: first, judicial primacy is a sine qua non for judicial appointments, which then the court went on to connect with judicial independence. Second, the preposterous claim of the apex court that such primacy forms part of the basic structure of constitution. The judgment is a glaring example of how even judges misinterprets the original ideas. The legal academia including lawyers and courts have a penchant for turning towards the Constituent Assembly debates to look for the original interpretation of the constitutional text. Provision related to present day Article 124 was taken up by the Assembly and debated upon.[20] To state briefly, three prominent amendments from Shibban Lal Saxena, Prof K.T. Shah and B. Pocker Sahib were considered for voting that bordered on US style appointments of requiring involvement of legislature in selecting judges. B. Pocker Sahib's amendment included the word "concurrence" of Chief justice that later went on to form the fulcrum of judges' case. It was Dr. B. R. Ambedkar, who went on to provide a "middle-course" amidst the divided opinions. He was neither in favour of US styled cumbrous procedure of executive-legislature model nor, British styled process that leaves too much discretion at the hands of the executive.[21] In his version of appointment process, there is a subtle but firm determination that both the executive and judiciary must balance each other. Regarding the basis of primacy that stemmed from B Pocker Sahib's suggestion, Dr Ambedkar pointed towards, without undermining the credibility of chief justice, the possibility of judicial bias, after all, judges are cut from the same fibre of the society that makes up every other human being.[22] The court missed the point that if Dr. Ambedkar was not in favour of executive influence he was also not in favour of giving veto power to the chief justice either. The majority's opinion that CAD establishes judicial primacy therefore is highly flawed.

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[20] Constituent Assembly Debates VOL. VIII (May 24, 1949). https://www.constitutionofindia.net/debates/24-may-1949/.

[21] *Id.*

[22] *Id.*

The next aspect is whether judicial primacy can ideally be considered a part of basic structure doctrine. Keshavananda Bharti established judicial independence to be an unamendable basic structure of the constitution.[23] But to consider every attribute of "judiciary and judicial function" a basic structure might render a frivolous interpretation to every such aspect say, right to life or democratic values as basic structure. Out of the four majority opinions in NJAC judgment, Justices Khehar and Goel has raised appointment to the stature of basic structure, Justice Lokur has made the consultation between the executive and the Chief Justice a mandatory aspect that cannot be overshadowed by a veto power of eminent persons and the Law Minister but has not shown support for judicial primacy being the basic structure.[24] As Sengupta argues, in the absence of a majority holding, the opinion on judicial primacy has not set any binding precedent for future purposes.[25] This leaves the door open for the executive to come up with alternate model based on the elements of judicial independence.[26] The majority opinion could not, though, establish judicial primacy, however, it resisted against an executive primacy. The puzzling reference of Justice Lokur[27] to UK in the judgement makes us examine the scheme of appointment there.

2. **Judicial Reforms Towards Transaprency: Comparative Aspects**

Justice Khehar's repeated warning about any presence of executive influence in judicial appointment violates independence of judiciary despite cases being cited of many foreign jurisdictions

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23 *Kesavananda Bharati v. State of Kerala,* 4 SCC at 768.

24 Arghya Sengupta, *Judicial Primacy, and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 50:48 EPW, 27-30, (Nov. 28, 2015). (last accessed July. 23, 2023 10AM). https://www.jstor.org/stable/pdf/44002894.pdf?refreqid=excelsior%3Aed33c52be4f79c79b446338354657a69&ab_segments=&origin=&initiator=&acceptTC=1.

25 *Id.*

26 Tarunabh Khaitan, *If Powerful Branches Act in a Constitutionally Shameless Manner, Citizens Must Step Up*, THE WIRE, (Jan. 23, 2023) (last accessed July. 23, 2023 10AM). https://thewire.in/law/if-powerful-branches-act-in-a-constitutionally-shameless-manner-citizens-must-step-up.

27 NJAC judgment, para 477: "So much for the appointment process in the UK and the 'judges appointing judges' criticism in India".

has led this paper to delve into the other jurisdictions.[28] This paper by drawing from UK claims that despite segregating powers of Lord Chancellor, UK has supported the formation of commission that plays a substantial role in selecting judges following specified criteria. Many countries with colonial linkages to UK have reformed their judiciary even before UK did it itself. The CRA brought in sweeping reforms in transforming judicial appointment process. It not only created a UK Supreme Court that replaced the House of Lords as the apex judicial authority but also transformed the system by establishing separation of powers which UK has been long struggling with since mid-1990s.[29] Long standing support from reform groups, lawyers and politicians have made this change possible.[30] Apart from studying the other systems worldwide that went for reform, UK had the advantage of looking into transformation closer to home through establishment of Judicial Appointment Board (JABS) in Scotland in 2002 on an administrative basis[31] and Judicial Appointment Commission in Northern Ireland (NIJAC) in 2005.[32] The composition of JABS and NIJAC reflects on a preliminary level the presence of law professors, judicial members, lay persons, police in the commission.[33] The above mentioned judicial commissions advertise publicly their vacancies through expression of interests. On 3rd April 2006, the Judicial Appointment Commission (JAC) was set up under the CRA, which was determined to maintain and strengthen judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord

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28 NJAC judgment, at 368-369.

29 Kate Malleson, *Creating a Judicial Appointments Commission: Which Model Works Best?* Public Law (2004) (last accessed July. 23, 2023 10AM). https://www.researchgate.net/publication/291023298

30 *Id.*

31 The Judicial Appointments Board for Scotland was established on an administrative basis by the Scottish Ministers in 2002. https://www.judicialappointments.scot/about/history

32 NIJAC was established under the Justice (Northern Ireland) Acts 2002 & 2004 which implemented the recommendations of the Northern Ireland Criminal Justice Review which flowed from the Belfast Agreement (1998). https://www.nijac.gov.uk/about-nijac

33 Northern Ireland Judicial Appointment Commission, https://www.nijac.gov.uk/about-nijac(last accessed July. 23, 2023 10AM).; Judicial Appointment Boards of Scotland, https://www.judicialappointments.scot/about/history (last accessed July. 23, 2023 10AM).

Chancellor[34] and making the appointments process clearer and more accountable. Briefly speaking, CRA took the appointing functions and transferred it to two independent commissions in England and Wales, which were statutorily required to select judges only on merit but were also trusted to enhance diversity among the judges. The composition of commission comprises of fifteen members who are selected through open competition except the three judicial members who are selected either by the Judges' Council or the Tribunals' Council.[35] From what Mallesson has observed, creation of a judicial commission is not mere an adoption of a wholesale product from another jurisdiction, rather it is a conscious choice made upon considering which model can accommodate the legal, political and cultural conditions of the country.[36] The core reason to modernize the judiciary in UK was made upon the call to increase public trust in the system by guaranteeing independence from unlawful politicization. However, creation of a commission renders inclusion of participatory voice in selection mechanism. Unlike India, UK did not stubbornly mandate judicial primacy, neither it interpreted judicial independence in a narrow sense. Although Sir Kentridge in pre-CRA UK did not support the concept of 'representation' among judges simply because judges are not supposed to act on behalf of people, rather he preferred the term 'diversity'.[37] Also judges necessarily do not represent the interest of the group from which he or she is drawn from. Therefore, women judges, being representative of her gender, will always support the interests of women is theoretically weak.[38] The judiciary in UK was never envisioned to play a greater role under a parliamentary sovereignty, so quite naturally those candidates were not chosen who did not resonate ideologically with the government and hence it built a judiciary in its own image. Although the JAC changed the

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34 Section 2 of CRA 2005.

35 Courts and Tribunals Judiciary, Judicial Appointments Commission https://www.judiciary.uk/judicial-appointments-commission/ (last accessed July. 23, 2023 10AM).

36 Malleson, *supra* note 29.

37 Sir Sidney Kentridge, The Highest Court: Selecting the Judges, 62 C.L.J. 55 (2003). https://www.jstor.org/stable/pdf/4508969.pdf?refreqid=excelsior%3A66395b027da3dd3cab57f061fc6342bc&ab_segments=&origin=&initiator=&acceptTC=1

38 This holds true from an Indian perspective as well. The dissenting opinion of J. Indu Malhotra in Indian Young Lawyers' Association v. State of Kerala, (2019) 11 SCC 1.

"secret soundings" and "taps on shoulder" to open application process, but the powers of JAC are not entirely determinative in nature. JAC can recommend a candidate under the CRA to the Lord Chancellor, who then has three options, either he can appoint the candidate or ask JAC to reconsider the decision or reject the recommendation.[39] For the Supreme Court, an ad hoc panel is set up of members of JAC of England and Wales, Scotland and Northern Ireland as well as the president and the deputy president of the Supreme Court. The panel is statutorily required to consult with all senior judges who are not member of panel and are also not willing to be considered for the selection.[40] Once this panel submits its report to Lord Chancellor, he or she consults again with the same set of people and then either recommends the name to Prime minister who then sends it for the Crown's approval, or may ask to reconsider or reject the recommendation.[41] The role of Lord Chancellor is neither completely toothless nor a very powerful one but as Rackley explains, it is a "backstop" arrangement.[42]

The CRA enshrined judicial independence in law for the first time in UK in 900 years, which has typically followed parliamentary sovereignty. UK has been sceptical of USA styled judicial appointments based on political patronage.[43] Establishment of sound structural protection was therefore a sine qua non against political control to secure the health of the judiciary. But the more pressing need was that of diversity. UK's gender diversity cling at a mere 8% in comparison to USA, Canada, Australia and South Africa.[44] South Africa has refurbished it's judicial appointment process after a terrifying Apartheid by enacting the Constitution in 1996. The Judicial Service Commission (JSC) comprises of 23 members including politician, judges, lay persons, law professor and professional legal bodies. JSC fills up the vacancy through open applications and even conducts public interviews of the potential

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39 JAC is responsible for all judicial appointments except for the Supreme court and the lay magistrates.

40 CRA 2005, section 27(2)

41 CRA 2005, s 26, 29, 30.

42 ERIKA RACKLEY, WOMEN JUDGING AND JUDICIARY: FROM DIFFERENCE TO DIVERSITY, 87 (Routledge 2013).

43 Kentridge, *supra* note 37, at 6.

44 Rackley, *supra* note 42.

candidates. For the constitutional court positions, the JSC sends selected nominees to the President who selects after consultation with Chief Justice and leaders of political parties.[45] One of the purposes of the commission is therefore to balance out political pressure with transparency and diversity.

Justice Chelameswar's dissenting opinion spoke of instance of Justice Dinakaran's controversial exit from the judiciary and draws lesson by stating that this episode correctly pointed out the 'shallowness' and inefficiency of the collegium system.[46] The recent elevation of Victoria Gowri, additional judge of Madras High Court[47] has again put the collegium process under the scanner and has pushed us to pose the question: had the candidates been screened through an open application process, could it have saved the collegium from this embarrassment? The whole saga of NJAC has been about establishing who gets to control the appointment process whereas in reality, comparative evidence suggests that it should have been more about bringing transparency and enhancing the appointment through adopting a 'middle course'. Garoupa and Ginsburg acknowledges the multi-stakeholder commission model's wider acceptance rate but also cautions against one-size-fit-all approach[48] which does resonate with Malleson's country specific adoption policy when it comes to commission model.[49]

3. **WHERE IS DIVERSITY?**

When Erika Rackley wrote her book, as on January 2012, the percentage of women in the supreme court of UK was 8.3% as out of 12 judges there was only one woman.[50] In 2023, it is still at

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45 Section 174(3) Constitution of South Africa, 1996.

46 NJAC Judgment, p. 508 (Chelameswar, J., dissenting).

47 Krishnadas Rajagopal, *The saga of appointing Justice Victoria Gowri,* THE HINDU, (Feb. 12, 2023) (last accessed July. 23, 2023 10AM). https://www.thehindu.com/news/national/the-saga-of-appointing-justice-victoria-gowri/article66501651.ece

48 Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence* (John M. Olin Program in Law and Economics Working Paper No. 444, 2008).

49 Malleson, *supra* note 29, at 6.

50 Rackley, *supra* note 42, at 7.

8.3% with Lady Rose being the only woman judge on the court.[51] Clearly creation of JAC has not been able to contribute in this situation. Rackley argues in her book that creation of diversity was never the primary intention behind setting up of JAC.[52] Rather than increasing the representation of non-traditional candidates on the bench, primary focus of reformation was to improve transparency of the process to defend the appointments that were being made.[53] The modality of appointment continued to be as it was with Lord Chancellor – appointments being made on "merit" with a slight addition of section 64(1) that also encourages diversity in the appointments. The Crime and Courts Act 2013 has introduced the Equal Merit Principle. Although judges should be selected 'solely on merit'[54], if two candidates have equal merit, this process allows the selecting body to prefer one of them over the other for the purpose of increasing diversity.[55] How to decide that two persons are of equal merit? The "trickle-up" approach has failed to ensure that women despite being in the profession in a large number are unable to climb up the echelons of the higher judiciary. Rackley suggests affirmative action policies[56] which was 'paralysed', as Malleson observes, by the fear of compromising the merit principle.[57] Hence, the position of UK is a cause of trepidation for India if it thinks of following pursuit. In 2023, Indian Supreme Court at present, has 32 judges out of which only 3 are women which is 9.3%.[58] Informal selection criteria have reflected religious and regional diversity on the bench but has miserably failed in promoting gender and caste diversity.[59] The NJAC, like JAC, did

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51 https://www.supremecourt.uk/about/biographies-of-the-justices.html

52 Rackley, *supra* note 42, at 7. p.91.

53 Rackley, *supra* note 42, at 7. p.91.

54 CRA s 63(2)

55 CRA ss 63(4), 27(5A)(b); s159 of Equality Act 2010.

56 Rackley, *supra* note 42, at 7. p.95.

57 Kate Malleson, *Rethinking the Merit Principle in Judicial Selection*, 33:1 J. Law & Society (Mar. 2006) (last accessed July. 23, 2023 10AM). https://www.jstor.org/stable/i369312 ; Kate Malleson, *Diversity in the Judiciary: The Case for Positive Action*, 36:3 J. Law & Society 376-402 (Sep., 2009) (last accessed July. 23, 2023 10AM).

58 Supreme court of India website.

59 Abhinava Chandrachud, Informal Constitution (OUP); Apoorva Mandhani, *SC reflects India's religious diversity but not gender & caste diversity, says new book,* The Print (Jul. 24, 2023 11:03AM)

not touch upon the issue of diversity. So, what is it that we are missing. As Malleson observes, "the ability of the commission to achieve this goal will depend on whether or not increasing diversity is clearly prioritised within its remit".[60] Mere segregation of executive and judiciary should not be the goal behind creation of this commission.[61]

Conclusion

The discussion in India, as far the parliamentarian efforts are concerned, it can be safely said that judicial reforms are directed towards gaining a 'voice' in appointment process. Whereas that of judiciary has been to retain their 'voice' in the process. If someday the discussion of a commission is again initiated[62] it must be done with a genuine intention of securing independence of judiciary, diversification of the bench and to boost the public trust in the system. What a commission is intended to achieve can be assessed from certain specific markers; first, the division of responsibility between commission and its appointing authority, i.e. how determinative are its powers; second, composition of the commission, a multi-stakeholder model will bring the necessary diversity and must be created in a manner so that it can function as a checks and balance mechanism; third, process of selecting the members of this commission, except the executive and the judges, an open application process with selection criteria can enhance the credibility and make it participatory in nature. Having said so, the function of the commission should not be limited to only selecting suitable judges, rather it must also devise a fair, transparent and reasonable process of selecting judges. Once 'transparency' is achieved, it will open the door for researchers to access the challenging factors behind drooping diversity. As Surith Parthasarathy states, judicial independence is integral to the maintenance of democracy but

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60 Malleson, *supra* note 29, at 6.

