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NATIONAL LAW UNIVERSITY

Vol. II 2023

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We dedicate this edition of the journal to our colleague and friend late Mr. Nilesh Nibhoria (1999-2023) from the batch of 2018-23 for his fortitude, sincerity, and positive attitude towards life that will keep inspiring us.

Justice Ravi Malimath
Chief Justice

सत्यमेव जयते

High Court of
Madhya Pradesh

25th September, 2023

FOREWORD

The legal profession has been witness to exponential growth over the past few decades. This has also been accompanied by the augmentation of legal scholarship, albeit at a relatively slower pace. This notwithstanding, the extensive and diverse nature of the laws provide ample opportunities for research and innovation. Both emerging and traditional areas of law deserve a thorough microscopic examination. Reticence in doing so would impede the advancement of the otherwise flourishing legal sector.

To this end, I am pleased to learn of the launch of the inaugural issue of the DNLU Journal of Legal Studies and Volume II of both the DNLU, Student Law Journal and the DNLU. Faculty Law Journal. This indicates the commitment of the Dharmashastra National Law University towards fostering research, an essentiality for growth and evolution.

It is sustained efforts such as these that lead to the progressive creation of an ecosystem geared towards development. Inquisitive minds not only contribute to legal scholarship but also, to the improvement of the legal sector as a whole. The impact of quality scholarship on the legal sector is often overlooked and this perception must necessarily undergo a change. The legal profession and the justice delivery system consist of many areas that require minor tweaks and some that warrant a substantial overhaul. Gaining a fresh perspective, which conscientious research and scholarship could provide, may aid in the identification of viable solutions in this regard.

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I congratulate the authors, editors, publishers and all other stakeholders of the DNLU Journal of Legal Studies, the Student Law Journal and the Faculty Law Journal for their efforts in these publications and wish them the very best for their future endeavors.

(Justice Ravi Malimath)

Message From the Patron

Dear Contributors, Editors, and Readers,

It gives me immense pleasure to address you all as the Vice-Chancellor In-Charge of Dharmashastra National Law University and as a patron of the DNLU Student Law Journal, our esteemed flagship journal. It is with great pride that I witness the release of yet another volume of this remarkable publication, showcasing the intellectual prowess and scholarly achievements of our students.

The DNLU Student Law Journal stands as a testament to the dedication, hard work, and academic rigor exhibited by our budding legal minds. As the patron of this journal, I am truly humbled by the insightful research and thought-provoking articles presented in each edition. This platform has become a haven for innovative ideas, critical analysis, and deep-rooted legal discussions.

The journal serves as a vital medium for nurturing the intellectual growth of our students and encourages them to embark on a journey of scholarly inquiry. It is in this area that they explore the intricate facets of the law, unravel complex legal doctrines, and contribute to the evolution of legal scholarship. The multidisciplinary approach adopted by the journal stimulates cross-cutting analysis and broadens our understanding of the interplay between law and society.

I extend my heartfelt appreciation to all the contributors who have meticulously crafted their articles, delving into diverse legal subjects and providing fresh insights. Your unwavering commitment to excellence and your relentless pursuit of knowledge are a testament to your intellectual capabilities. Your work not only enriches the legal community but also contributes to the development of jurisprudence.

I must also commend the tireless efforts of the editorial team who have meticulously reviewed and refined the articles to ensure the highest standards of academic excellence. Their commitment to upholding the integrity of legal scholarship and maintaining the quality of the journal

is truly commendable. I express my sincere gratitude to them for their invaluable contributions.

To the readers, I urge you to make the most of this journal. Engage with the articles, challenge the ideas presented, and embark on your own intellectual voyage. Let the research contained within these pages ignite your curiosity, inspire your own scholarship, and shape your perspective on the ever-evolving legal landscape.

As we continue to expand our horizons in legal education, the DNLU Student Law Journal remains a cornerstone of our academic endeavors. It not only reflects the intellectual growth of our students but also symbolizes our commitment to excellence in legal scholarship. Let us cherish this journal as a testament to our collective pursuit of knowledge, justice, and the rule of law.

In conclusion, I extend my heartfelt congratulations to the entire team behind the DNLU Student Law Journal for their dedication, hard work, and unwavering commitment to fostering a culture of scholarly discourse. May this journal continue to thrive and inspire generations of legal minds to come.

Wishing you all a rewarding and enlightening reading experience!

Prof. (Dr. Shailesh N. Hadli

Vice-Chancellor (I/C), Dharmashastra National Law University (DNLU)

Editorial Note: Odyssey of A Scholarly Pursuit

As members of the editorial board of DNLU Student Law Journal, we often face frequent questions from students - why should we write? Are there any added advantages? While as writers and editors, it is difficult- perhaps, painful for us to equate writing to materialistic benefits. However, today we take this proud moment with the introduction of DNLU Student Law Journal Volume II to answer the most simplistic yet tricky question. We borrow it from Barack Obama,[1] where he talks about why he [Obama] writes.

> "Writing has been an important exercise to clarify what I believe, what I see, what I care about, what my deepest values are ... the process of converting a jumble of thoughts into coherent sentences makes you ask tougher questions."

As aspiring lawyers, judges, law-makers, civil servants, authors and members of civil societies among many other aspirations that we are unable to note down but as they exist. It becomes essential for all to write anything, academic articles, poetry, a story or a journal. As writing is not an isolated exercise, it is preceded by thinking, self-introspection, arguments, understanding what has transpired, assessing the anticipations and, at the core, asking yourself how and where we place our values in these turbulent times.

We are undoubtedly living in turbulent times - in the sense that law has become volatile and susceptible to frequent changes. Not much time has passed since the U.S. Supreme Court overturned[2] *Roe* v *Wade*,[3] bringing an end to the right of abortion, or the historic judgment of the Kenyan High Court[4] where it preserved the Basic Structure doctrine citing the most revered decision of the Indian Supreme Court in *Kesavananda Bharati*.[5] In India, we are witnessing a sense of judicial revolution - while the courts are implementing the guidelines laid down in *Swapnil Tripathi*[6] and making the proceedings available to watch for

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1 Michael Scherer, '2012 Person of the Year: Barack Obama, the President' (*Times Magazine*, 19 December2012) <https://poy.time.com/2012/12/19/person-of-the-year-barack-obama/4/> accessed 20 May2023.