61 Malleson, *supra* note 29, at 6.

62 Nick Robinson, *Institutional Reform at the Supreme Court Institutional Reform at the Supreme Court*, LAW AND THE OTHER THINGS Nov 10, 2020 (last accessed July. 23, 2023 10AM). https://lawandotherthings.com/institutional-reform-at-the-supreme-court/

primacy of judges is not a necessary corollary in matters of appointment.[63] There are other factors of independence which needs serious deliberation. As Khaitan observes, the analysis of post-retirement appointment of judges to public offices can often find linkages with unwanted favours from government.[64] In such a scenario, in the absence of any consultation with legal fraternity, judges, oppositions, or legal academia, a blind 'executive primacy' in judicial appointment would have surely made the case worse.[65]

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[63] Surith Parthasarathy, *Comparative Law in the NJAC judgment,* in Appointment of judges to the supreme court of India, ed. Arghya Sengupta & Ritwika Sharma (OUP, 2018)

[64] Tarunabh Khaitan, *If Powerful Branches Act in a Constitutionally Shameless Manner, Citizens Must Step Up*, THE WIRE, (Jan. 23, 2023) (last accessed July. 23, 2023 10AM). https://thewire.in/law/if-powerful-branches-act-in-a-constitutionally-shameless-manner-citizens-must-step-up

[65] *Id.*

IMPLICATIONS OF INTELLECTUAL PROPERTY PRINCIPLES ON OUTER SPACE ACTIVITIES

Sheheen Marakkar[*] *& Anila K*[♦]

Abstract

As humanity continues to explore outer space, the implications of intellectual property (IP) rights on these endeavours become increasingly significant. This article delves into the core principles of IP and their application in the context of outer space activities, while also examining how these principles intersect with international conventions. The goal is to strike a balance between encouraging innovation and ensuring fair access to space-related technologies. The article begins by discussing the Principle of Territoriality, which traditionally governs the application of IP rights within national borders. However, outer space's lack of clearly defined territorial boundaries poses unique challenges. The article explores emerging legal frameworks and potential solutions to address the jurisdictional complexities in this extraterrestrial domain. Next, the National Treatment Principle is examined, advocating for equal treatment of foreign and domestic entities concerning IP protection. As nations and private entities collaborate on space exploration, ensuring equitable IP protection for all stakeholders becomes paramount. The Most-Favoured Nation Treatment is then discussed, emphasizing the equal treatment of entities from different nations in IP matters. Given the global nature of outer space activities and the prevalence of international collaborations, the article investigates how this principle can foster cooperation and encourage sharing of technological advancements while safeguarding creators' IP rights. Furthermore, the

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article reviews the impact of relevant international conventions, such as the Outer Space Treaty, on IP in outer space. Understanding how these agreements shape the landscape of IP rights and obligations for nations and private entities is crucial in promoting responsible space exploration and technology transfer.

Keywords: Intellectual Property, IP Rights, Outer Space Activities, Territoriality Principle, National Treatment Principle, Most-Favoured Nation Treatment, International Conventions, Space Exploration, Technology Transfer, Innovation, Equitable Access.

Introduction

As humankind ventures further into the realm of outer space exploration, the implications of intellectual property (IP) rights on these activities become increasingly significant. This article delves into the fundamental principles of IP and their application in the context of outer space endeavors. It also explores the intersection of IP rights and international conventions, seeking to strike a balance between promoting innovation and ensuring equitable access to space-related technologies.

Intellectual property rights are given to the creators of intellectual work as an acknowledgment of their effort. The works can be categorized into different subjects which can be protected under intellectual property law subject to certain conditions specified by the law, irrespective of the location of the work created. There are various types of work that can be protected. That is literary, artistic, and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[1] The work created in outer space can also

[1] Article 2(viii) of The Convention Establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on 14 July 1967.

be protected under the purview of intellectual property as those works are created on earth. It can be given protection under different forms of intellectual property including patents, trademarks, trade secrets and, copyright. This article deals with international intellectual property law instruments and will examine the fundamental principles of Intellectual property and its implication for Outer Space Activities.

Intellectual Property Rights and International Conventions

International conventions emphasize mainly two intellectual property which can be divided into two categories that are an international agreement relevant to industrial property rights which includes patents, trademarks, and industrial design, and those relating to copyright.

It is necessary to examine the different conventions related to intellectual property to understand what are the main general principles stated in those international law instruments. For the same purpose, I am focusing only on the law instruments of patents and copyright.

In the case of patents, the Paris convention is the first convention which is for the Protection of Industrial property which has a vital role in the protection of industrial property. It gives vide protection to the patents, trademarks and industrial design. The convention specifies the principle of National Treatment enriched under Article 2 and 3 of the Convention. Under the provisions on national treatment, the convention provides that each contracting state must grant same protection to nationals of other contracting states that it grants to its own nationals. The convention also provides for the right of priority. This right means that on the basis of the regular first application filed in one contracting state the applicant may within a period of 6 months apply for protection in any of the other contracting parties.[2] These subsequent applications will be regarded as if they had been filed on the same day as the first application. The convention also establishes that any priority-

[2] Paris Convention for the Protection of Industrial Property, 1883, art. 4.

claiming applications filed in various countries are independent of each other.[3]

Another treaty is the Patent Cooperation Treaty (PCT) which mainly aims to address the filing procedures of patent applications in multiple countries. It requires only one single filing for all the multiple countries. This international application preserves the original priority date for any subsequent national filings derived from the PCT application. It also provides the international search for looking out the prior use or prior filing of a similar patent application with similar claims in the complete specification.

The Patent Law Treaty (PLT) which was adopted in 2000 aims to make harmonize and streamline national procedures for processing patent applications. This Treaty provides the standard for the formal requirement for patent application.[4]

In the case of copyright, in relation to international copyright and neighboring rights convention, the first and foremost convention is the Berne Convention for the protection of Literary and Artistic Works was an international assembly held in 1886 which has a goal to agree on a set of legal principles for the protection of original work. Like Paris Convention, Berne Convention also provides General Principles including National Treatment, foreign authors may expect equal treatment as given to that of their own national authors.[5] It precludes no formality for protection. It provides automatic protection. The convention provides independent protection that is the enjoyment and exercise of rights granted independent of the protection of the work in the country of origin.[6] The Convention provides the Economic and Moral rights of the authors. The convention also provides the minimum standard of protection to the authors and the scope of the Convention does not explicitly extend to new technologies, digital

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3 Paris Convention for the Protection of Industrial Property, 1883, art. 4bis, cl. 1.
4 Patent Law Treaty, 2000, art. 6.
5 Berne Convention for the Protection of Literary and Artistic Works, 1886, art. 5, cl. 1.
6 *Id.*

works like computer programs, databases and software-generated works.[7]

The WIPO Copyright Treaty (WCT) was adopted in 1996. It was introduced to give protection to new technological development. It is a special agreement with the Berne Convention.[8] Article 8 of the WCT has a provision about the right of the author to make communicate the work to the public in such a way that the public can access the work from a place and at a time which they can individually choose. The Treaty provides that the contracting party must provide adequate protection and also should provide a legal remedy.[9]

The Rome Convention adopted in 1961 provides protection to 'Neighboring rights' including the works of performers, producers of sound recording, and broadcasters. Rome convention also provides the principle of National Treatment. This means that performers, producers of sound recording, and broadcasters are treated similarly and enjoy the same protection in any contracting parties as is granted to their nationals.[10] It also provides the principle of Territoriality in respect of broadcasts.[11]

The WIPO Performances and Phonograms Treaty (WPPT) which was adopted in 1996 as a supplement to the Rome Convention. It gives more protection to the performers and phonograms producers except for the broadcasters which is stated under Rome Convention.[12]

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7 Hanns Ullrich, *TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy*, 4 Pacific Rim Law & Policy Association. 153,165, (1995).

8 WIPO Copyright Treaty, 1996, art.1, cl. 1 states: "This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention", and Article 20 states that "the Government of the countries of the Union reserves the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention."

9 WIPO Copyright Treaty, 1996, art.11.

10 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, art. 2. cl.1.

11 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, art. 6. cl.2.

12 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, art. 7, 8.

The Brussels Satellites Convention is a special agreement under the Rome Convention. The Rome Convention's rights are extended to broadcasting organisations under the Brussels Satellites Convention, which was brought about by the growing use of satellites in international telecommunications. The convention provides the contracting states are obliged to take necessary measures to prevent the distribution of program-carrying signals by any distributor for whom the signals emitted to or passing through the satellites are not intended.[13]

In the case of the TRIPS Agreement (Trade-Related Aspects of Intellectual Property) which came into force in 1995. It extends to all types of intellectual property.[14] TRIPS Agreement also provides the principle of National Treatment as of other Conventions and it applies to industrial property rights (patents, trademarks, industrial design) and copyright. TRIPS Agreement also requires the member states to comply with the 'Most Favored Nation Treatment' principle.[15]

With the above-mentioned conventions, I came to an understanding that they provide protection to the works in the case of copyright and patent if it satisfies the standards prescribed. If we consider the subject matter of patents and copyright. Some of the outer space activities can be considered as works that can be given intellectual property protection under the aspect of copyright and patent and trademark. If we mention the activities like literary and artistic works including databases and computer programs, satellite

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[13] Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Satellites Convention), 1974, art.2.

[14] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 1, cl.2. states: "For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II." (1) copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations);
(2) trademarks, including service marks;
(3) GIs;
(4) industrial designs;
(5) patents, including the protection of new varieties of plants;
(6) the layout designs of integrated circuits; and
(7) undisclosed information, including trade secrets and test data.

[15] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 4.

broadcasts, and remote sensing data fall under the category of copyright-protected works and it can be given protection under the Berne Convention and also under Neighboring rights in the Rome Convention. Also, the case of up-linking and downlinking through satellite communication is also considered copyright-protected work. In the case of patents, the TRIPS Agreement provides that "an invention is eligible for patent protection regardless of the location of its invention.[16] It also includes that any invention, whether a product or process, in any field of technology is potentially patentable.[17] So with these, I came to understand that the application of intellectual property rights to space activities can be possible. To understand further that whether fundamental principles of the intellectual property specified under different Conventions can be applied to intellectual property rights instruments for outer space activities.

Fundamental Principles of IP and its Implication on Outer Space Activities

As above stated, in the different conventions, there are fundamental principles of intellectual property including the principle of Territoriality, the principle of National Treatment, the Most Favored Nation Treatment, the Right of Priority, and the Independence of protection.

1) The Principle of Territoriality

The concept of territoriality has traditionally been used to explain the foundation of the intellectual property system. Territoriality refers to a legal system in which intellectual property rights are acquired on a country-by-country basis: in the case of unregistered rights, acts of creation or publication must take place in the state that granted the right; in the case of registered rights, an

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[16] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 27, cl.1. stipulates that "patents shall be available and patent rights enjoyable without discriminations as to the place of invention."

[17] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 27, cl.1. states, "Patents shall be available for any inventions, whether product or processes, in all fields of technology, provided that they are new, involve an inventive step, and are capable of industrial application."

application must be submitted in the prescribed format to the appropriate agency, which will typically grant legal protection if certain conditions are met. Therefore, the territoriality principle also indicates that receiving protection in one country does not offer the recipient any legal right to receive the same protection in a different country.[18] More significantly, such exclusive intellectual property rights are only effective within the borders of the granting states, in accordance with the territoriality principle; this would logically imply that acts of infringement must take place within the territorial borders of the protecting country.

As there is advancement in new technology and the internet, the infringement happening of intellectual property rights has become without boundaries. So, the judiciary taken such infringement cases and decide differently. Further, due to the signing of international conventions, the nation has the discretion to make flexibility in their legal system to give extensive protection towards the protection of intellectual property.[19] Despite the fact that private international law and intellectual property law developed independently for a considerable amount of time, a unique choice of law rule for intellectual property infringement cases was developed. This regulation mandates the application of the law of the nation for which protection is sought in cases of cross-border violation (*so-called "lex loci protectionis").* Therefore, in the event of a violation of intellectual property rights, the right holder must specify under whose legislation they are seeking protection. Traditional interpretations of the territoriality and *lex loci protectionis* principles are inextricably linked. Additionally, *lex loci*

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[18] In the case of patents, Paris Convention for the Protection of Industrial Property, 1883, art.1bis, cl.1. provides that "Patents shall be independent of patents obtained for the same invention in other countries...‖ This rule is known as the principle of independence of patent rights."

[19] In accordance with Trade-Related Aspects of Intellectual Property Agreement, 1994, art 1, cl. 1. "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

protectionis can be viewed as a development of the idea of territorial intellectual property rights.[20]

According to the territoriality principle, the infringement can only take place within the boundaries of the nation that is guarding it, and in such case, the laws of that nation would be relevant. I cannot accept the notion that distant intellectual property infringements when infringing acts committed in one country cause damage in a third country. There are number of cases dealt by the national and international judiciary related to territoriality principle or the issue of jurisdiction.[21]

In the case of the implication of the principle of territoriality in outer space activities. States are barred from exercising their territorial jurisdiction, control, and authority over outer space. In fact, outer space is a *res comunis omnium*; something that is open for free exploration and uses by all states without the likelihood of appropriation. The general consensus on the binding value of the non-appropriation principle in Art II has rendered the non-appropriative nature of outer space as a customary rule of international law.[22] In outer space, there is no state. I am in doubt that whether the territorial scope of national intellectual property law would be extended to outer space in the same way as in the case of cross-border jurisdiction. But when we consider the two aspects that is 'an object launched into outer space' and 'outer space as such'. The Article VIII of the Outer Space Treaty, the flag state shall retain the jurisdiction and control over that object. Also, if any object is being launched into outer space it must be registered under the Registration Convention as which state such Object is owned.[23] The United States is the only country who make a law to extent the jurisdiction and control over any space object that they launch.[24]

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[20] Paulius JURČYS, *The Role of the Territoriality Principle in Modern Intellectual Property Regimes: Institutional Lessons from Japan,* Jurys2010TheRO. 125, (2010).

[21] See US Supreme Court decision in case Voda v. Cordis, where courts refused to consolidate cases of parallel patent infringements.

[22] Yun Zhao, *Intellectual Property Protection in Outer Space: Reconciling Territoriality of Intellectual Property with Non-Territoriality in Outer Space*, 7 Queen Mary J Intell Prop 137 (2017).

[23] Registration of Objects Launched into Outer Space, 1976, art.II.