2 *Dobbs* v *Jackson Women's Health Organization*, 2022 SCC OnLine US SC 9.

3 *Roe* v *Wade*, 1973 SCC OnLine US SC 20.

4 *David Ndii* v *Attorney General,and Ors.*2021 KEHC 9746 (KLR) (19), (53), (457).

5 *Kesavananda Bharati* v *State of Kerala*, (1973) 4 SCC 225.

6 *Swapnil Tripathi* v *Supreme Court of India*, (2018) 10 SCC 639.

the people - or a magnificent step by the Supreme Court to record its transcripts, making it indeed a 'court of record' on the administrative side. We are witnessing an unprecedented fight for same-sex marriage on the judicial side. As a student of law - where you place your values is of paramount importance amid these episodes. Now that values are at the core of this profession - it has always been judges, lawyers and academicians who work together and place their values in the right places in the interests of justice. For instance, it will be convenient and respectful to adore the kind of depth that academic scholarship provided in *Kesavananda Bharati*; Prof. Dieter[7] Conrad's scholarship somehow made its way to the corridors of the Supreme Court and then to the paragraphs of *Kesavananda Bharati*.

We hope to have answered a little from the question of why should we write? Let us take this opportunity to also unearth the number of books that Advocate Satyakam has suggested for young law students to read for instilling thoughts on similar lines, while he has not dealt with the notion of writing rather – he goes for an ethical pursuit.

In continuation of this question, we are excited to introduce Volume II, the DNLU Student Law Journal, which encapsulates ideas from practitioners, young scholars and students. This journal remains unique to us, as we were tasked to produce a journal without compromising the quality in merely eight months - this included forming an editorial board, revising all the editorial policies, and archiving the earlier published edition. In our favour, we completed the journal in eight months and released the online version - a forum designed to respond to contemporary legal developments - within four months of the forum's construction - we were indexed with Hein Online.

At this crucial juncture, it is incumbent upon us to magnify the unwavering efforts of all the esteemed stakeholders involved in this remarkable endeavour. First and foremost, we are compelled to acknowledge the profound contributions of our distinguished advisory board members, whose sagacious guidance and unwavering support have propelled us to new heights of excellence. They have not only served as beacons of wisdom but have also imbued us with invaluable ideas that have enriched the very fabric of our work.

Furthermore, we are deeply indebted to the peer-review board members, whose selfless commitment to our cause has been nothing short of

[7] Monika Polniz, 'The Basic-Structure Doctrine and its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting' (2021) 5(1) ILR <https://www.tandfonline.com/doi/full/10.1080/24730580.2020.1866882> accessed 20 May 2023.

extraordinary. Despite their demanding schedules, they have graciously made themselves available, demonstrating an unparalleled dedication to fostering intellectual rigor and ensuring the utmost quality of our journal.

No tribute would be complete without recognizing the indomitable support of our esteemed institution, which has provided us with multi-faceted assistance encompassing moral fortitude, financial backing, academic guidance, and logistical facilitation. This unwavering commitment has been pivotal in enabling us to navigate the intricate path towards our scholarly aspirations.

Our profound gratitude extends to the cherished members of our faculty, including the remarkable Dr. Gargi Chakrabarti, whose unwavering availability and commitment as the Controller of Examination have been invaluable to our cause. We also extend our heartfelt appreciation to the esteemed Dr. Manwendra Tiwari, whose unerring guidance has been with us since the inception of this esteemed journal. Moreover, we express our deepest gratitude to the erudite Dr. Praveen Tripathi, whose comprehensive support spanning academic, administrative, and technical realms has been instrumental in the realization of our vision. We would be remiss not to acknowledge the invaluable administrative guidance provided by the esteemed Hon'ble Prof. (Dr.) Shailesh N. Hadli, whose astute counsel has steered us towards success we offer our sincerest thanks to the Hon'ble Vice-Chancellor, whose unwavering commitment to academic excellence has positioned him as the esteemed patron of this esteemed journal.

Additionally, we wish to extend our heartfelt appreciation to the Student Bar Association (SBA) of DNLU for their generous sponsorship of this journal. It is with profound gratitude that we recognize Mr. Rahul Goyal, the esteemed President of SBA, for his invaluable contribution of time and unwavering support, which has been pivotal in our journey.

As we reflect upon and preserve this momentous achievement, we humbly acknowledge the indispensable role played by our cherished readers and writers. Our endeavours would be bereft of purpose without their intellectual curiosity and creative expression. Their unwavering support and engagement have breathed life into our scholarly pursuits; we are eternally grateful for that.

In this resplendent tapestry of collective effort and unwavering dedication, we find ourselves humbled by the contributions of each esteemed individual and organization. Their magnanimity, guidance, and unyielding support have paved the way for our success, and we stand in awe of

their collective brilliance. Thank you for enduring with us by reading the letter – as we finish in the words of Mark Twain – *"If I had more time, I would have written a shorter letter."*

Ashit Kumar Srivastva & *Shaileshwar Yadav* (On behalf of the Editorial Board)

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ANALYZING THE CONFLICT BETWEEN TRADEMARK AND COPYRIGHT LAW IN LIGHT OF THE PROTECTABILITY OF FICTIONAL CHARACTERS

*—Vedant Saxena**

Abstract—While it is true that fictional characters have not traditionally been considered as works of art separate from the work they originally appeared in, or as an indicator of origin, in light of a plethora of judgments over the years, the relevance of fictional characters has been recognized by courts and certain arenas of protection have been granted. However, the jurisprudence of providing protection to a fictional character becomes a lot more complicated when a particular character is the subject of both copyright and trademark protection. Several jurists opine that on account of such dual protection, the very purpose behind the forces of copyright law, i.e., to encourage creativity by stifling the material available to future authors, shall be dampened.[1] Other jurists, on the other hand, contend that since the nature of protection granted by copyright and trademark law is entirely different, the rights conferred under both laws are capable of co-existing, if implemented in a proper manner.[2] The majority of the issues concerning such dual protection are yet to be resolved by courts in a meaningful manner. However, the limited jurisprudence available on the topic does provide ways in which copyright and trademark protection could co-exist and thereby provides an invaluable insight as to how courts could resolve this issue and determine the appropriate ambit of dual protection. Through this paper, the author seeks to decipher potential ways

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1 Alex Kozinski, 'Mickey & Me' (1994) 11 U. Miami Ent & Sports L. Rev. 465, 467.