[24] US Patent in Space Act, 1790, § 105, cl. a.

This is the main example that can be seen that there can be scope for expansion of jurisdiction by any national/ domestic law in the case of extraterritoriality.

I can also make an argument that the extraterritorial application can be made by the nationals who are party to the TRIPS Agreement. Since Article 1.1 of the Agreement gives some flexibility to the members to extend their domestic law in the field of jurisdiction or any matters but shall not be contrary to the TRIPS Agreement. With this Article, I think it is possible to make Laws related to it. So, the national intellectual property law of the relevant launching country might be applicable in the case of an object launched into outer space. So we can consider the spacecraft or space station could be deemed as a part of the territory of a state by application of the Flagship principle in which there is no such explicit provision on the domestic law.

2) The National Treatment Principle

The principle of National Treatment is another important principle concerned with intellectual property conventions. It is stated under Paris Convention, Berne Convention, Rome Convention, and TRIPS Agreement respectively. The National Treatment principle means that each contracting state must grant the same protection to nationals of other contracting states that it grants to its own nationals. In my viewpoint, National Treatment cannot be applied to outer space because it states about the contracting parties so outer space cannot be treated as a state so that it cannot be a member party to any Convention related to Intellectual Property.

If I state an example to make it clear, suppose Citizen X is a national of A country and Y is a national of B country. Here if we take a case that Y country is not signed in Paris Convention. Then, X and Y made a product or invent an new invention independently throughout the course of an extended stay on a space station. In this case, Citizen X can make patent application as A country is a party to the convention but what will be the position of citizen Y in country B? whether Y can file a patent application that country B is

not a party to Paris Convention? Also, whether Country A is obliged to accord Citizen Y the same treatment as accorded to citizen X?

In Article 3 of the convention itself state that if the state is not a member to the Paris Union, he can get the same treatment if he is domiciled in any of the member state of Paris Union, whether staying for a long period in the space station module is considered as domiciled if such space station has been registered by a Country Z? it does not gain any national treatment. The application of this principle is complicated, and it is uncertain.

3) The Most-Favoured Nation Treatment

TRIPS Agreement provides the principle of Most Favoured Nation (MFN). This principle requires that with regard to intellectual property, any advantages, favour, privilege, or immunity granted by a member to the nationals of any other member shall be accorded immediately and unconditionally to the nationals of all other members except in such situations provided.[25] In my opinion, it cannot be applicable as similar to National Treatment. When the MFN principle is applied to works produced in space by nationals of any member state, there are no issues, but the MFN principle does not apply in those cases where a work is produced by a national of a non-member. This is because a work created by a national of a non-member state is not obliged to receive same treatment.

In the case of patents, the principle of priority can be applied because it different from the view of copyright, though its protection is automatic. The rights of priority is stated under Article 4 of Paris Convention.[26] In the case of outer space. This principle cannot be applicable since there is not patent office in outer space for filing the patent application or the inventor can apply patent application after he return into the earth.

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[25] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 4.

[26] Paris Convention for the Protection of Industrial Property, 1883, art.4A, cl. 1. states: "any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed."

In the case of independence of patents, it is stated under Article 4bis of Paris Convention, this principle states that no matter whether these patents have a shared priority claim, each equivalent patent issued by each national patent office is distinct from the others that is the countries are free to determine the conditions for the registration of patents, the application for registration may not be refused on the ground that filing, registration, or renewal has not been effected in the country of origin. A patent once registered in a country of origin will be independent of the patent registered in other countries of the union. According to me, this principle cannot be applicable to outer space.

Conclusion

I conclude by stating that there is no scope of territorial implication in outer space activities. The inventions created and used in outer space cannot be protected as intellectual property under the principle of territoriality. But as I earlier discussed about the extraterritoriality effect can be applied. The applicability of national law for the protection of Intellectual property because it possesses some limitation of the protection of outer space activities. The other principles cannot be implicated in the outer space activities as such but to an extent.

The state can extend its territorial jurisdiction and some states including the United States had extended their territorial jurisdiction. Since outer space has a quasi-territorial jurisdiction and international law grants jurisdiction to the space objects that it registers. So, it only has jurisdiction over registered space objects and nothing beyond it. Since outer space is not a state, and it is beyond the territorial limits, the principle of National Treatment[27] and Most-Favoured Nation Treatment[28] cannot be applicable to outer space if any works are created (copyright) in outer space by a non-member of the Union. To conclude that there are difficulties in applying the fundamental principles of treatises in outer space activities because the main issue is that International Space Station (ISS) cannot be considered as a state to establish protection under any conventions and treatises.

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[27] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 3.
[28] Trade-Related Aspects of Intellectual Property Agreement, 1994, art 4.

CORPORATE DEMOCRACY IN THE LIGHT OF INVESCO v. ZEE

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Abstract

Shareholder involvement and participation in the corporate decision-making process is crucial for improving corporate governance and accountability. The legal system provides various mechanisms like shareholder meetings and shareholder proposals for shareholders to participate in the governance process. Passivity of shareholders was a major governance issue hampering corporate democracy. Recently, institutional investors have started assuming greater responsibility in corporate governance through internal governance mechanisms. In this context, the article examines the concept of corporate democracy. The article analyses corporate democracy in action through a case analysis to substantiate the role played by institutional shareholders in corporate governance. It examines role of judiciary in upholding the concept of corporate democracy and argues that the judiciary should respect shareholder primacy on matters over which they are statutorily vested with the decision-making power. Shareholder interaction and shareholder activism is gaining traction in India which is definitely a positive trend to be protected in the larger interest of corporate governance.

Keywords: Corporate democracy, shareholder activism, shareholder meetings, shareholder resolutions, institutional shareholders.

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Corporate governance and corporate democracy form an integral part of the effective working of a corporation. The concept of corporate governance has gained much foothold and significance in India and was incorporated into the Companies Act, 2013. Corporate governance is the mechanism that regulates and directs the working of a business. Corporate democracy is an essential element of corporate governance and it is so interlinked that corporate governance is incomplete in the absence of corporate democracy. Corporate democracy implies the democratic culture in a company that recognizes the rights of the shareholders as true owners of the company. Corporate democracy works on the principle that investors should have better role and influence over corporate decisions. The courts have through various judicial pronouncements emphasized the significance of corporate democracy in corporate governance.

The article aims to examine the significance of corporate democracy in corporate governance and the role played by the judiciary in incorporating the concept of corporate democracy into the ambit of corporate governance in India. The article examines the judgment rendered in *Invesco Developing Market Funds & Ors v. Zee Entertainment Enterprises Ltd & Ors* (Invesco case) [1] which analyses the significance of corporate democracy and highlights the necessity for a legal system that encourages shareholder engagement. This article moves on to critically evaluate the judgment in the context of the right of shareholders to requisition a general meeting. The article deliberates on the need for respecting the primacy of shareholders over matters falling within their decision-making power. It examines the propriety of an ex-ante review and ex-post review of shareholder resolutions and discusses the ouster of the jurisdiction of the civil court in company matters. The article concludes by emphasizing that better corporate governance requires shareholder interventions to be promoted.

[1] (2021) 229 Comp. Cas. 540 (Bom)

Corporate Democracy

A democracy is a system of government 'of the people, by the people and for the people'. Drawing analogy from political democracy, the concept of 'corporate democracy' would mean 'a company of the shareholders, by the shareholders and for the shareholders.' A company is an economic entity where business is managed by the agents of the shareholders for the benefit of the shareholders. Though a shift in approach from the shareholder model to the stakeholder model of corporate governance can be seen, the major focus of governance still remains to be the protection of the rights of shareholders and increasing the shareholder value.[2]

Corporate democracy implies governance of the company by the majority of shareholders. Democracy refers to the standards and procedures adopted for decision making including the process of election and voting. Democracy as an organization principle stands for participation in decision making and deliberations.[3] Public companies represent an economic extension of political democracy.[4] In *Life Insurance Corporation of India v. Escorts & Ors.,*[5] the Honourable Supreme Court drew an analogy between the company and the State functioning under the constitution. The shareholders in general meeting and the board of directors, the primary organs of a company are compared with the legislative and executive organs of a parliamentary democracy. The Companies Act, 2013 provides for the distribution of powers among the shareholders and the board of directors. The shareholders in general meeting have sovereignty (decision making power) over matters reserved for the shareholders and the board of directors are vested with the primary responsibility of management of affairs of the company. The board of directors are accountable to the shareholders. However, the strict theory of Parliamentary

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2 Jensen, Value Maximisation, Stakeholder Theory and the Corporate Objective function, 12 Business Ethics Quarterly 235 (2002)

3 Hielscher et al, Participation versus Consent: Should Corporations be run according to democratic principles? 24 Business Ethics Quarterly 533 (2014)

4 Harvey Frank, The Future of Corporate Democracy, 28 BAYLOR L. REV. 39 (1976)

5 AIR 1986 SC 1370

sovereignty will not apply by analogy to a company as under the Companies Act, 2013 the shareholders cannot interfere with the powers vested on the Board of directors.

Corporate democracy stands for the protection of the rights of the shareholders which are regarded as inviolable and sacrosanct. Right to vote, right to stand as a candidate for directorship, right to dividend, right to access information, right to copy of financial statements and right against oppression and mismanagement are the main statutory rights provided to shareholders. The 'charter rights' of shareholders include the rights guaranteed under the memorandum and articles of association. A company is not supposed to violate these rights. But we have seen many corporate horror stories of abuses of shareholders rights.[6] Corporate law provides mechanisms to protect the rights of shareholders and provide remedies in case of violation of shareholder rights. Corporate democracy demands participation of shareholders in the corporate decision-making process. Shareholder meetings, shareholder proposals, the scheme of distributions of powers, proxy fights and suit against oppression and mismanagement are some of the mechanisms provided to enhance shareholder participation and to protect shareholder rights. Shareholder proposals are widely being used to exert influence over corporate affairs.[7] Shareholder proposal accompanied by shareholder voting is the mechanism through which shareholders voice their opinion in corporate affairs. Important decisions concerning the company are taken during annual general meetings based on the majority view of the shareholders. Shareholder meetings and proposals are envisaged to work as a consultative mechanism so as to improve shareholder communication and engagement in corporate governance.

Recently there has been an increase in the involvement and participation of shareholders particularly institutional investors in the corporate governance process. Institutional investors like insurance companies and mutual funds are showing keen interest in

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6 The instances of shareholder rights violation include the Satyam case, the Sahara case and the IPO Scam.

7 Patrick J. Ryan, Rule 14a-8, Institutional Shareholder Proposals and Corporate Democracy, 23 GA. L. REV. 97 (1988)

monitoring the governance process of companies in which they invest. The investment made by institutional investors involves huge money and hence they cannot afford to be passive in governance matters. It is necessary to examine how the scheme of distribution of powers among corporate organs ensure that shareholders are consulted on crucial matters concerning the company.

Distribution of Powers Among Corporate Organs

The scheme of division of powers under the Companies Act, 2013 shows a clear demarcation of power amongst the primary organs of the company namely the shareholders, the board of directors and the management.[8] Each organ shall have primacy over matters falling within their respective domains. The power of the board of directors is co-extensive with that of the company and board of directors are empowered to do all acts which the company is entitled to do. However certain powers are to be exercised by the board only with the consent of the company in general meeting.[9] Consent and approval of the shareholder is mandatory for all major acts affecting capital structure of the company. It includes the power to sell, lease or otherwise dispose of the property, power to borrow beyond paid up share capital of the company, power to invest compensation received as a result of merger or amalgamation.

The power of appointment and removal of directors are vested with the shareholders of a company.[10] These are matters which fall exclusively within the domain of shareholders and hence their wisdom in selection and removal of directors need to be respected by the board of directors. Shareholders have the right to propose a resolution for the appointment and removal of directors. The power of appointment of directors is one way of exercising shareholder control over management of corporate affairs. The right to move a resolution itself is a statutory right.[11] Shareholder proposal mechanism provides a forum for shareholders to challenge

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8 Companies Act, 2013, S 179
9 Companies Act, 2013, S 180.
10 Companies Act, 2013, Ss 152 & 169.
11 Companies Act, 2013, S. 111.

the management rather than passively support all decisions taken by the management. It provides a mechanism to compel management to hold a voting on issues which are considered as significant by the shareholders. Shareholder resolution is the collective mechanism through which shareholders assert their decision-making power and the decisions so taken should be respected by the other organs of the company including the board of directors and the management. When shareholders resolve on matters which are exclusively reserved for their consideration, the board is expected not to obstruct the shareholders but to execute their decisions. The wisdom of the shareholders over matters falling within their jurisdiction requires to be secured and protected.

INVESCO Case

The working of corporate democracy is examined through a detailed case analysis of the decision in Invesco *Developing Market Funds & Ors v. Zee Entertainment Enterprises Ltd & Ors*.[12] The factual metrics of the case is as follows. Invesco Developing Market Funds & OFI Global China Fund LLC (Invesco) collectively held 17.88% of the total paid up share capital of Zee Entertainment Enterprises Limited (Zee). On 11th September, 2021 Invesco issued a requisition notice to Zee to convene an Extraordinary General Meeting (EGM) to remove three non-independent directors and for the appointment of six independent directors on the board of Zee. On 13th September, 2021 Zee informed the Stock Exchanges of receipt of resignation letters from two of these directors. The National Company Law Tribunal, Mumbai Bench (NCLT) directed Zee to consider the requisition. Zee rejected the requisition citing multiple legal infirmities contained in the requisition and filed a suit before the High Court of Bombay which granted an injunction restricting the holding of an EGM. On appeal, the division bench of the Bombay High Court examined whether the shareholders right to hold an EGM can be curtailed and whether the High Court has jurisdiction to decide on the question of holding of shareholders meeting. The Division Bench of the Bombay High Court held that a requisition called by the shareholders cannot be refused by the

[12] Supra n1.

board of directors if the requisition satisfies the numerical and procedural requirements specified under the Companies Act, 2013.

The division bench of the Bombay High Court relied on the decision of the Supreme Court in the case of *LIC v. Escorts & Ors*[13] which is a comprehensive authority on the subject of corporate democracy. The decision emphasised the significance of corporate democracy and shareholder rights thereby supplementing the right guaranteed under section 100 with a judicial precedent. In LIC case, the constitution bench of the Supreme Court ruled that every shareholder of a company has the right to call an extraordinary general meeting in accordance with the provisions of the Companies Act. The Supreme Court dwelled into the ambit of corporate democracy and held that an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint others. Corporate democracy implies rule by the majority. The will of the majority is exercised through the voting process which happens during shareholder meetings. If shareholder meetings are not held, discussion and voting process cannot happen and the expression of the will of majority of shareholders becomes impossible. Ultimately, this may result in the company being run according to the whims and fancies of the management who may constitute the minority. Management of corporate affairs by the minority group goes against the fundamental principle of corporate democracy.

The division bench of the Bombay High Court relied on the decision in *Isle of Wight Railway Company v. Tahourdin* [14] where it was observed that it is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere if the majority of them think that the course taken by the director, in a matter intra vires of the directors, is not for the benefit of the company. Also, in *Bentley Stevens v. Jones*[15] it was held that a shareholder had a statutory right to move a resolution to remove a director and that the

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13 AIR 1986 SC 1370
14 (1883) 25 Ch D 320
15 *Bentley Stevens v. Jones* (1974) 2 All ER 653

court was not entitled to grant an injunction restraining him from calling a meeting to consider such a resolution.

Section 100(2)(a) of the Companies Act, 2013 guarantees the shareholders a statutory right to requisition for an EGM and Section 100(4) of the Act secures the right so guaranteed by granting an additional right to the shareholders to hold an EGM if the board fails to do so. The term 'shall' as used in section 100(2) imposes on the management an obligation, mandatory and not discretionary in nature. The intent of the legislature to secure and protect the rights of the shareholder can very well be inferred from the use of the term 'shall' under section 100.

Requirements for a Valid Requisition

Shareholder meetings provide opportunity to shareholders of a company to debate and vote on matters affecting the company. The annual general meeting is held every year to discuss and review the working of the company. The Companies Act, 2013, section 100 enables the shareholders to requisition an extra ordinary general meeting. The requisition is to be signed by shareholders having one tenth of share capital. In case of a company not having share capital the requisition is to be made by shareholders who have not less than one-tenth of voting power. The requisition must specify the matters for consideration during the meeting. When the requisition is deposited at the registered office, the directors should call a meeting within 45 days of requisition. If the directors fail to call a meeting, the shareholder who had given the requisition can call a meeting on their own. Any reasonable expenses incurred by the shareholders in calling the meeting shall be reimbursed by the company. The shareholders can make use of the right to requisition a meeting whenever they feel that any matter is to be taken up for discussion among the shareholders.

If the procedural and numerical requirements are satisfied, the board has no option but to call the meeting. Thus, the only question which the single bench in Invesco case ought to have looked into was whether the requisition was a valid requisition or not. 'Validity' of the resolution is to be examined on the basis of the

procedural and numerical requirements mentioned in section 100 of Companies Act, 2013. But instead of examining this issue, the court went on analyse the illegalities alleged to be involved in the resolution proposed to be adopted by the shareholders, which was a totally unwarranted exercise. The Companies Act, 2013 does not provide the validity of the resolution to be tested on the touchstone of the merits of the resolution proposed to be adopted as that would amount to the board sitting in judgment over the decision of the shareholders.

Alleged Illegalities in The Proposed Resolution

The single bench of the Bombay High Court issued the injunction restricting the holding of the EGM based on alleged illegalities in the resolution proposed by Zee. The main argument adduced before the Court was that the resolution if passed would amount to an illegality on account of violation of legal provisions. The illegalities were alleged on the grounds of non-conformity with the Policy Guidelines for Up linking of TV Channels, 2011 by Ministry of Information and Broadcasting (MIB Guidelines), procedural non-compliance by circumventing the Nomination and Remuneration Committee (NRC), and violation of Regulation 17(1)(a) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015(SEBI LODR). An in-depth analysis into the allegation of illegalities shows that it lacks merit.

Approval of MIB

The provisions of clause 5.10 of the MIB Guidelines for Up linking of TV Channels, 2011 issued by Ministry of Information and Broadcasting mandate prior approval before effecting changes in the board.[16] Prior permission for change of board of directors is to be obtained by the license holder 'Zee' and not the shareholder (Invesco). The interpretation of MIB guidelines would not reasonably mean that the approval should be obtained prior to the holding of the EGM. MIB Guidelines require consent to be taken before effecting the changes in the board. The resolution passed by

[16] Ministry of Information and Broadcasting (MIB) Guidelines, https://mib.gov.in/sites/default/files/FinalUplinkingGuidelines05.12.2011.pdf

shareholders In the EGM can very well provide a clause that the appointment and removal of directors will take effect only after the same is approved by MIB. The decision going to be taken in an EGM cannot be predicted in advance and hence approval can be sought only subsequent to the decision of the EGM. There are equal possibilities of the resolution for removal or change in directors to be approved or rejected. Hence the argument that the proposed resolution will result in violation of MIB guidelines is unsustainable. It is also pertinent to note that the requisition given by Invesco for appointment of new directors expressly mentioned that the appointment shall be subject to the approval by MIB.

Approval of Nomination and Remuneration Committee

The second illegality alleged is the violation of Section 178 of the Companies Act, 2013 and Regulation 19 of SEBI LODR regulations which deals with the power of the Nomination and Remuneration Committee (NRC) to identify persons to be appointed as directors. NRC is vested with the power to identify persons who are qualified to be appointed as directors and in senior management and make recommendations for their appointment to the board of directors. Thus, NRC is envisaged as a body to assist the board of directors in matters related to appointment of directors. The nomination put forward by Invesco of independent directors will not amount to circumvention of the powers of the NRC as Section 160(1) of the Companies Act, 2013 explicitly provides the shareholders the right to propose candidates to be appointed as directors or independent directors. Section 160 requires a notice signifying the candidature and the intention of a member to propose him as a candidate for directorship to be given to the company 14 days prior to the general meeting along with a deposit of the amount prescribed. It these requirements are satisfied, the company shall inform its members of the candidature.

The statutory right of shareholders to propose persons of their choice for directorship and the right of a person to stand as a candidate for directorship cannot be taken away on the ground of non-approval from NRC. NRC approval is envisaged only for appointment of directors made by the board of directors and not for

appointments proposed by shareholders. NRC approval cannot restrain the opportunity given to the shareholders who are not part of the existing management to stand as a candidate for directorship or nominate another person as director. The election process must be open to all shareholders. Nomination and remuneration Committee was introduced to identify potential candidates who has the requisite skills and talents for managerial positions. It is never intended to withdraw the right of shareholders to nominate director candidates. If approval by NRC is made mandatory, it can result in undue control of management over the process of selecting directors. It is a fundamental principle of corporate law that power to elect directors shall be exclusively vested with the shareholders.

Vacancy of Executive Director

The third allegation raised is the violation of Regulation 17 of SEBI LODR, 2015 which requires the board to have optimum combination of executive and non-executive directors. Zee's contention that the removal of Mr. Goenka, the only executive director of Zee will result in a vacancy and is a violation of Regulation 17(1)(a). This argument lacks merit in light of Section 203(4) of the Companies Act, 2013 which provides that vacancy in the office of the Chief Executive officer is be filled within a period of 6 months from the date of such vacancy. If the shareholders lose faith in the only executive director of the company, they have every right to remove him from office. But a new executive director needs to be appointed within six months.

The provisions of the Act as well as the decision in *LIC v. Escorts* lays down the ground rule that the rights of the shareholder to hold an EGM cannot be curtailed. The statutory right of the shareholder to convene an EGM cannot be barred on the grounds of alleged illegalities in the proposed resolutions. The Supreme Court rightly pointed out that a shareholder is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting and the reasons for the resolutions cannot be subject to judicial review. The legality of the resolution cannot be used as a ground to bar the holding of an EGM since it would put a fetter on the rights of the shareholders.

Ex-Ante V Ex-Post Review of Shareholder Resolutions

An *ex-ante* review of the resolutions proposed to be adopted by the shareholders in the general meeting is an attack on the very concept of corporate democracy. An *ex-ante* review of shareholder resolutions would amount to an usurpation of decision-making powers of the shareholders and would act as a fetter on shareholder democracy. Preempting the decision-making power of shareholders through an ex-ante review of the proposed shareholder resolution by the court is an indirect way of denying the statutory rights of shareholders. Ex-ante review process may be used as a tool by an unwilling board seeking to obstruct its shareholders from exercising their statutory rights. In the case of *Centron Industrial Alliance Ltd v. Pravin Kantilal Vakil & Anr.,*[17] the single judge of the High Court rightly observed that the main reason why injunctions are not normally granted to restrain the holding of a requisitioned meeting is that the shareholders ought to be allowed to regulate and set right the affairs of the company by calling general meetings. Normally, meetings are requisitioned by the shareholders in order to pass resolutions which are not supported by the board of directors or the management of the company. The board of directors may try to thwart the calling of such a requisitioned meeting. The board of directors should not be allowed to refuse to call a requisitioned meeting on the ground that the board considers the resolutions proposed to be passed at such a meeting as undesirable or not in the interest of the company. The ex-ante review derails the democratic functioning of companies as is evident in the Invesco case, where the shareholders despite have requisitioned an EGM on 11th September, 2021 was unable to hold the same for months thereafter.

As opposed to *ex-ante* review an *ex-post* review not only serves the interest of justice but also protects the rights of shareholders. In the case of *Cyrus Investments Pvt Ltd & Anr v. Tata Sons Ltd & Ors*[18] the National Company Law Appellate Tribunal (NCLAT) in an *ex-post* review of the resolution passed for the removal of a director from his office went on to hold the director's

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17 1985 57 Comp.Cas. 12 Bom

18 2019 SCC OnLine NCLAT 858

removal as illegal and ordered his reinstatement to the office of the director. The Companies Act, 2013 provides ample provisions to seek appropriate remedies against actions taken in pursuance to illegal/improper resolutions passed by the company in general meeting. Thus ex-post review of the resolution should be the rule and courts should refrain from issuing injunctions restraining shareholders from holding meetings.

Even if the board has serious objections to the proposed resolution, they are obliged to convene the meeting and their remedy lies not in preventing the meeting from being convened but only in challenging the resolution after it has been passed. The right of the shareholders to hold an EGM forms part of their right of corporate democracy and the rights granted to the shareholders in their capacity as owners of the company are inalienable and should not be curtailed. Moreover, proposing resolutions in the agenda of the meeting does not mean that it is going to be surely passed. The resolution would be passed only if it receives the support of the majority of shareholders who would be taking the decision after considering various aspects of the proposal including the best interests of the company. Restraining the shareholders from holding the meeting would be a violation of shareholders statutory right to discuss, deliberate and decide on the affairs concerning the company.

Ouster of Jurisdiction of Civil Court

Ouster of jurisdiction of civil court over company matters need to be appreciated in the light of the fact that company cases involve complex issues requiring expertise and specialized knowledge in the field. Corporate democracy, shareholder engagement and oppression of minority are issues which can be better adjudicated by a specialized tribunal.

The Companies Act, 2013 ousts the jurisdiction of the Civil Court.[19] The National Company Law Tribunal is vested with the power to deal with matters relating to the calling of a meeting of

[19] Companies Act, 2013, S. 430

members.[20] The scheme of sections from section 96 to 100 grants the tribunal the power to call an AGM and an EGM. Section 100 r/w section 98 clearly empowers the tribunal to deal with matters regarding the calling of an EGM and consequently ousts the jurisdiction of the civil court to determine the same. The Supreme Court in the case of *Union of India v. R Gandhi* [21] highlighted the fact that when the Companies Act substituted the High Court by creating the NCLT, there was necessarily a 'wholesale transfer' of company law matters to the tribunal. The transfer of jurisdiction was an inevitable consequence of the creation of NCLT.

The *Invesco case* is a clear case where the single judge of High Court wrongly assumed jurisdiction. Mumbai bench of NCLT had ordered Zee to consider the requisition, but Zee rejected the requisition and chose to file a suit before Bombay High Court. When specialized tribunals like NCLT & NCLAT are created with expertise to deal with company matters, other courts should restrain themselves from entertaining matters which are brought within the exclusive jurisdiction of specific forums. Parallel exercise of jurisdiction by different forums can defeat the cherished rights of shareholders as it happened in the Invesco case. Parallel exercise of jurisdiction by Bombay High Court in Invesco Case resulted in ex-ante review of proposed resolution defeating the statutory right of shareholders to convene the shareholders meeting. If jurisdiction of civil courts is allowed, corporate democracy would be a casualty. We have to accept the fact that tribunals are in a better position to appreciate company matters by virtue of their expertise and specialized knowledge.

Shareholder Activism

Shareholder activism refers to the strategies adopted by investors to influence corporate policy and behaviour.[22] Shareholder activism play a significant role in shaping corporate behaviour and in fostering better governance and performance of companies.

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[20] Companies Act, 2013, S. 98.

[21] [2010] 11 SCC 1

[22] Stuart L. Gillan & Laura T. Starks, The Evolution of Shareholder Activism in the United States, 19 Journal of Applied Corporate Finance 55, 58 (2007).

Abuse of power by corporate managers and directors could also be curtailed to a large extend if the investors play an active role in controlling the directors and managers through their active engagement in governance mechanisms. Traditionally investors have taken a 'hands-off' approach in governance issues. The landscape of corporate governance has changed over the years. The growth of shareholdings of institutional investors was followed by a significant rise in shareholder activism all round the world. Investors are using different strategies to influence corporate behaviour. Proxy fights involving contest for board seat, use of voting rights to unseat board members, shareholder proposals in matters like executive remuneration, choice of auditors, and shareholder campaigns for environmental and social causes are widely employed strategies of shareholder activism.[23]

There has been a gradual increase in shareholder activism in India and institutional shareholders are using different engagement strategies to influence corporate behaviour and polices.[24] The Invesco case present a classic case where the institutional shareholder took a proactive role in the management of corporate affairs of the investee company by requisitioning a meeting for appointment of six independent directors and removal of three executive directors. Lack of confidence in the incumbent management or mismanagement of affairs may be the reason that prompted the institutional investor to take such a drastic step. Whatever may be the reason behind the requisition, the initiative taken by the institutional investor need to be appreciated because instead of remaining passive, the investor took an active role in 'setting things right.' Such kind of shareholder activism would surely incentivize the management to ensure better corporate governance and protection of shareholder rights.

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[23] Yermack, Shareholder Voting & Corporate Governance, 2 Annual Review of Financial Economics 103, 125 (2010).

[24] Preetha S, "Emerging Prospects of Shareholder Engagement in India",14 Indian Journal of Corporate Governance, 226,247 (2021).

Conclusion

Corporate democracy is gaining strength in India with the activist role played by institutional investors. The judgment of division bench of the Bombay High Court in Invesco case is a landmark judgment upholding the rights of shareholders and the concept of shareholder democracy. It lays the foundation upon which the future demands of shareholders rights and corporate democracy can be met. The judgment would pave the way for increased and proactive shareholder activism in India and act as a deterrent to the corporations in their attempts to restrict corporate democracy and shareholder activism. Shareholder democracy demands better access to the shareholders to corporate governance which can be achieved through the right to participate in the decision- making process. The right to appoint a director and right to remove a director are substantive rights given to a shareholder which can be exercised collectively only in a general meeting. The shareholders choice should ultimately prevail on matters over which they are empowered to take a decision as per the statutory scheme. Hence interdicting shareholders from holding a general meeting would be a blatant violation of the shareholders rights. It is encouraging to find that institutional investors are playing an active role in corporate governance through different interventionist strategies which need to be promoted by the legal system in the larger interest of better corporate governance in India.