2 *Boston Professional Hockey Assn. Inc.* v *Dallas Cap & Emblem Mfg. Inc.*, 360 F Supp 459: 464 (ND Tex 1973), rev'd 510 F 2d 1004 (5th Cir 1975).

to counteract the trademark-copyright divide in light of certain relevant legal pronouncements.

Keywords: Fictional Character, Copyright, Trademark, Public Domain, Fair Us.

I. INTRODUCTION

A. The Protect Ability of Fictional Characters Under Trademark and Copyright Law

Fictional characters could be considered as works for which independent copyright protection may be granted if the following essentials are fulfilled. Firstly, just like any other work for which copyright protection is sought, it should not merely be an idea, but a creative expression of one. Secondly, the fictional character must have sufficiently been delineated upon. The 'Character Delineation test' was laid down in *Nichols* v *Universal Pictures Corpn*.[3] The Court herein held that the defendant had merely copied from their prototypes, which were basically public property. Moreover, it was also stated by the court that the characters had not been sufficiently delineated by the plaintiff. From this judgement, it could thereby be inferred that a fictional character can only be granted protection if it has been sufficiently described and deliberated upon. The lesser developed the character, the lesser protection it is entitled to receive under copyright law.

There do arise instances where copyright law is unable to provide adequate protection to fictional characters.[4] In such cases, the creator could seek refuge under alternate remedies, such as trademark law and unfair competition. Under trademark law, a fictional character does not need to be developed in order to satisfy a particular standard, as is the case under copyright law.[5] However, since a trademark represents the applicant in the market and helps distinguish his business from other businesses, it is essential that the fictional character mark possesses a distinctive character, i.e., it is capable of distinguishing the applicant's goods or services from other people's goods or services. Acquired distinctiveness also acts as a defence against generic words or devices; for

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3 45 F 2d 119 (2nd Cir 1930).

4 Kenneth E. Spahn, 'The Legal Protection of Fictional Characters', University of Miami Entertainment and Sports Law Review, 331, (1992).

5 *ibid*.

instance, courts have accorded trademark protection to single colours in the event of such colours acquiring a secondary meaning.[6] Concerning fictional characters, while it is true that there has not been a single case where courts have denied that a fictional character could be inherently distinctive, to date, courts have not recognised a fictional character as 'inherently distinctive'.[7] In order to establish distinctiveness, courts seek to determine whether the concerned fictional character has obtained a secondary meaning with respect to the business of the applicant.

B. The Trademark-Copyright Divide

The period across which a fictional character enjoys intellectual property protection could be broken down into two stages. While the first stage comprises the duration when the character is subject to concurrent copyright and trademark protection, the second stage is the period when the character enjoys the remainder of its trademark protection post the expiration of its copyright term. With respect to the first stage, the primary concern is that the aforementioned trademark protection may limit the fair use doctrine provided under copyright law, in an improper manner. The fair use doctrine under copyright law is a carefully crafted doctrine in order to balance the two purposes of copyright law: encouraging creativity by limiting the material available for appropriation and the wider dissemination of knowledge.[8] As per the doctrine, therefore, a protected work may be employed for certain purposes, such as scientific research, review and education, without the author's prior permission.

II. CONCURRENT TRADEMARK AND COPYRIGHT PROTECTION

While setting up the copyright fair use doctrine, the formulation of concurrent trademark protection was not anticipated. Therefore, trademark protection further adds to the disruption of this already unpredictable and complicated doctrine. The case of *Original Appalachian Artworks Inc.* v *Topps Chewing Gum, Inc*.[9] is evident in the aforementioned issue. The plaintiff company herein, Cabbage Patch Kids, were involved in the manufacture and sale of cloth dolls for kids. It filed a suit against the defendant company, Topps Chewing Gum, upon knowing that they were manufacturing stickers and trading cards that depicted dolls similar to the Cabbage Patch Kids dolls, in violent, rude and frequently noxious settings.[10] According to the defendant company, the figures of the dolls they had produced were a parody

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6 *Christian Louboutin Sas* v *Ashish Bansal*, 2018 SCC OnLine Del 10205..

7 Christine Nickels, 'The Conflicts Between Intellectual Property Protections When a Character Enters the Public Domain' (1999) UCLA Ent. L. Rev. 133, 155.

8 17 U.S.C. Section 107 (2000).

9 642 F Supp 1031, 1034, 1036 (ND Ga 1986).

10 *ibid*.

of the Cabbage Patch Kids dolls and therefore, were protected by the copyright fair use doctrine. However, the Court, disregarding the fair use doctrine, held that on account of the immense goodwill and reputation attached to the Cabbage Patch Kids dolls, it was necessary to injunct the defendants from carrying on their act of reproducing dolls similar to the plaintiff's. While the Court did analyse the applicability of the fair use doctrine in the present case, the entirety of its focus on the goodwill attached to the plaintiff's character resulted in an erroneous importation of trademark principles into the analysis of the copyright fair use doctrine.

The aforementioned Appalachia case brings up yet another issue associated with the concurrent protection of fictional characters under copyright and trademark law. Even if the court, in this case, had implemented the fair use doctrine and pronounced the legality of the defendant's actions, once the Court found it a case of trademark infringement, an injunction would nevertheless have been granted. It is thus the case that the presence of trademark protection would eliminate the application of the copyright fair use doctrine in its entirety. There have also been certain other cases when courts, in order to determine copyright fair use, have made in-depth inquiries into the use of the subject character by the defendant and denied relief to the plaintiff, despite the existence of copyright infringement.[11] However, such sophisticated inquiries by courts have been fairly seldom. It could therefore be concluded that trademark protection would eliminate or at the very least, curtain the otherwise applicable fair use doctrine. While the such limitation of the copyright fair use doctrine is highly desirable in light of the public benefits associated with trademarks, it also forms a marred blot upon the liberty of the public to appropriate fictional characters. Such limitation of the copyright fair use doctrine also undermines the importance of granting trademark protection to fictional characters in a proper manner, right from the onset.

III. TRADEMARK RIGHTS IN CHARACTERS EXISTING IN THE PUBLIC DOMAIN

It is mostly the case that issues arise concerning distinctiveness when the applicant has sought for the registration of a character that has been extracted from the public domain, rather than one that was independently created or governed by the applicant. For instance, consider the case of *Disney Enterprises Inc.* v *Eidgenössisches Institut für Geistiges Eigentum*[12], which was centred around the question of whether an entity could enjoy exclusive rights in the character of 'Rapunzel'. It was stated by the Court that the character was an outcome of a German fairy tale and had enjoyed widespread popularity among children, generation after generation. The character's name had thereby

[11] *Pillsbury Co.* v *Milky Way Productions, Inc.,* 215 USPQ (BNA) 124, 129–32 (ND Ga 1981).
[12] IGE (2016) (Swiss Federal Court).

become a thematic description of a particular subject over time, on account of such recognition by the common masses. The character was not recognized as an indicator of a source of origin and therefore, no entity was entitled to enjoy exclusive rights in the character.

However, there is no provision or judgement that expressly denies the trademark protection of characters picked from the public domain.[13] For instance, Disney has successfully acquired rights to characters such as 'The Little Mermaid', 'Rapunzel' and 'Snow White' which have existed as fairy tales and children's stories for centuries. However, it is important to note that these characters still exist in the public domain and any person could appropriate them for his private purposes. Disney has merely acquired exclusive rights to its own versions and/or descriptions of the characters, featured in its movie adaptations. For instance, Disney, in its movie, 'Snow White and the seven dwarfs', portrayed Snow White as a princess typically in an attire comprising a blue bodice and a high-waisted yellow skirt. The original story, however, did not mention any specific clothing. Therefore, in order to escape the complications of trademark infringement, one is entitled to appropriate the character of Snow White; however, if the character is portrayed to be in an attire similar to the one portrayed by Disney, one shall be held liable for infringement.

In *Frederick Warne & Co., Inc.,* v *Book Sales Inc.*[14], the plaintiff publisher acknowledged the fact that at the time of the institution of the suit, the subject work existed in the public domain. However, despite such acknowledgement, the plaintiff sought trademark protection for eight-character illustrations that were featured in the original books. The defendant based his contentions on the argument that since the character illustrations that he sought protection for, featured in the original books that had fallen into the public domain, the plaintiff was no longer entitled to the exclusive use of the subject illustrations. The Court, however, did not find much substance in the defendant's contentions. It went on to state that once a character that was once protected by copyright makes its way into the public domain, it must not be precluded from enjoying trademark protection if it has garnered independent trademark significance, i.e., it acts as an identifier of the owner's goods with respect to the general public. On account of the fact that the kinds of protection granted by copyright law and trademark law are entirely dissimilar, it is not disruptive of trademark protection co-existing with copyright protection.[15]

Thus, in this case, the Court, firstly, recognized the existence of concurrent copyright and trademark protection of a fictional character and secondly, it elaborated upon the possibility of trademark protection beyond the expiration of the term of copyright. The Court also went on to state that dual protection

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[13] *ibid*.
[14] 481 F Supp 1191 (SDNY 1979).
[15] *ibid*.

under trademark and copyright laws is particularly desirable in the event of a character having to be represented graphically.

The Warne case was not only the case that elaborated upon the significance of dual protection to fictional characters under trademark and copyright laws. In *Boston Professional Hockey Assn. Inc.* v *Dallas Cap & Emblem Mfg.*[16], the Court stated that it was not feasible to grant trademark protection for the plaintiff's logo since that could lead to a copyright monopoly over non-copyrighted designs. The Fifth Circuit disagreed with the district court's judgment and held that the protection offered by trademark law is in lieu of public interests and business interests and therefore, there was no reason to consider the moving of trademarks into the public domain with the mere passage of time. It further stated that if an individual were to pick a design out of the public domain and use it as a trademark for his goods, and that design goes on to act as a prominent indicator of origin for the individual's products, he shall have acquired a property right in that mark. This would be an effective case of the passage of a design from the public domain into the protective ambits of trademark law.[17]

The situation would be no different in the case when a character that was once protected by copyright law passes into the public domain. In such a scenario, if the fictional character serves as an indicator of origin with respect to the user's goods, it shall be removed from the public domain of another trademark. The Fifth Circuit thereby recognized concurrent copyright and trademark protection of fictional characters and the persistence of trademark protection beyond the expiration of the term of copyright.

While several courts have recognized the potential of concurrent copyright and trademark protection to fictional characters and the possibility of the persistence of trademark protection after the expiration of the term of copyright, certain other courts have held that once provided, such protection shall be problematic. For instance, Justice Nies did not favour the grant of trademark registration to three-dimensional designs of Batman, Superman and the Joker.[18] According to her, in the event of copyrighted design also being a trademark for itself, there would arise the issue of whether the quid pro quo, i.e., something for the public in return for a copyright monopoly, for the protection under copyright law, has been provided, if, in the event of the expiration of the term of copyright, the subject design cannot at all be used by others.[19] This represents an extreme scenario, where a fictional character that would otherwise lie in the public domain in lieu of the expiration of the term of copyright, is, in its entirety, forbidden from entering the public domain due to trademark protection. In such a case, the public domain is not greeted by even a single

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16 360 F Supp 459, 464 (ND Tex 1973).
17 *ibid*.
18 *DC Comics, Inc., In re*, 689 F 2d 1042 (CCPA 1982) (Nies, J., concurring).
19 *ibid*.

element of the previously copyrighted character. It could instead be argued that the term of copyright only served to fulfil the acquired distinctiveness standard with respect to the subject character and the public does not receive anything in exchange for the grant of copyright protection.

On one hand, the concerns expressed by Justice Nies certainly cannot be denied. On the other hand, it can be argued that the public does receive something in exchange for the grant of copyright protection, i.e., the birth of a new trademark. The value of the exchange is, naturally, directly proportionate to the aptness of the grant of trademark protection in the first place. Therefore, the decision to grant trademark protection to a fictional character becomes even more important in light of the maintenance of the quid pro quo of copyright.