RUSSIAN INVASION OF UKRAINE: ILLUSION OF HUMANITARIAN INTERVENTION

Dr. Vaibhav Goel Bhartiya[*] *& Anshul Saxena*[♦]

Abstract

This article argues that Russian invasion of Ukraine which began on 24th February 2022 does not have any humanitarian character as was tried by Russian Federation to be one of the subtle justifications for its aggression. In the initial parts this article discusses about two fundamental norms of international law that are- Non-intervention and Protection of human Rights and how this creates an impasse for legal jurists which has led to widespread condemnation of Unilateral Humanitarian Intervention in legal fraternity with only minority arguing for its legitimacy. This article then assumes for discussion's sake that Unilateral Humanitarian Intervention is legal and outlines the generally accepted criteria among its proponents which should be used to test if any such humanitarian intervention is genuine or not. Then it is shown using credible evidence that Russian invasion does not even meet the basic prerequisite given in the said criteria. This article finally concludes that even if Unilateral Humanitarian Intervention is assumed to be legal, still this invasion would not be legitimate as it does not satisfy the minimum condition for it to be a genuine act done on humanitarian grounds.

Key words: Invasion, Russia, Ukraine, Aggression, Human Rights, Unilateral Humanitarian Intervention.

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Introduction

On 24th February 2022, Russian President Vladimir Putin announced in a televised address that he has authorized Russian armed forces to launch what he described as a "special military operation." If we look at the official letter sent by the Permanent Representative of the Russian Federation to the United Nations (hereinafter UN) addressed to the UN Secretary General, it talks about the measures taken by the Russian Federation in accordance with the Article 51 of the UN Charter in exercise of right of self-defense. The letter also had attached with it the text of address President Putin made to the public announcing the start of the campaign. The text in one of the paragraphs outlined the official legal justification put forward by Putin for his invasion. It read as follows:

> 'In this regard, in accordance with Article 51 (chapter VII) of the Charter of the United Nations, I have decided to conduct a special military operation with the approval of the Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, as ratified by the Federal Assembly on 22 February this year.'[1]

So. the official justification of Russia was the exercise of right of self-defense and the mention of mutual assistance treaties with the two so called republics as recognized by Russia also implies the right of collective self-defense.

However, one interesting thing to observe is that Putin also talks about atrocities being faced by people of the Donbass region and uses the term genocide to signify the extent of humanitarian crisis. At one place he says:

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[1] Full Text of Vladimir Putin's Speech Announcing 'Special Military Operation' in Ukraine, (Feb 24,2022), https://theprint.in/world/full-text-of-vladimir-putins-speech-announcing-special-military-operation-in-ukraine/845714/ (last visited April 20,2023).

> 'As I said in my previous address, one cannot look without compassion at what is happening there, but all of this became simply impossible to tolerate. We had to stop this nightmare – a genocide against the millions of people living there who are pinning their hopes only on Russia, on us alone.'[2]

More importantly, just below that paragraph wherein Putin justifies the invasion by invoking right of self-defense as given under Article 51 of the UN Charter, he also mentions the purpose of stopping genocide and abuse by Kiev regime. He says: "Its purpose is to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years."

This article will focus on this potential justification of humanitarian intervention given by Russia to grant legitimacy to its invasion and look at the factual and legal questions involved as far as this proposition is concerned. Though Russian Federation only used right of self-defense as the sole official justification for its invasion as seen above, however by referring to alleged human rights abuses and more significantly using the word genocide multiple times, it is highly probable that Russia wants to use humanitarian intervention as a potential justification, maybe not in official UN meetings or in some other official settings, but certainly in the court of public opinion. So, in this article it will be discussed whether Russia's invasion can get any sort of legitimacy by using the justification of humanitarian intervention.

In this regard, we shall first discuss about the legality of concept of Unilateral Humanitarian Intervention (hereinafter UHI) as it will be highly difficult for Russia to use UHI as a potential justification if the very concept is treated as illegal. For this purpose, it is first necessary that we look at the text of the UN Charter as it is the most important written document or treaty in the field of Public International Law to this day and try to extract the relevant Articles which would have a material bearing on the question of legality of Unilateral Humanitarian Intervention.

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[2] *Id*.

Fundamental Principles Enshrined in the UN Charter

If we look at the text of the UN Charter, two fundamental norms or principles can be said to be the overarching theme of the Charter. The first principle is that of territorial sovereignty of a State. Indeed, the UN Charter in one of its article[3] clearly prohibits member states from using any force or even threat of it against any other State which would violate its territorial integrity. The prohibition on use of force in explicit terms in the Charter illustrates the desire of the drafters to reduce the chances of armed conflicts to the maximum extent possible.

This principle has been strictly interpreted in various United Nations General Assembly Resolutions. Most relevant is the resolution: "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,"[4] which was adopted by the Assembly in 1965 which prohibits any armed intervention done for any reason whatever, to uphold spirit of non-intervention and territorial sovereignty enshrined in Article 2(4).

Similarly, in one other Article[5] the Charter also prohibits the UN itself to intervene in domestic jurisdiction of any State except for the measures undertaken under Chapter VII of the Charter. It can be thought of as containing the general principle of non-intervention.

These two articles make it clear in no uncertain terms that sovereignty of a State is inviolable and Charter only recognises exception of self-defence explicitly. However, as we shall see later, some jurists have interpreted the above articles in such a manner so as to justify other exception namely, Unilateral Humanitarian Intervention.[6] Still, it cannot be denied that principle of territorial sovereignty and integrity of a State is a fundamental norm of

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3 U.N. Charter art. 2(4).
4 G.A. Res. 2131 (XX) (Dec 21,1965).
5 U.N. Charter art. 2(7).
6 *Infra* note 10.

International Law from which no derogation is permitted unless exceptional circumstances arise.

Second fundamental principle enshrined in the Charter is respect and promotion of Human rights and dignity. To illustrate, one of the purposes written in Article 1(3) of the Charter is that of promoting and encouraging respect for human rights.

Similarly, clause three of Article 55 of the Charter also talks about observance of human rights and having respect for them.

Article 56 asks States to take joint and separate action in cooperation with the organization for achievement of purposes set forth in Article 55.

However, the most definitive evidence that UN was created primarily to protect and promote human rights comes from its preamble which states: "United Nations is determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."

Further, many resolutions that have been adopted by the General Assembly over the years to protect human rights have also helped in making human rights protection as important as respecting territorial sovereignty. Most important being Universal Declaration of Human Rights (UDHR)[7] adopted in 1948 which was passed without any dissenting vote and which many consider to be the most authoritative interpretation of the Charter.[8]

This discussion makes it clear that respect and promotion of Human Rights is one of the fundamental principles of International Law and one of the primary objectives of UN and also individual States.

These two norms of International Law are relevant in our discussion because those who oppose UHI argue that it violates first

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7 G.A.Res.217 A (III),A/RES/3/217A (Dec 10,1948).

8 Louis B. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMM'N JURISTS 17, 23 (1967).

norm of territorial sovereignty while its supporters argue that it promotes the second norm of protecting human rights. So, we can see why doctrine of Unilateral Humanitarian Intervention has created an impasse for jurists since it puts two fundamental norms of International Law in a conflict with each other if we go by popular interpretation of relevant UN Charter provisions.

Unilateral Humanitarian Intervention- Testing its Legality

There are two sets of arguments given to rebuke legality of UHI. First set consists of a pure legal exercise, or we can say consists of a purely legal position where the concept of UHI is shown to be violative of UN Charter, especially Article 2(4) prohibiting use of force[9]. This argument essentially states that even if a particular case of UHI is shown to be genuine, still it would be illegal. The prohibition contained in Article 2(4), as per this argument is all pervasive, admitting of no exception except those contained in the Charter itself like right of self-defense. It does not try to go into the fact-finding process of determining intention of the intervening state and its conduct before, during and after the intervention, as according to this legal position even a genuine UHI is illegal.

The second set of arguments is more based on realistic view of geopolitics and practical considerations. It is essentially the idea that if an exception is made out for UHI from general principle of non-intervention, then it could be used as a pretext by the States to initiate wars for their own interests. Some authors call it the most "compelling"[10] argument against legalization of UHI while some call it the most "common"[11] one. This fear or apprehension is rooted in the history which is full of massive bloodshed, loss of human lives and destruction of property that has occurred as a result of various acts of aggression by one State against another. For such realists, if UHI is made or considered legal, then we might actually

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9 I. Brownlie, International Law and the use of Force by States 267 (Oxford University Press,1963).

10 Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000).

11 Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1020 (1998).

end up losing more lives due to cases of pretextual UHI than we save in genuine ones. So, on practical grounds, they reject any limited exception in favor of genuine UHI.

It is worth noting that those relying on purely legal basis to question legality of any case of UHI, also take the help of abovementioned practical considerations to draw inferences regarding intention that the drafter had while framing Article 2(4). It is their argument that since UN came into existence in the aftermath of the most horrific war that the mankind had ever seen, the primary purpose of UN was to prevent any type of war in the future. Indeed, the first line in the preamble of Charter states: *"*.... to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."

So as their argument goes, drafters intended to completely prohibit use of any type of unilateral force for any purpose by one State against another since allowing exceptions to this principle would increase the possibility of pretextual actions and dangerous escalations which could result in a war and the drafters were fully aware of this. They only admitted exception of self-defense which they incorporated explicitly in Article 51 of the Charter and so no further exceptions can be implied to Article 2(4) of the Charter as per this argument.

On the other hand, there are few jurists who accept that a limited right to intervene purely on humanitarian grounds exists and same can be made out from a purposeful interpretation of the Charter. For example, jurists Michael Reisman and Myres McDougal[12] point out to the "qualifying phrases" mentioned in the Article 2(4) to support this contention. These qualifying phrases can be broken down into three parts:

1.territorial integrity
2. political independence
3. any manner inconsistent with purposes of United Nations.

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[12] W. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, *in* Humanitarian Intervention and The United Nations 177 (Richard Lillich ed., 1973).

In their view UHI does not violate Article 2(4) as it does not fall in any of the above three mentioned qualifying phrases. They argue that a genuine act of UHI is undertaken solely to defend human rights of the persecuted in another State and the intention of the intervening State is not to violate the territorial integrity of the State or of splitting it and neither does it have any intention of politically subjugating that State. Further it is contended that protection of human rights is one of the fundamental norms in International Law today as seen from the language of the Charter and which has been discussed here earlier. So instead of being inconsistent with purposes of UN Charter, it rather fulfils its purpose.[13]

There are other legal arguments also presented to support the legality of UHI like trying to justify it on the basis of a customary norm or on the basis of subsequent State practice. This article will not go into details of such arguments as it is beyond its scope. It is sufficient to say that multiple line of legal reasoning exists among some jurists to conclude that genuine case of UHI is legal.

Besides the strictly legal arguments given in support of UHI, there is also a normative argument given in its support. It states that such intervention should be made legal or at the very least considered as legitimate on moral grounds of protecting human lives and dignity. Such jurists are of the view that even if it is accepted that UHI is not strictly legal if we go by the prohibition contained in Article 2(4) of UN Charter, a new legal right of UHI which is undertaken in situations of extreme human rights abuses should be recognized. One such jurist says: "the right of people not to be killed should not depend on whether the state of which they are citizens is in a position to protect them, wants to protect them, or is itself the source of the danger."[14].

As it is known, United Nations Security Council (hereinafter UNSC) rarely reaches a consensus on issues of grave importance

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[13] *See also* Fernando R. Tesón, Humanitarian Intervention: an inquiry into Law and Morality 158-59 (Transnational Publishers,1988).

[14] Malvina Halberstam, *The Legality of Humanitarian Intervention* 3 CARDOZO J.INT'L & COMP.L.1 (1995).

since interests of its two permanent members which are United States of America and Russia are most of the times divergent to each other. This has led to veto power being used to block resolutions time after time concerning major conflicts or cases of grave human rights abuses. Since UNSC has been given the primary responsibility under the UN Charter to maintain international peace and security along with the power to authorize an armed intervention in any State for that purpose, deadlock due to rivalry among permanent members has led to inaction or late action in most instances. Jurists who put forward the normative argument contend that fate of human beings facing grave violation of their rights and dignity cannot be made subject to a veto of any permanent member of UNSC[15] and any State willing and able to intervene in such a scenario purely with the purpose of protecting human rights has a moral obligation to do so and such intervention should be granted legality in International Law.

As we can see, there are few jurists who do support the right of UHI either by using legal arguments or by using a normative or moral argument. However, as it stands today, still almost all States and majority of the scholars view UHI as unlawful[16]. Many strong States including China and India have expressed strong opposition to any such humanitarian intervention. Many post-colonial states in Africa and Asia too have opposed it. They have always had doubts if intention of an Intervening State in such an intervention would remain purely humanitarian[17].

In such a scenario, it seems difficult for Russia to get any legitimacy by using the justification of UHI. However, besides strict legal principles, there is a moral dimension too in this debate. The 'illegal but legitimate argument'[18] given in support of UHI by some scholars, particularly in context of Kosovo intervention by NATO forces, can be potentially used by Russia as a moral justification

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15 *Id* at 6.

16 Sean D. Murphy, *Criminalizing Humanitarian Intervention* 41 CASE W. RES. J. INT'L L 341, 345 (2009).

17 Adam Roberts, *The So-Called "Right" of Humanitarian Intervention* 3 Y.B. INT'L HUMANITARIAN L.3, 32 (2000).

18 *See generally* Independent International Commission on Kosovo, Kosovo Report: Conflict, International Response, Lessons Learned (Oxford University Press, 2000).

which is perhaps as important as legal justification in the real world. For this purpose, it would be interesting to see if this invasion can qualify as a genuine UHI. We shall assume that UHI is legal hypothetically for this purpose and see if Russian invasion can qualify as a genuine case of an UHI.

Criteria for a Genuine Unilateral Humanitarian Intervention

Even after assuming UHI to be legal, no one can deny or challenge that there exists a real danger that a State might commit aggression upon another Sate under the garb of UHI. Threat of pretextual interventions is a very real one which is one of the main reasons that so many jurists oppose granting any sort of legitimacy to even genuine humanitarian interventions[19]. To overcome this hurdle, there have been few attempts made to come up with some criteria to test whether any such humanitarian intervention is genuine or not. Obviously, there is always going to be some controversy on any such criteria proposed since we cannot take help or guidance from any treaty or ICJ judgement or any official resolutions of the General Assembly in this subject matter. However. the very nature and concept of UHI is such that there can be said to exist few broad sets of criterions that any reasonable person would expect to be satisfied by any such genuine intervention. This article shall touch these criterions in brief and then test if Russian invasion of Ukraine satisfies them as far as humanitarian character of their invasion is concerned.

The most fundamental criteria which is an absolute pre requisite for any UHI to be deemed as genuine is that there should be credible evidence of grave and widespread human rights abuses that absolutely shock the conscience of mankind. Oppenheim also wrote about the level and extent of human rights abuses which could justifiably trigger such an intervention:

"When a state renders itself guilty of cruelty against and persecution of its nationals in such a way as to deny their

[19] *Supra* note 11.

fundamental human rights and to shock the conscience of mankind."[20]

While it is impossible to be precise in defining this standard and some may even say not desirable either when we are talking about saving human rights and dignity, still this standard conveys the message that UHI is only to be undertaken in rarest of rare cases, when human rights abuses are gross and extreme with substantial deprivation[21] and gives enough guidance to international community to judge whether any purported act of UHI is genuine or not.