The case of *Comedy III Productions Inc.* v *New Line Cinema*[20] saw the limits of trademark protection for previously copyrighted works, getting reached. The defendants herein released a motion picture entitled 'A long kiss goodnight'. In one of the scenes of the film, a clip from the plaintiffs' short film, 'Three Stooges', played on a television set in the background, for a short span of 30 seconds. In lieu of this, the plaintiffs alleged that the defendants had violated their trademark rights, since their short film included certain distinctive aspects, such as the 'Three Stooges comedy'. However, the Ninth Circuit denied the grant of trademark protection for a film clip whose term of copyright had expired, in lieu of the recognition of broader implications of the plaintiff's claim. The Court held that in the particular case, the footage was clearly covered under the ambit of copyright law and the elements of trademark law cannot be considered to override.[21] Therefore, if a previously copyrighted design has entered the public domain, it is open to be appropriated by the general public and cannot be made subject to trademark protection without nullifying the Copyright Act.[22]

The Comedy III case thereby affirmed the reinstatement of the independence of trademark and copyright protection and the unwillingness of courts to replace one with the other in an improper manner.

IV. THE MUTATION OF A PERPETUAL COPYRIGHT

In *Dastar Corp.* v *Twentieth Century Fox Film Corp.*[23], the US Supreme Court redefined the trademark-copyright divide. The defendants herein were the exclusive owners of the television rights to Dwight D. Eisenhower's book, 'Crusade in Europe'. However, on account of the failure to renew the copyright held in the television series, the series passed into the public domain. In

[20] 200 F 3d 593 (9th Cir 2000).
[21] *ibid*.
[22] 17 U.S.C. Sections 201-216 (1958).
[23] 2003 SCC OnLine US SC 53.

anticipation of the 50th anniversary of the Second World War, the defendant company acquired the beta cam tapes of the plaintiff's television series and, after making a few minor adjustments, released the series. The tapes were sold by the defendant company as its own, without pronouncing any reference to the plaintiffs' television series. Subsequently, the plaintiffs filed a suit against the defendant company, alleging trademark infringement in light of a false representation of the origin of the series.

The Supreme Court, in lieu of rendering its judgment, warned against the over-extension of trademark law into domains traditionally occupied by copyright law. The Court's primary concern in according trademark protection to the plaintiffs' television series was that it would create a mutant copyright protection that would deny the appropriation of works existing in the public domain, by the general public.[24] This could easily lead to a substantial increase in the duration of the monopoly over the concerned work, which would severely impact one of the primary goals of copyright law, i.e., to seek an effective balance between exclusivity and public appropriation.

While it is true that the Supreme Court in Dastar did not directly delve into the intellectual property protection of fictional characters, it certainly clarified that once the term of copyright expires, the concerned work is open to be appropriated by the general public, irrespective of the fact whether it has come to be an indicator of origin. It is likely that future defendants who appropriate characters existing in the public domain, cite this proposition in their defence.[25] However, it is important to note that in this case, the Court did not object to the peaceful co-existence of copyright and trademark protection, but only to an improper supplantation of one with the other.[26]

It could thereby be concluded that the Dastar decision, in order to eliminate the grant of improper protection, increased the secondary standard requirement for fictional characters, many-fold. There are numerous characters that have gone on to become highly recognizable and exclusively associated with the user. However, as per the Dastar decision, the acquisition of a secondary meaning would not merely require the association of the character with the author or illustrator, but would also require the association of the character with the actual producer or sponsor of the goods upon which the character makes an appearance.[27] The Dastar decision also further strengthens the proposition laid down in Frederick Warne & Co. v Book Sales Inc.[28], wherein it was held that

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[24] *ibid*.

[25] Riger K. Zissu, 'Copyright Luncheon Circle: The Interplay of Copyright and Trademark Law in the Protection of Character Rights with Observations on Dastar v Twentieth Century Fox Film Corp.' (2004) 51 J. Copyright Soc'y U.S.A. 453, 455.

[26] Viva R. Moffat, 'Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection' (2004) 19 Berkely Tech. L.J. 1473, 1522–23.

[27] *Dastar Corp.* v *Twentieth Century Fox Film Corp.,*2003 SCC OnLine US SC 53.

[28] *Frederick Warne & Co. supra* note 12.

in order to demonstrate trademark monopoly, it was necessary that the subject illustrations not only served to designate the author but also the producer of the original books. In the case of *DC ComicsInc.* v *Unlimited Monkey Business*,[29] wherein trademark rights with respect to the characters of 'Batman' and 'Wonder Woman' were granted on the ground that on account of long and concurrent use, the characters had become exclusively associated with the plaintiffs and thereby any subsequent use would confuse the public regarding the source of the characters. However, it is unlikely that this judgement would be able to stand the heightened secondary standard requirements held in Dastar.

V. THE COPYRIGHT-TRADEMARK DIVIDE IN THE 'ENOLA HOLMES' LAWSUIT

As explained earlier in this paper, the Conan Doyle estate had, soon after Netflix's announcement that it had acquired distribution rights to make a movie based on the character of 'Enola Holmes', filed a complaint against the producers of the show, citing copyright and trademark infringement in the works of Conan Doyle. Apart from copyright infringement, the estate also contended that the use of the term 'Enola Holmes' would cause the common masses into believing that the work has been produced or sponsored by the Doyle estate. The estate claimed that due to the fact that it had successfully insisted on obtaining a licence for a long number of years, the public had come to believe that even any form of derivative work was in some way associated with the estate.

However, the majority of the original novels featuring Sherlock Holmes were in the public domain.[30] Therefore, the question was, could the Conan Doyle estate claim trademark protection over the names of characters such as 'Holmes', 'Sherlock Holmes' and 'Watson' that existed in the public domain? If this were so, the estate would end up holding exclusive perpetual rights to a character existing in the public domain. In *Dastar Corp.* v *Twentieth Century Fox Film Corp.*,[31] Justice Scalia, writing for the Supreme Court, stated that if such protection were to be accorded to entities, it would end up imposing unreasonable restrictions on the public to appropriate characters existing in the public domain. In December 2020, it was announced that the Conan Doyle estate and Netflix reached a consensus and agreed to dismiss the lawsuit.[32]

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[29] *DC Comics Inc.* v *Unlimited Monkey Business*, 598 F Supp 110, 119 (ND Ga 1984).

[30] 'The Case-Book of Sherlock Holmes' Enters Public Domain; Here's What it Means, (*The Indian Express*, 5 January, 2023) <https://indianexpress.com/article/books-and-literature/the-case-book-of-sherlock-holmes-enters-public-domain-2023-meaning-other-books-8362788/> accessed 13 May 2023.

[31] 2003 SCC OnLine US SC 53: 156 L Ed 2d 18: 539 US 23 (2003).

[32] Alison Flood, Lawsuit Over Warmer Sherlock Depicted in Enola Holmes Dismissed, (*The Guardian* 22 December, 2020) <https://www.theguardian.com/books/2020/dec/22/lawsuit-copyright-warmer-sherlock-holmes-dismissed-enola-holmes> accessed 13 May 2023.

However, this suit brought up interesting questions about the rights to characters existing in the public domain.

VI. CONCLUSION

It could thereby be concluded that a fictional character is a unique entity that is capable of serving the roles of both a creative expression of art and an indicator of origin. In lieu of this, fictional characters are capable of enjoying both copyright and trademark protection. However, in the event of an overlap of copyright and trademark protection, the fair use doctrine under copyright law is potentially compromised.[33] It is therefore pertinent that courts pay heed to the fair use doctrine and ensure that the general public's right to carry out certain appropriations of copyrighted works that are necessary in lieu of the larger dissemination of knowledge are not denied due to the public recognition of the character. In the event of the persistence of trademark protection after the expiration of the term of copyright, cases such as Frederick Warne[34] and Dastar[35] should be sufficient in guiding the analysis and ensuring that the appropriation of characters in the public domain is not improperly limited. For a user to be granted trademark protection for a fictional character, it is essential that he furnishes evidence regarding public recognition of the character as an indication of the user.[36] It is essential that mere associations of the subject character with the original work, the author or the character must not be the reason for the grant of a trademark monopoly. Only a character, which is in the public domain due to the expiration of the term of copyright, fulfills the source-identifying requirement in a proper manner, should it be removed from the public domain. In the event of an absence of such fulfilment, providing trademark protection for the fictional character would create a mutant copyright species, eliminating the general public's right to appropriate characters in the public domain.

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33 *Frederick Warne & Co. supra* note 14.
34 *ibid.*
35 *Dastar Corp. supra* note 27.
36 *ibid.*

CONVICTIONS BASED ON CIRCUMSTANTIAL EVIDENCE: DOES A BIAS EXIST?

—*Pranav Kumar**

Abstract—Convictions based on circumstantial evidence are not uncommon. However, there seems to be an adjudicatory difference in the treatment accorded to such evidence by the judges. This article attempts to study such differences and rationalise it. To that end, it shows that despite the Courts explicitly declaring parity between circumstantial and direct evidence (in the sense, that conviction can be based on both), judges do show an implicit undervaluation of circumstantial evidence that is not explained by mere lack of probative value of such evidence. It then argues that such bias is psychological and not cognitive, and moves on to rationalise it further. Thus, the article impresses that judges don't disregard individual circumstantial evidence by calculating its probative value but do so because they are psychologically biased against all circumstantial evidence.

Keywords: Circumstantial evidence, burden of proof, psychological bias.

I. INTRODUCTION

"Some circumstantial evidence is very strong, as when you find a trout in the milk."

Henry David Thoreau

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The law demands reasonable certainty of guilt before convicting any person of a criminal offence. The evidence used to reach said certainty, is classified alike in common and legal parlance, as direct or circumstantial. While direct evidence is a statement attempting to prove a disputed factual proposition, circumstantial evidence proves facts from which such disputed proposition may be inferred.[1] That is, the former (e.g.: eyewitness to the murder) aims to prove a material fact with minimal or nil usage of judicial deduction, while the latter (e.g.: eyewitness testimony placing the defendant at the murder scene) requires an added step of inference to declare the fact proved. Notwithstanding the contrary assumption by scholars and laymen alike, the law draws no distinction between the weight or reliability of circumstantial evidence as opposed to direct evidence. That is, "there is no doubt that conviction can be based solely on circumstantial evidence",[2] if such evidence can lead to a strong inference.

Further, the scheme of the Indian Evidence Act, 1872 ("IEA") requires the judge to engage in an 'inferential process' post the production of all evidence, to gauge the sufficiency of evidence in proving guilt. That is, post the determination of a fact's relevancy, and the admissibility of evidence to prove such fact, the judge ought to decide on the sufficiency of evidence adduced to prove it. This process is mandated notwithstanding the nature of evidence (direct or circumstantial) the courts are dealing with. This article is, in some ways, a study of such an inferential process. It is argued that though the IEA does not differentiate between direct and circumstantial evidence and mandates an identical process of inference for both, the judges show an implicit bias against circumstantial evidence as against direct evidence.

Part I of the article argues, that despite the Courts explicitly declaring parity between circumstantial and direct evidence (in the sense, that conviction can be based on both), judges do show an implicit undervaluation of circumstantial evidence that is not explained by mere lack of probative value of such evidence. Part II of the article argues that such bias is psychological and not cognitive; i.e., the sweeping generalized bias has very little logical or cognitive basing, but a strong psychological one. Part III of the article shall discuss the reasons behind such bias. Thus, the article attempts to impress that judges don't disregard individual circumstantial evidence by calculating its probative value but do so because they are psychologically biased against all circumstantial evidence.

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1 'Sufficiency of Circumstantial Evidence in a Criminal Case', Columbia Law Review 55, April, No. 4, 1955, pp. 549-560.

2 *Ramesh Bhai* v *State of Rajasthan*, (2009) 12 SCC 603.

II. PART I

This Part shall determine if said bias exists in the mind of judges. It shall *first,* discuss the law on circumstantial evidence in India; and *second,* argue why such an approach does denote an underlying bias.