While the above condition is indispensable and sine qua non for undertaking any UHI, there are few other factors to be considered which are supplementary to this condition. Reason they are called supplementary is because even if some of them are not observed fully still intervention may be treated as genuine. However, they do have probative value in judging whether the intervention is genuine or not. Some of these factors are listed below:

1. ***Exhaustion of all peaceful means***

   Since UHI is an extreme measure, it should only be taken as a measure of last resort when all other peaceful means have been exhausted.[22] However, sometimes waiting too long before intervening might defeat the purpose of intervention. In situations where things are deteriorating rapidly, timely intervention is of essence and may be taken before exhausting all diplomatic and economic measures. Further, it is impractical to stress on exhausting all non-forceful measures since there is no end to measures that can be taken in this regard.

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[20] L. Oppenheim, International Law 312 (Lauterpacht ed., Longmans, 1955).

[21] Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 229,348 (John N. Moore ed., 1974).

[22] D. J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention* 23 U.TOL.L.REV.291 (1992).

2. ***Multilateralism***

When a group of countries join in undertaking an intervention on humanitarian grounds, it lends credibility to such an intervention. It indicates that any one State is not acting out of ulterior motives. However, it is unreasonable to expect that every genuine case of UHI would be multilateral since it might be impractical for some countries to join in due to geography and cost and there might be geopolitical concerns too preventing any sort of alliance to form to undertake UHI. However, positive response by various States towards the intervention in the diplomatic arena and support for use of force is also an aspect of multilateralism and goes a long way in establishing genuine character of the intervention.[23]

3. ***Proportional use of force***

It is natural to expect that any State intervening on altruistic grounds to end mass suffering would use only as much force as necessary and would not be excessively aggressive in dealing with the situation.[24] However, it is quite possible that there might be few incidents where force used is excessive because an honest error of judgement on part of the intervening State and its armed forces in dangerous situations cannot be ruled out. Hindsight in these situations sometimes can place an unrealistic burden on the intervening State.[25]

Whether Russia's Intervention Can Qualify as Humanitarian?

After having analysed in brief the broad set of criteria that is generally given by supporters of UHI to test genuine character of any purported act of UHI, let us now turn our focus to Russian

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[23] Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities 16* FORDHAM INT'L L.J. 120, 155 (1992).

[24] Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter* 4 CAL. W. INT'L L.J. 203, 262-64 (1973).

[25] *Id.*

invasion of Ukraine to test if it satisfies them and whether one of the Russian justifications of the invasion which was that it is humanitarian in character holds any ground or not. It is again reiterated here that this article does not consider UHI legal and it is only a hypothetical discussion to check if this invasion is genuine as far as its humanitarian character is concerned even if we assume that UHI is legal or should be considered legitimate on moral grounds.

We shall first start with the most basic prerequisite given in the criteria that should form the basis for starting any humanitarian intervention, which is that UHI can only be ever accepted when there are human rights violations so grave and widespread that they shock the conscience of mankind. It envisages a situation where a group or community is under systemic or widespread repression and are victims of some of the most heinous crimes known to mankind. Further, it is acknowledged that it would be impractical to expect intervening State in such a situation to act out of purely humanitarian concerns since such an intervention would normally entail huge economic costs and also possible loss of lives of its citizens or serious injuries to them. It would be thus sufficient if the dominant objective was to save human lives and dignity even if it also might have contained some other benefits to the intervening State.

In the present Russia Ukraine conflict, Russia has accused Ukraine of committing grave and massive atrocities on Russian speaking people of the Donbass region. Present conflict in Donbass region can be said to have started in 2014 after Russia annexed Crimea. The rebel groups in the Donbass proclaimed themselves as two independent Republics called Lugansk People's Republics (LNR) and Donetsk People's Republics (DNR). This started the conflict between pro Ukrainian Forces and the secessionist groups.

In almost eight years since the conflict started, there have been several reports of numerous human rights abuses in the region. However, interesting thing to note is that evidence suggests that these abuses occurred from both sides. To elaborate further, here is a quoted portion from paragraph three of one of the reports of Office

of the United Nations High Commissioner for Human Rights (OHCHR)[26]:

> 'OHCHR estimates the total number of conflict-related detentions in Ukraine from 14 April 2014 to 30 April 2021 as between 7,900 and 8,700 (with men comprising approximately 85 per cent and women 15 per cent of detainees): 3,600- 4,000 by Government actors and 4,300-4,700 by armed groups and other actors in territory controlled by the self-proclaimed republics.'

This quoted portion shows that for the approximate seven years duration between April 2014 to April 2021, both the sides were guilty in equal measure as far as conflict related detentions were concerned. The number of such reported detentions were almost equal by the authorities as well as armed groups. The same report in paragraph 11 further goes on to accuse both the parties of committing some grave human rights violations like indulging in acts of torture and ill treatment as well as sexual violence for extracting confessions or for humiliation and intimidation.[27] In the next paragraph, that is para number 12,report goes into some details about the kind of torture and ill treatment that was being carried out by both sides which included beatings, electrocution, rape of men and women, sleep deprivation and some other heinous acts. The report paints a grim picture of the situation that was prevailing in the area and accuses all the parties concerned of being guilty of perpetrating crimes against humanity. Furthermore, it is being reported by an UN agency which provides credibility to the evidence.

To further provide evidence that both sides were indulging in such acts, here is an excerpt from the summary at page number

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[26] OHCHR, Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021, (July 02, 2021), https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineArbDetTorture_EN.pdf (last visited July 03,2023).

[27] *Id* at 2.

six of a report published by the well-known NGO 'Amnesty International'[28]:

> 'Both the Ukrainian government authorities and Russia-backed separatists in eastern Ukraine have held civilians in prolonged, arbitrary detention, without any contact with the outside world, including with their lawyers or families. In some cases, the detentions constituted enforced disappearances, meaning that the authorities in question refused to acknowledge the detention of the person or refused to provide any information on their whereabouts or fate. Most of those detained suffered torture or other forms of ill treatment. Several were denied needed medical attention for the injuries they sustained in detention.'

This shows that both Ukrainian side and separatists have been involved in committing widespread and grave human rights violations. However, it is interesting to note that paragraph six of same report of OHCR as quoted above, also talks about the armed separatist group as being more guilty since as per report it has been the separatist forces that have been more indulged in committing abuses in recent times. The relevant portion states of the paragraph six states: *"*From 2016, the prevalence of conflict-related arbitrary detention by Government actors substantially decreased. Since late 2016, OHCHR has not observed a continuation of the practice of holding conflict-related detainees long-term in unofficial places of detention....."

Another report[29] from NGO 'Human Rights Watch' also echoed this point of separatists being the more guilty side as far as committing human rights violations were concerned. It too found arbitrary detentions and torture to have been taking place in regions controlled by armed groups while at the same time not coming

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[28] Amnesty International, "*You Don't Exist": Arbitrary detentions, enforced disappearances, and torture in Eastern Ukraine*", EUR 50/4455/2016 (July 2016).

[29] Human Rights Watch, *World Report 2022*, (Dec 16,2021), https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf (last visited July 03,2023).

across such an incident in the region controlled by the Ukrainian authorities. Here is an excerpt from the report relevant for our purpose:

> 'Russia-backed armed groups in Donetska and Luhanska regions continued to torture, arbitrarily detain, and forcibly disappear civilians and to deny them access to medical care. As of July, an estimated 300-400 conflict-related detainees were being held by these armed groups. There were no reports of prolonged arbitrary detention by the Ukrainian authorities in 2021.'

However, the most relevant evidence to illustrate the above point is the 33rd report[30] of OHCHR on human rights situation in Ukraine based on the work of United Nations Human Rights Monitoring Mission in Ukraine[31]. This report covers the period from 1 August 2021 to 31 January 2022 which happens to be just before Russia began its invasion, so this period is most relevant to our discussion. Paragraph 10 of the report states: "OHCHR continues to enjoy unimpeded access to official places of detention in Government-controlled territory……"

At the same time, paragraph 11 of the report laments the lack of access to the detention facilities in territories controlled by the separatists. It says: "The absence of access to places of detention continues to be of grave concern to OHCHR in light of the credible allegations of torture and ill-treatment received by OHCHR in a number of facilities." The same report while concluding, in paragraph 109 states:

> 'In territory controlled by self-proclaimed 'republics', persisting grave violations of human rights, including arbitrary detention, torture and ill-treatment, must be immediately halted. Widespread and credible allegations

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[30] OHCHR, Report on the human rights situation in Ukraine, 1 August 2021 to 31 January 2022, (March 28,2022), https://www.ohchr.org/sites/default/files/2022-03/33rdReportUkraine-en.pdf (last visited July 03,2023).

[31] Human Rights Monitoring Mission in Ukraine was deployed on 14 March 2014 to monitor and report on the human rights situation throughout Ukraine.

> of torture and ill-treatment underline the urgency for OHCHR and other independent international human rights monitors to be granted access to detainees and places of detention in this territory.'

It becomes clear from this report that in months just preceding the invasion, OHCHR was more concerned about human rights violation occurring in the separatists-controlled territories than the government-controlled territory. It is significant because UN mission in Ukraine is as close to a neutral and objective agency as there can be and it was more worried about human rights violations being perpetrated by the Russian backed separatists in their controlled territories than by the Ukrainian authorities and that too in months leading up to the invasion.

All the evidence presented thus far, at the very least proves that the conflict that had been going on in the eastern part of Ukraine since 2014 up until the Russian invasion involved some serious human rights abuses being perpetrated from both government side as well as from separatists. This makes this situation different than what is commonly expected to be present before any genuine UHI takes place. It is generally thought that any genuine UHI is undertaken when there is one group of people that are under constant attack from other part of population and that they are left in a defenceless and extremely vulnerable position with no means to save themselves. This situation can arise predominantly in two scenarios- in the first scenario, the government and its machinery are actively engaged in systemic repression of a certain group in their territory based on race, religion, ethnicity etc and most of the times they have the support of other majority groups. Here, the persecuted group is unable to defend itself against the might of State and in the absence of timely action by UNSC, UHI is the only practical alternative which can save the group.

In the second scenario there is a civil war going on in a country between groups that could be divided based on any differentiating factor like race, ethnicity, religion or any other characteristic. The need for UHI in absence of any action by UNSC would arise when there is clear evidence that one group is facing

much larger threat and is the victim of serious human rights abuses majority of the times. It is implicit that this would happen when there is serious inequality in power dynamics between the groups in terms of weapons, numbers, access to resources and so on. If this happens with the backing of State and its authorities, then it means that State is unwilling to do anything and it overlaps with the first scenario, and if it takes place in a weak State, then State might both be unwilling and unable to do anything or it might be simply unable to do anything meaningful. Whatever may be the case, there is a clear aggressor and a clear victim that can be identified and while there might be few instances where the victim group was the one which committed atrocities, overwhelmingly it is the aggressor who perpetrates grave human rights violations.

If any humanitarian intervention is done in the two scenarios as discussed above with the primary intention to save the vulnerable and victim group, then it could be said that it satisfies the most basic condition for it to be termed as genuine which is that it should be undertaken to protect people from grave and persistent human rights abuses.

However, there can be conflict where it would be difficult to label one side as aggressor and other as victim since both are capable of inflicting damages on each other and neither one can be said to be in a significantly weaker position in comparison to other. In such a conflict, we should ask ourselves what should a genuine UHI look like? For as we discussed earlier, most of the times when we think about UHI, we think about protecting a vulnerable group from grave and persistent human right abuses. However, in this case, there is no vulnerable group since there is balance of power between different groups. If all parties are considered as guilty, then it would be illegitimate for any State to intervene on behalf of one group, as it would be impossible to attribute any humanitarian character to such intervention since the primary objective would have been to benefit one group and help them win the conflict. Even if ultimately human rights abuses do decrease due to decisive victory of the group that got support from the intervening State, it would still not make the intervention as genuine, since the primary

motive or we can say the motive which 'moved' the State to intervene was to help one group to gain upper hand in the conflict.

Any genuine UHI in the scenario mentioned above should try to emulate UN peacekeeping missions in the sense that the motive of the forces of the intervening State should be to put an end to the episodes of all extreme human rights abuses being perpetrated from any of the parties[32]. For this they should deal with perpetrators from different groups with same aggression and intensity without making any real discrimination between them. There should be no favouring of one party over another and the only objective should be to bring peace to the area. This is also one of the principles that every UN peacekeeping mission follows, that is, to be impartial[33].

In the Russia-Ukraine conflict, as we said earlier, both Ukrainian government and its authorities and separatists in Donbass region have been accused of committing grave breaches of human rights towards the other group. There are plenty of credible evidence of both sides indulging in illegal detentions[34] and torturing the detainees[35]. Legal aid has been denied to such detainees and in some cases medical care too. Further both sides have in many instances been involved in forcible disappearances refusing to even acknowledge such detentions. This can hardly be said to be a situation where separatists have been defenceless victims who are the only ones suffering brutalities. Further, as seen earlier, documents show that in recent times it is the separatists that have been more serious violators of human rights while number of such violations from the side of Ukrainian authorities going down significantly[36].

In such a situation, any intervention on part of Russia to support the separatists against Ukraine can never be humanitarian in nature. It violated the principle of impartiality and has only been

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32 *See* John J. Merriam, *Kosovo and the Law of Humanitarian Intervention* 33 CASE W. RES. J. INT'L L.111, 140 (2001).

33 Principles of Peacekeeping, https://peacekeeping.un.org/en/principles-of-peacekeeping (last visited July 03,2023).

34 *Supra* note 26.

35 *Supra* note 28,29.

36 *Supra* note 30.

undertaken to shift the balance of power in Russia's favour. This was not the case where one group was suffering bulk of grave and persistent human right breaches for whose protection Russia could have legitimately intervened. Here, the separatists were guilty in equal measure and rather more if we focus more on recent times and any intervention for their alleged protection is more of a political intervention designed to give them an upper hand in the conflict which would be in the interests of Russia.

Conclusion

Russia would find it extremely difficult to potentially use humanitarian intervention as a justification for its invasion of Ukraine either on legal or moral ground. As far as legal aspect is concerned, we have seen earlier that UHI is still considered illegal by most of the International Law scholars and same is the stance of majority of the Nation-States. Even Russia in its official letter to the Secretary General of the UN, only cited Article 51 of the UN Charter, that is, self-defence as the sole justification for its invasion. This shows that Russia also understands that UHI will not be considered as legal in official discourse.

As discussed earlier, looking at the official text of the abovementioned letter it looks very likely that Russia does intend to get some legitimacy for its invasion on moral ground of protecting human rights. The potential moral justification of the invasion being done on humanitarian grounds is therefore an important aspect of this event. However, this article has shown that Russia cannot take any moral high ground as this was not a case fit enough to warrant any Unilateral Humanitarian Intervention even if we disregard the majority view point among jurists that treats any UHI as illegal. Going by all the credible evidences, it is difficult to label Ukrainian authorities as the aggressor and separatists as the helpless victim. Both have been guilty of committing human rights abuses in the region and separatists more so in recent past. The intervention of Russia to help separatists against Ukrainian authorities therefore can never be justified on humanitarian grounds.