A. The Law

The courts have consistently ruled that in a case based only on circumstantial evidence, an inference of guilt can be supported only if all the relevant facts and circumstances are deemed to be incompatible with the accused's innocence or any other person's culpability. In *Hanumant* v *State of M.P.*[3] it was observed, that "the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established… [as] conclusive", and must "exclude every hypothesis but the one…[sought] to be proved". In other words, "there must be a chain of evidence so far complete…[and] [in] consistent with the innocence of the accused".[4] It must be such that it shows within all probability "the act must have been done by the accused."[5]

The landmark case of *Sharad Sarda* v *State of Maharashtra*[6] then analysed *Hanumant* and other decisions to distil five principles which it called the 'panchsheel', to deal with cases relying on circumstantial evidence:

the circumstances from which the conclusion of guilt is to be drawn "*should* be fully established".[7]

The facts so established should not be explainable on "any other hypothesis except that the accused is guilty".[8]

the circumstances should be conclusive they should exclude "every possible hypothesis" except the one to be proved.[9]

there must be a chain of evidence so complete as to "show that in all human probability the act must have been done by the accused".[10]

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3 *Hanumant* v *State of M.P*, (1952) 2 SCC 71: AIR 1952 SC 343.
4 *ibid* 12.
5 *ibid*.
6 *Sharad Birdhichand Sarda* v *State of Maharashtra*, (1984) 4 SCC 116: AIR 1984 SC 1622.
7 The Court argues that circumstances concerned 'must or should' be established and not 'may be' established, consequently dividing "vague conjectures from sure conclusions"; cited from *Shivaji Sahabrao Bobade* v *State of Maharashtra*,(1973) 2 SCC 793.
8 Supra, note 6, para 153.
9 *ibid*.
10 *ibid*.

These principles were reaffirmed by the Supreme Court as recently as 25th August, 2022.[11] Thus, conviction based merely on circumstantial evidence is possible, provided it is tested by the touch-stone of the 'Panchsheel' laid above.

B. Unapparent Bias?

The above-mentioned test is not the creation of Indian judges or jurisprudence. It's merely a restatement of what most jurisdictions across the world require in the absence of direct evidence: the prosecution must prove consistency of all circumstances with guilt, and inconsistency with hypotheses of innocence. Another rephrasing of said test can also be found in Sir Wills' book on circumstantial evidence,[12] where he provides five rules to be observed in cases involving circumstantial evidence; one of them being, "in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other *reasonable hypothesis* [emphasis provided] than that of his guilt".[13]

While Sir Wills uses 'reasonable hypothesis', the Supreme Court does not. The Court instead says 'every possible hypothesis'. This clearly imposes a heavier burden on the state, and unlike Wells' test, is not a reformulation of the 'reasonable doubt' standard.[14] The possibility of justification of such a higher burden lies outside the domain of this Part of the article. However, the existence of such a higher burden is amply clear, as it is now not enough that the judge could reasonably draw the inference of guilt; there must also be no reasonable hypothesis of innocence. Moreover, strictly speaking, not only is the test placing a higher burden, it is placing an impossible one. Circumstantial evidence is inherently probabilistic. That is, it can always lead to inferences of inculpatory/exculpatory nature, and both such inferences have a probability greater than 0. They may not be equally probable, but exist as possibilities anyway, and thus having 'no hypothesis of innocence' is impossible: an issue the Indian Courts have never addressed.

Consequently, the use of such special tests and higher burden can then only be justified if one either deems circumstantial evidence less probative as a matter of cognition or logic, or deems it psychologically less convincing than direct evidence, or both. The subsequent Part of the article will argue why the bias is not cognitive, but psychological.

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[11] *Ram Sharan Chaturvedi* v *State of M.P.*, 2022 SCC OnLine SC 1080.

[12] Sir William Wills, 'An Essay on The Principles of Circumstantial Evidence', Alfred Wills, ed., Philadelphia, T. & J.W. Johnson 1881.

[13] *ibid* 171.

[14] Courts in the United States too have opined that the burden imposed by said test is higher than the reasonable doubt standard. States like New York have accepted and acknowledged the greater onus (see *People of the State of New York*v. *Taddio*, 292 NY 488, 497: 55 NE 2d 749, 754 (1944)), while some Courts have spoken against the test citing its unreasonable burden refer: *Commonwealth* v *Kloiber*, 378 Pa 412, 438, 106 A2d 820, 828 (1954).

III. PART II

This part argues that such bias is psychological and not cognitive; i.e., the sweeping generalized bias has very little logical or cognitive basing, but a strong psychological one.

A. Theoretical and Doctrinal Proof of Psychological Bias

Firstly, for the bias against circumstantial evidence to be cognitive or logical, such evidence must be inherently inferior in *character* to direct evidence. However, the distinction between direct and circumstantial evidence is not broad enough to indicate such inferiority. Direct evidence, as mentioned, proves a fact in issue while circumstantial evidence proves other relevant facts from which an inference needs to be drawn as to the fact in issue. Thus, the logic of deduction is straightforward in direct evidence, while circumstantial evidence requires an additional step of inference.[15] The requirement of such inference alone cannot taint the character of all circumstantial evidence. Such evidence can still be in the same form as direct evidence; for example, a testimony can be direct or circumstantial, depending on the fact it seeks to prove. The inference drawn using such proved facts may be unconvincing to accord guilt to the accused, but it cannot itself prove that all circumstantial evidences are *inherently* inferior. Thus, even if there exist good reasons to be reluctant to convict based on some forms of circumstantial evidence, the general lack of inclination to rely on them cannot be justified as a cognitive or logical measure.

Secondly, some forms of circumstantial evidence are in fact more reliable than direct evidence. For example, in Penrod and Cutler's study,[16] participants were asked to identify the perpetrator of a crime from a line-up after seeing the crime. More than 58% of the time, when the offender appeared in the line-up, people were unable to correctly identify him.[17] Further, subjects also identified an innocent person almost 36% of the time in cases where the perpetrator was absent from the line-up.[18] These studies, unlike real-life situations, rarely involve violent acts, long delays between the act and identification, or imperfect visibility, and yet eyewitnesses often make staggering errors. Per-contra, certain circumstantial evidence has minimal error rates. For example, ballistics analysis has a false-positive rate of a mere 2-3% and hair analysis returns false-positives only about 4% of the time.[19]

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[15] Roy D. Burns, '*Weighing Circumstantial Evidence*', 1957, 2 S.D. L. Rev. 36.

[16] Brian L. Cutler and Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law*, Edition 13 (1995).

[17] *ibid*., pp. 12, 13.

[18] *ibid*.

[19] Kevin Jon Heller, 'The Cognitive Psychology of Circumstantial Evidence', Michigan Law Review , November 2006, Vol. 105, No. 2 (November 2006), pp. 241-305.