A HELPING HAND OR BACKSTABBING: WHAT IS THE TRUTH BEHIND RESTRICTED LABOUR MOBILITY?

Ms. Ipsita Ray[*]

Abstract

The world has witnessed rapid changes since the advent of globalization. The phenomenon has started a race to form single market (economic globalization). WTO, World Bank and IMF promoted participation by removing barriers (liberalization) to international trade. The whole regime of trade law attempts to formulate theories to explain and justify effects of reduced barriers on price, income and employment. Conflictingly, trade negotiation rounds were kept focused on free flow of capital and reciprocity of benefits but tactfully set aside sensitive areas like agriculture, garments labour mobility and services outside. Developing countries have labour-surplus population which keeps labour-wages low. Low-labour wages is considered comparative advantage for these countries as low wages allow these nations to attract firms within their territorial limits. On the contrary, the industrialized nations are pointing out violation of human rights occurring in these developing countries. The 'comparative advantage' of developing nations is often argued as 'race to bottom' by human rights supporters. The paper seeks to identify whether disguised protectionism on the part of developed nations, is motive behind advocacy for implementing labour standards in developing countries.

Key Words: globalizations, capital-mobility, labour-mobility and protectionism

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"As a rule, the political activities of states in the field of international relations are primarily devoted to safeguarding collective economic interests, no matter under what disguise they happen to appear." Sir Hersch Lauterpacht[1]

I. Introduction

Sir Lauterpacht's statement still holds true in today's globalized world. The world has witnessed rapid changes since the advent of globalization. The phenomenon of globalization has started a race to form single market (economic globalization of world). In other words, it is the phenomenon of 'economic liberalization by way of open markets and unburdened trade'.[2] Globalization of world market gained prominence due to availability of cheap transportation and improved means of telecommunication in past decades. WTO, World Bank and IMF promoted participation by removing barriers (liberalization) to international trade and capital flow. Free-flow of finances, attract firms to invest in countries where higher profit can be earned.

This neo-classical theme of free trade is based on Ricardian comparative advantage theory which shows resource endowment (capital/labour ratio) as a deciding factor for a nation to trade. Interestingly, in Ricardian theory, labour is immobile outside national borders. In this context, the paper explores the interaction between trade liberalization, labour rights and labour movement (international migration). It is important to note that developing countries have labour-surplus population which keeps labour-wages low. Low-labour wages is considered comparative advantage for these countries as low wages allow these nations to attract firms within their territorial limits. On the contrary, the industrialized nations are pointing out violations of human rights occurring in these developing countries. The 'comparative advantage' of developing nations is often branded as 'race to bottom' by human

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1 Hersch Lauterpacht, Private Law Sources and Analogies of International Law: With special Reference to International Arbitration, Archon Books, reprit 1970.

2 Zonaid M. Sayed, Trading in Human Rights: Questioning the Advance of Human Rights into the World Trade Organization, 27 Fla.J.Int'L.261, 2015.

rights supporters[3]. The paper seeks to identify whether disguised protectionism on the part of developed nations, is motive behind advocacy for implementing labour standards in developing nations. The paper further looks into the conflict between neo-liberal techniques for using labour standards and human rights and sovereign rights of developing states to engage in world trade.

II. Labour Trade Linkage

Scholars like Adesina (2012) and Akuhwa (2015) believe,

> '*Globalization includes increased capital mobility, decline in costs of transportation, computing and communications. Other aims of globalization from the economic perspective include: (a) internationalization of production accompanied by changes in the structure of production, (b) expansion of international trade and services, and (c) widening and deepening of international capital flows. All these imply a more connected world.*'[4]

It is also said that globalization and inter-linked agencies have gained prominence in current world. The primary work of these international agencies is to integrate economies with reduced barriers. Economic integration forces policy makers to reduce domestic regulations including social protection laws, to maintain participation at world market. Low wages coupled with deregulation of labour protection laws[5], is being encouraged as a key technique to attract investments by labour surplus developing countries. Concerns are also raising related to social effects of reduced relevance of national borders in liberalized and integrated economic global world.

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3 Tyc Aneta, The Linkage Between Labour Standards and International Trade: How to Offset the Global Inequality? Wroclaw Review of Law, Administration & Economics Vol 9:1, 2019.

4 Adesina, S.O. (2012) The Negative Impact of Globalization on Nigeria. International Journal of Humanities and Social Science, 2. www.ijhssnet.com.

5 Eddy Lee, Globalization and Labour Standards: A Review of Issues, 136 INT'l LAB. REV. 173 (1997).

There are substantive concerns about such integration. Globalization has been sold by neoliberal institutions as a natural phenomenon (Johnston and Goodman, 2006). Some other supporters take a milder interpretation of the phenomenon and show capitalistic globalization as 'there is no other alternative' (TINA) to development. Critiques do not agree globalization being is as natural as it is being portrayed. In the light of TINA approach, globalization has resulted in a 'political consensus' among nations of the world to embrace neoliberal mechanism of development. Same economic reform medicines are prescribed for all countries. Thus, these mechanisms have taken a form of interfering approach. It is now evident globalization has been used as a tool to exploit natural resources of the south.

The dark side of neo-classical economics is that it results in mistreatment of developed countries by overuse of their resources (labour) that 'comprise their comparative advantages'.[6] While on the one hand, globalization and liberalization are promoting interconnection and interdependency via 'trade, finance, people and ideas in global market',[7] on the other hand, it restricts labour mobility. Dowlah (2016, 2018) speaks of mobility of capital, international trade and cross-border mobility of labour as 'three legs' of economic globalization. He considers human labour is the 'most fundamental factor of production'. It has been further argued that 'capital is past labour' as capital is nothing but 'fruit of labour'. But differential treatment of labour and capital at global level is becoming a concern. The whole regime of trade law attempts to formulate theories to explain and justify effects of reduced barriers on price, income and employment. Conflictingly, trade negotiation rounds were kept focused on free flow of capital and reciprocity of benefits but tactfully set aside sensitive areas like agriculture, garments, labour mobility and services.

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6 Townsend, J., Just Trade: A New Covenant Linking Trade and Human Rights by Berta Esperanza Hernández-Truyol and Stephen J Powell [NYU Press, New York, 2009].

7 Pekarskiene Irena and Susniene Rozita, The assessment of the manifestation of economic globalization: the international trade factor, Social and Behavioural Sciences 156 (2014) 392 – 397.

Although labour-trade linkage can be found in the preamble and Article XX (e) of GATT, other provisions do not lay down any affirmative connection between the two. The preamble expressly speaks of 'full employment' and 'raising standard of living' whereas Article XX (e) extends liberty to member states to reject goods produced by 'prison labour'. But the negotiators at multilateral trade negotiations conveniently kept further deliberations under wraps to be discussed at subsequent rounds and finally, at Singapore Ministerial Conference, it was decided that labour will not be linked with trade under WTO. It has been agreed that the WTO will work in close association with ILO to understand labour issues, but ILO will remain as sole authority to set international standards which will not be pursued to be followed by member-states of WTO. Therefore, labour concerns still fall under sovereign decision of a states.

Caf Dowlah (2020) starts the preface of his book titled "*Cross- Border Labour Mobility: Historical and Contemporary prospective*", showing comparative statistics of capital mobility and labour mobility. He shows only 3.3 per cent of world live in foreign lands[8]. Trade in goods and foreign direct investment doubled and increased thirty percent respectively in last half century but world migration increased by a mere one percent. Thus, it is clear that labour mobility across the international borders is not as smooth as capital.

Drawing connection from the previous paragraph, true meaning of global world should denote integration at core level and not selected integration (mobility of capital across borders). The connection between labour and trade should have been incorporated in the negotiation rounds. Ironically, trade and labour are disconnected. The effect of such disconnect is visible in terms of wealth distribution[9]. 80-90 per cent of world wealth lies in the hands of rich class whereas remaining 10 per cent caters to the need of poor (Piketty, 2014). The disconnect between labour and trade has

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8 More 257 million migrated across national borders in 2015 (IOM 2017).

9 Thomas Piketty, CAPITAL IN THE TWENTY FIRST CENTURY, Cambridge: Harvard University Press, 2014, P.257.

made clear that neoliberal institutions aim to make rich richer and poor poorer.

Similarly, scholars like Burgmann (2016) argue labour create goods and services around the world. In other words, the labour class is responsible for capital creation. Labourers are compensated in terms of salaries and wages from employers but lack control over the conditions of their employment. Governments are being forced to abandon efforts for 'wage justice' in order to keep capital flowing inside the borders (result of Structural Adjustment Programs). Burgmann also points out the states are competing in attracting higher capital gain but there are no efforts to correct the capital-income ratio. There is steady decline of 'wages as share of national wealth'[10].

According to ILO Global Wage Report, 2016/17, wage growth around the World has been decreasing since 2012. The rate dropped from 2.5 per cent to 1.7 per cent in 2015. It is the lowest rate in last four years. On the contrary, share prices and corporate gains are increasing in double digit figures whereas income and wages are continuously shrinking under economic integration.[11] This disparity in income and capital distribution is largely related to capital generated by production versus purchasing capacity of working class. Moreover, the same report also shows wage differences between various countries. A comparison of wages between bottom 1 per cent with top 1per cent shows a significant gap in terms of wages. For example, difference is 33 times in United Kingdom[12].

Richard Freeman (2006) also estimated wage gap varying four to twelve times between low income and high-income countries[13]. The comparison is made based on the earning capacity

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[10] Hans- Peter Martin and Harald Schumann, The Global Trap: Globalization and assault on prosperity and Democracy, London and New York: Pluto Press/Zed Books, 1996, P.7.

[11] ILO, Global Employment Trends (2014), Risk of a Jobless Recovery? Executive Summary, Geneva: ILO.

[12] ILO, Global Wage Report 2016/17: Wage inequality in the workplace, P. 35.

[13] Richard B. Freeman, People Flows in Globalization, Journal of Economic Perspectives—Volume 20, Number 2—Spring 2006—Pages 145–170.

of a worker identically placed in market but in two different economies. The suggestion shows capacity of a worker to earn relatively more when placed in a high-income country[14]. Restricted mobility based on skill level of workers is depriving a chance of dignified living for low-skilled workers as relative income gains for them is highest. Such wage gap acts as an incentive for labour, especially unskilled workers from low and middle-income countries. Human Development Report 2021-22[15] reaffirms 2009 report[16] by saying international mobility provides access to economic benefits as well as better access to education and health care facilities. Thus, labour laws should combat injustices that occur in the world of work. The said laws are also responsible for improving productivity and to ease failures in labour market thereby boosting economic activity of nations. These propositions seem to show that trade and labour laws are inter-connected.

III. Existing International Labour Standard Enforcement Mechanisms

ILO was established in 1919 for improving labour conditions worldwide. The unique tripartism of ILO works as standard setter. ILO recently celebrated its centenary anniversary in 2019 where members pressed upon need for social justice. Every working man and woman should be free to claim their share over the wealth they have generated in this economic world. Such claims must be based on fair and equal opportunity available to all. Unequal treatment is a threat to socio-economic growth which further results in rise of inequality and exclusion. These challenges of unprecedented nature can be addressed by social justice. The *Declaration on Social Justice for a Fair Globalization* adopted by participants in 2008 is one such step. The Declaration also helped Decent Work Agenda, which has four limbs known as employment

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[14] Tomaskovic-Devey et al., Rising between-workplace inequalities in high-income countries, PNAS, Vol. 117|No. 17 (2020).

[15] Uncertain times, unsettled lives Shaping our future in a transforming world, Human Development Report 2021/2022, UNDP.

[16] Overcoming barriers: Human mobility and development, Human Development Report 2009, UNDP.

promotion, social protection, fundamental rights at work and social dialogue.

However, non-linking of labour and trade under trade negotiations, has kept a wide gap in the mechanism of implementation of ILO standards. Standards at ILO are set primarily through Conventions and Recommendations. Once a convention is ratified by a nation, compliance become mandatory. However, ratification of ILO-designated labour standards and recommendations are voluntary in nature. Its conventions lack ratification by members and are "loosely worded."[17] Government members may adopt wide-range of interpretations at their convenience. Member states can ratify or "denounce" (de-ratify) these conventions on discretion. Moreover, members are ratifying only those conventions which are already in line with their domestic regulations' that are contrary to the objective of ratifying conventions to change domestic legal framework (Helfer, 2006). An interesting new trend has been observed by Samwer in his study analyzing gap between de facto and de jure labour conditions prevailing in more than 132 countries over a period of thirty years.[18] Samwer has pointed out the interaction between labour rights and globalization. Similarly, Peksen and Blanton (2016) identified that ratification of conventions helps member-states to earn external prestige and trade benefits but in fact, the internal conditions of working class do not change. This results in a gap between de facto and de jure labour conditions. Labour rights are created at state-level but are mostly implemented by employers. This creates complex enforcement issues in the regime of labour rights at global level, as 'monitoring and enforcement' becomes troublesome and accountability is harder to establish. At this juncture, it is important to pay attention to the fact that enforcement mechanism of ILO standards becomes operational after ratification of said standards by both countries in question. The problem is different countries have ratified different conventions creating a collage of labour values

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[17] Standing Guy, The ILO: An Agency for Globalization? Development and Change, volume 39, issue 3, 2008.

[18] Samwer, Julia, The Effect of ILO Conventions on Labor Standards. The Structural Change (October 31, 2017). Available at SSRN: https://ssrn.com/abstract=3062691 or http://dx.doi.org/10.2139/ssrn.3062691

around the world, thereby making complaints with respect to a particular standard becomes challenging.

The effectiveness of ILO is often compared with WTO. Promoting trade through an aim of creating open market (WTO regime) meant interdependence over each other. Internationalization of factors of production affects every sector of manufacturing. Both ILO and WTO aspire of a fair and equitable world by providing level playing field to all participants. However, it is evident that 'trade-labour' linkage is advocated on the basis of disparity between enforcement mechanism under WTO and ILO. While on one hand, WTO Dispute Settlement Body (DSB) is considered as the 'crown jewel' of WTO and often considered as reason for success of WTO, on the other hand, 'despite being one of the oldest pedigrees in international law, ILO's enforcement mechanism has proven woeful'.[19] Although ILO constitution allows sanction but the language used is vague as '…any other member may take against that member the measure of an economic character indicated … as appropriate to the case.'[20]

It is also interesting to note International labour standards set by ILO, are being imposed on developing countries for improving labour conditions but in reality, most of the industrial nations are yet to ratify such conventions. At the same time, deregulations at national level (liberalisation) are being dictated in order to have globally integrated world with increased production. However, domestic demand in these developing economies is not increasing at the same pace as quantum of production in globalized world. These countries do not constitute a significant portion of global demand. This condition perpetuates a class-based distinction between the producer and the consumer nations. Enterprises of small developing countries are not only competing with big industries with capital but also with other small enterprises from other developing nations. Free trade and fair competition along with overproduction further depress labour wages. Last but not the least,

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[19] Chantal Thomas, Should the World Trade organization Incorporate Labour and Environmental Standards, 16 Wash. & Lee L. Rev. 347, https://scholarlycommons.law.wlu.edu/wlulr/vol61/iss1/6.

[20] Article 26, ILO Constitution.

global financial institutions are imposing Structural Adjustment Programs for granting loans. Even before inception of actual loan negotiations, the concerned government has to submit a letter of intent to the Bretton Wood Institution (IMF) to bring in substantial changes on macro- economic policies.

Despite IMF and World Bank's claim to reduce world poverty, there are substantial literature focused on contradictory claims. For instance, Hertz (2004) reported higher poverty rates and reduced standard of living after receiving IMF loans on multiple economies. Oberdaberning (2010) said SAPs are development necessary 'under capitalism' and questioned its efficiency on poor economies. Fidler (2000) has drawn parallels between SAP and 'capitulations.' He reminded everyone of past and mechanisms of capitulations used by western world thereby relating it to SAP. SAP has been imposing uniform measures on countries since debt crisis of 1980s. Developing countries were turning to global financial institutions to tackle financial crisis. But funds were extended on conditions of policy stabilization. Developing countries were scared to jeopardize chance of future help by not agreeing to structural changes. Autonomous position of developing countries is lost thereby making IMF and World Bank mightier. Interestingly, almost all developing countries are under debt of international financial institutions. Thus, it becomes necessary to raise questions about the underlying objectives of developed nations acting through international organizations. Is it a technique to continue colonial exploitation under the veil of creating level-playing field for every nation? Why are developing nations being attacked from multiple fronts?

The question raised in the previous paragraph can be supplemented through Chossudovsky's argument. Chossudovsky (2003) argues the 'new financial order feeds on human poverty and destruction of natural environment'. Even though the economic packages of IMF are intended to take economies out of debt but the reality is, developing economies are forced to achieve the opposite. The new-conditionality based loans increase burden of external loan. At the same time, such countries also face balance of payment crisis as a result of trade liberalizations. In other words, the

economic stabilization method destroys the possibility of 'endogenous national economic development process' through policy decisions of sovereign nation. The consequences of such exploitation are unemployment and marginalization of people by suppressing wages, social apartheid and encouragement to racism. Chossudovsky calls this phenomenon 'globalization of poverty.' Unemployment and depressed wages forced people to move away from their homes in search of employment. International migration, has become a significant phenomenon in many parts of the world. Many people are working or seeking to work in countries that they do not call home.[21]

IV. Labour mobility versus Capital Mobility

Labour mobility is a highly complex issue involving political and sovereignty concerns. Control is visible in terms of immigration policies, quotas, visa requirements, point-based system and stringent border patrols in developed countries.[22] Political justification for such measures include 'cultural threat to political instability.' It is often argued by labour receiving countries that uncontrolled migration can ignite xenophobia and national security breaches (Weiner 1995). At the same time, skilled migrants and sector specific migration is welcomed. In sectors like infrastructure, agriculture and other service, circular movement or seasonal movement of same labour is encouraged under international trade to cater needs of 'immobile sectors.'[23]

The practice of commodification of labour is proven by Ruhs (2013) with the help of collected data. For instance, high-income countries like United Kingdom, form their immigration policy explicitly based on skill level. Huge inflow of skilled labour

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[21] Henry J. Bruton, Islamabad Labour Migration and Shadow Prices, The Pakistan Development Review, Vol. 19, No. 1 (Spring 1980), pp. 65-74, http://www.jstor.org/page/info/about/policies/terms.jsp.

[22] Wifag Adnan, who gets to cross the border? The impact of mobility restrictions on labor flows in the West Bank, Labour Economics 34 (2015) 86–99.

[23] For example, NAFTA (North American Free Trade Agreement) allows labour mobility of selected categories for temporary purpose (circular/ seasonal migration). Chapter 16 lays down temporary entry of Mexican, Canadian and U.S citizens for investment, trade in goods or services. Labour Market Impact Assessment (LMIA) and work permit is exempted for such categories.

is seen in recent past within UK whereas work permit for low-skilled migrants remains limited (MAC, 2009). Moreover, in recent past, UK introduced points-based system for bringing migrant workers. The system has five tiers- Tiers 1-3 represents migrant workers, Tier 4 is representing students and Tier 5 allows temporary migration program. The system has been updated last year[24]. Under the new version, low-skilled workers are not to be recruited from overseas except for social care and seasonal horticulture.

At this juncture, Tony Blair, the then Prime Minister of U.K, when proposals were discussed to bring point-based visa system, can be quoted saying, "*The challenge for the Government is to maintain public confidence in the system by agreeing [to] immigration where it is in the country's interest and preventing it where it is not.*[25]" In fact, strategy is not unique for UK. Ireland also follows a similar approach to control immigration. Dual labour immigration system is practiced to attract skilled workers[26]. Similar practice is visible in German immigration policies. Since 2005, Germany is attracting highly skilled workers inside while actively restricting unskilled labour. The Immigration Act expressly mention the requirement of German Economy to manage immigration as per the need of labour market (Germany).

The sharp contrast is visible in terms of labour treatment and capital treatment in global world. Capital is gaining free and unrestricted mobility while labour mobility (unskilled) is tightened day by day. For example, granting special benefits for skilled migrants goes beyond mere immediate economic considerations. Singapore is a prominent follower of this strategic move. Followers of this strategy believes immigrants (once integrated with native population) will become part of nation's identity. Therefore, who is permitted for permanent residency and who is not, decides the future of the receiving nation. Once, the then Deputy. Prime

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[24] CJ McKinney, Melanie Gower, Georgina Sturge. The UK's new points-based immigration system. Research Briefing. House of Commons Library.

[25] The Guardian (27th April, 2004), Speech by Tony Blair to the Confederation of British Industry on migration.

[26] Ireland allows 'Green card permits' for skilled labour immigration and 'work permit program' for medium skilled workers.

Minister of Singapore said in a speech, "…*But not all foreigners who come here to work are allowed to sink roots. We allow only those of good quality and who share our core values to become PRs or citizens. We take into account not just factors such as the applicant's economic contributions, qualifications and age, but also whether he can integrate well into our society, and his commitment to sinking roots*…"[27].

Most international migration occurs from developing to developed countries to earn extra in a high wage paying economy. Moreover, the developed countries are in need of foreign labour as a significant portion of developed countries' population consists of elderlies. At the same time, 3-D Jobs (Dirty, Dangerous and Degrading) are rejected by native labour force, import of workers to fulfil such vacancies have become need of said countries. Thus, deregulation along with restricted movement of workers take away bargaining power from labour class. This reflects how labour rights are being manipulated for gaining in terms of international trade without considering well-being of labour.

Looking at the larger picture, it is possible to conclude, globalization is acting as a double-edged sword for developing economies vis-à-vis workers of low-income economies. Whereas, on one hand, market access granted under WTO rules are robbing away natural resources from developing countries on the other hand, active immigration programs are framed to lure away skilled workers from failing economies (developing)[28]. Those who are left in the sending countries are further exploited by means of temporary migration schemes or with payment of wages below sustainability. The current global world is witnessing commodification of labour as per the need of high-income nations.

On the contrary, scholars like Hamilton and Whalley (1984), Moses and Latness (2004) and Dowlah (2012) believe reducing

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[27] DPM Wong Kan Seng's Speech on Population at the 2011 Committee of Supply, addressing Singapore's population challenge, available at https://www.population.gov.sg/media-centre/speeches/speech-by-dpm-wong-kan-seng-on-population.

[28] Canada and Australia have been using open immigration policies for skilled migrants. Restriction free immigration of skilled migration is used as nation building tool.

barriers to cross-border labour mobility will result in huge gain. As the world has witnessed significant gain with liberalization of movement of goods and investment, free movement of labour across international borders, has potential to increase global GDP[29]. Moreover, there are empirical evidence to show continuation of regular as well as irregular migration challenging border control measures[30]. Scholars like Bhagawati (2003); Castles (2004) and Cornelius et al. (2004) often question effectiveness of immigration policies set by migration restricting countries. These group of scholars believe migration is the result of greater external factors like unequal wealth distribution among countries, labour market demands and other factors involving political or environmental unrest in country of origin. Furthermore, it has been suggested that future migration to a destination is determined by social network of already settled migrants (Massey, 1990). Irregular migration also becomes a common phenomenon in the countries with strict immigration policies. Therefore, it is essential to divert focus from 'volume of immigrants' to 'ways people immigrate'. This is a significant issue as quality of life and the livelihood of many are at stake. The concerns are well supported by human rights scholars. Under Article 28 of UDHR, 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized.' But in practice, human rights are tied with nationality. Often it has been found that migrant workers are not even granted a dignified living. Moreover, the language used under Article 13 of UDHR is also vague. The said article deals with spatial mobility and allows 'everyone to leave any country, including one's own, and return to his own country' only. It is noteworthy to pay attention to this article of UDHR as it is the only article that deals with freedom of mobility across countries but has been drafted in such a manner as to disallow a right to enter any country except 'his own'[31].

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[29] Dowlah Caf, Cross Border Labour Mobility Historical and Contemporary Perspectives, Palgrave Macmillan (2020).

[30] Mathias Czaika and de Haas Hein, The Effect of Visas on Migration Processes, International Migration Review (2016), Centre for Migration Studies of New York.

[31] Nevins Joseph, The Right to the World, Antipode Vol. 00 No. 0 2017 ISSN 0066-4812, pp 1–19.

At this juncture, it is essential to address rights of workers to access global resources including global space. The right is essential to fulfil the most basic human right- the right to dignified life. Extension of such rights requires taking steps forward by allowing free movement across borders, residence and work permit in country of preference. Therefore, true meaning of right of mobility is ability to control one's movement and thus include ability to stay in one's own country of origin (Bacon 2014). But currently, labour mobility (migration) is being used by industrial nations for their own gain. In other words, nation-states and other agencies like WTO regulate free mobility of labour for narrow benefits. It is essential to take a labour-centric approach to provide free mobility and exploitation-free environment to work for all.

IV. 'Right of Mobility' Across International Borders

Labour centric approach to 'right of mobility' brings in a fresh way of looking at international migration. But it is essential to remember that migration is often 'politicized before it has been analyzed' (Collier, 2013). Allowing free mobility is not an easy change to implement. Movement of labour is a complex socio-economic issue. Migration policies vary immensely throughout the world. Some country-of-origin directly promote migration whereas others are selective in process. Similarly, host countries also differ enormously in allowing immigration permit to alien[32]. Success stories of both groups are available. Japan maintained a closed-door policy to become one of the wealthiest societies of the world and on the other hand, countries like UAE in Middle East, succeeded by keeping an open-door policy with restrictions imposed on permanent residency. Therefore, it is essential to understand the gravity of labour mobility in global world.

The 'political trilemma' of globalization- 'deep' economic integration, democratic politics and self-determination is impossible to achieve in the present global world (Rodrik, 2002). Rodrik says the three purposes are mutually exclusive and thus at most two out of three can be accomplished. 'Deep' economic integration remains

[32] Paul Collier, Exosus How Migration is Chnaging our World, Oxford University Press (2013).

unachievable in a world of sovereign state with democratic government. Therefore, he suggests economic integration with limitations and global governance as a solution.[33].

Inclusion of social clause into world trading regime is skeptical for industrialized countries as well as developing countries. From the standpoint of industrialized countries, developing countries are getting away with human rights violations, on the other hand, developing countries look at the situation as unnecessary interference with their sovereign rights. Moreover, labour surplus developing countries consider imposition of labour standards as a means to increase cost of production to take away their comparative advantage from them. Therefore, it is essential to look for a solution which will be acceptable to both industrial as well as developing countries.

In the previous part of the article, I have discussed inefficiency of ILO standards. In past few decades, ILO is continuously struggling to transform international labour right regime. Adoption of 'decent work' agenda and 'core labour standards' started with a ray of hope but soon lost its significance as the essence of monitoring and implementation mechanism remained the same. Although the mechanism had been reorganized keeping ILO nominally involved in direct implementation process. Many considered the Declaration as a revolutionary step for ILO because of its applicability without need of ratification. Some authors even said that the declaration achieved the status of jus cogens status[34]. Mere membership to ILO will automatically make the states bound by such standards. But the Declaration itself failed to clearly differentiate between core labour standards and remaining labour standards set by ILO[35]. It did not explain about the fate of remaining standards. Similarly, the previous implementation mechanism was kept intact with the new one, which created an environment of

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[33] Rodrik, Dani, 2002. "Feasible Globalizations," Working Paper Series rwp02-029, Harvard University, John F. Kennedy School of Government.

[34] Arne vandaele defended this argument in chapter 3 of his Doctoral thesis titled 'a critical analysis on use of international trade measures as means to enforce basic labour rights' at Leuven in 2003.

[35] Alston P., Core Labour Standards' and the Transformation of the International Labour Rights Regime, European Journal of International Law, 2004 / 06 Vol. 15; Iss. 3.

confusion resulting in contradictory outcome not expected at ILO level. Therefore, it is essential to move away from the current mechanism of implementation to a human-right centric approach vis-à-vis labour centric approach.

Despite the shortcomings of labour standards set by ILO, they have the potential to improve the work environment and lives of a significant number of people. Thus, the significance of such standards should not be underestimated. ILO has already adopted similar approach as human right agencies. In terms with human rights, some are placed at a higher pedestrian than others. In other words, few rights are primary human rights and other human rights are derivative of primary ones. Thus, hierarchical superiority of these rights is designated as indispensable for all human beings. Although, ILO identified core standards but failed to draw up a superior enforcement mechanism. It is essential to segregate between core standards and other conventions passed by ILO. In today's globalized world, it is impossible to separate trade and labour issues. Mere participation as observer in one-another's proceedings is not enough.

At this stage, it is interesting to note that Mode 4 of GATS is applicable to employees moving to a foreign land but does not apply to persons 'seeking employment in international labour market.' In other words, a person is allowed to cross international borders with ease when he/she has already secured a job with a foreign employer. Sadly, further negotiations on the service sector have been stagnant for past years. Both WTO and ILO can jointly negotiate for erasing border restrictions for labour. The practice points out cross-border labour mobility is allowed where workers are needed for 3-D jobs in the developed world. Moreover, the GATS agreement is also silent about employment in permanent basis[36]. Furthermore, unlike GATT, GATS do not contain any provision for S & DT for developing countries[37]. Therefore, higher

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[36] B.S Chimni, Development and Migration, in Migration and Legal Norms, The Hague, Asser Press, 2003.

[37] Mohammad A. Razzaque (ed.), Trade, Migration and Labour Mobility, Cameron May Ltd (2008). Article IV of GATS emphases on greater participation for developing

degree of co-operation between ILO and WTO is needed. Better negotiations are possible within the existing frame of WTO and ILO. Co-operation should be to discuss and negotiate both at ILO and WTO level through labour representatives and governmental representatives in light of 'Declaration of Philadelphia- labour is not a commodity'.

countries while Article XII allows developing countries to restrict trade in service sector for reasons of balance-of-payment crisis.

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