Thirdly, the usage of circumstantial evidence in many cases might be more desirable than direct evidence. For example, the case of *Daya Singh* v *State of Haryana*[20] dealt with convicting the accused solely based on his identification in court by two witnesses. Pursuant to the crime, the accused was arrested in May 1988, and the test identification parade was scheduled for June 2, 1988.[21] However, the appellant refused to participate on that day and was brought for identification in court over 8 years after the incident date. As explained by psychologist Ebbinghaus in his 'forgetting curve hypothesis', the fading rate of human memory is directly-proportional to the 'retention interval'.[22] Since the retention interval, in this case, is eight years, the chances of misidentification are higher. Hence, the Court in this case would have benefitted from according greater weight to circumstantial evidence (e.g., blood sample), than merely relying on human memory. The court, however, did not do so.

Thus, it is amply clear that the court would rather rely on direct evidence notwithstanding the deterioration of its probative nature, over circumstantial evidence. This bias is not logical or cognitive, as it continues even in cases where direct evidence may have been clearly unreliable in comparison to circumstantial evidence. Hence, by the method of elimination, we may doubt that the bias is a psychological one. The subsequent section shall strengthen such doubt by discussing an experiment that proves the existence of said psychological bias.

B. Experimental Proof of Psychological Bias

For all evidence direct or circumstantial, there exist two probabilities. *First*, the probability of the accused being guilty given the evidence is true, and *second*, the probability of the evidence being true. The former measures the probative value of each piece of evidence (e.g. how probable is the accused's guilt given that the eyewitness isn't lying), while the second measures its reliability (e.g. how probable is it that he isn't lying).[23]

Since the probative value is also dependent on reliability, these probabilities are in some ways, related. If the evidence is completely non-reliable, its probative value is consequently reduced. Only if we believe the eyewitness is completely reliable, as the judges did in *Daya*, can we conclusively establish guilt and accord high probative value to the testimony. However, if we consider the forgetting curve hypothesis and the fact that identification happened eight years after the incident, the probative value of the identification will necessarily be less than 1: we cannot say it conclusively establishes guilt.

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[20] *Daya Singh* v *State of Haryana*, 2013 SCC OnLine P&H 16885.

[21] *ibid* 4-7.

[22] Jaap M. J. Murre, 'Replication and Analysis of Ebbinghaus' Forgetting Curve', PLoS ONE 10 (7): e0120644. <https://doi.org/10.1371/journal.pone.0120644>.

[23] Supra, note 15.

Consequently, judges can over/undervalue evidence in two ways: *first*, they may wrongly estimate the probative value of reliable evidence (by assuming it increases probability of guilt more than it does), or *second,* by wrongly estimating the reliability of the evidence and thus, assigning it the wrong probative value. In cases of direct evidence, judges fall trap to the second way of overvaluation: they rarely question the reliability of witness identifications, and as seen in the *Daya* case, fail to discount its probative value in situations where it is unreliable.[24] In other words, they believe that eyewitnesses are simply more reliable than they actually might be, by ignoring factors that may hinder reliability.

In situations where they do consider reliability, like in *Shahadat Hussain Rehmat Hussain* v *State of Maharashtra,*[25] they are quick to dismiss any theories: *"where evidence is cogent...it is no use to imagine and magnify theoretical possibilities...with regard to their power of memorizing."*[26] Further, the capacity to recapitulate *"would depend upon the strength or trustworthiness of the witnesses"*.[27] The factor of determination (the witness's confidence) is not a function of accuracy and also may have no correlation with reliability.[28] The witness may be convinced that his identification is correct, but may in his subconscious memory reconstruction, commit an error. Thus, while qualities like trustworthiness can't be relied upon, courts shun other important factors like memory deterioration with time.

However, the case of circumstantial evidence cannot be explained with such ease; the next subsection shall use the Wells Effect as an anchor for its elucidation.

C. Wells Effect

Having a similar explanation for the undervaluation of circumstantial evidence is lacking, as it assumes that judges would be willing to accord the right value to circumstantial evidence once they have been made privy to their undervaluation. If this were the case, judges would have already done so, as the counsels in both *Daya* and *Shahadat* clearly explained the pitfalls of having extensive reliance on direct evidence in such cases. This assumption has also been disproved by Gary Wells and other researchers[29] where they showed that

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[24] Supra, note 20 *Daya Singh* 4-8.

[25] *Shahadat Hussain Rehmat Hussain* v *State of Maharashtra* 2007 SCC OnLine Bom 111: (2007) 3 AIR Bom R 816.

[26] *ibid* 14.

[27] *ibid*.

[28] Jennifer L. Devenport and Brian L. Cutler, Eyewitness Identification Evidence, 3 Psychol. Pub. Pol'y & L. 338, 349 (1997).

[29] Supra, note 19, p. 254.

judges are likely to acquit in circumstantial evidence cases *"even when their subjective probabilities of guilt are sufficient to convict"*.[30]

Wells presented a fictitious civil case in which a colour-blind elderly woman sued the Blue Bus Company ("BBC") for having run over her pet dog to distinct groups of pretend jurors, one of which consisted of judges. Each group received the same basic information, and were told that BBC and Grey Bus Company ("GBC") had an equal percentage of traffic in the region, and thus, equal chances of hitting the dog. One half of the group was then presented with direct evidence as to BBC's liability, while the other half, with circumstantial evidence. The direct evidence entailed the defence attorney calling the weigh-station attendant along with his log-book, and showing that his previous entries were wrong 20% of the time, and correct only 80% of the time. The other half hearing circumstantial evidence on BBC's guilt were told about a tire-track print analysis of the culprit bus, revealing that its tracks matched with GBC's buses by only 20%, while it matched 80% with BBC's buses.[31] Note, that in both cases, the probability of guilt was equal: 80% (also satisfying the beyond reasonable doubt standard). Both halves were then asked to decide the case.

Despite the equal probability of guilt in both cases, the judges were four times more likely to convict BBC relying on direct evidence, than on circumstantial evidence.[32] Meaning, judges seem to distinguish between cases where there exists an 80% chance something is true, with cases declaring truth in a proposition based on 80% reliable evidence. Thus, the results make more certain the existence of a fundamental psychological distinction as opposed to a mere cognitive one between direct and circumstantial evidence that results in the judges' reluctance to convict on circumstantial evidence cases.

IV. PART III

In this Part, said psychological bias shall be rationalised in 3 ways. *First,* regarding the qualitative difference between direct and circumstantial evidence; *second,* regarding the probabilistic nature of circumstantial evidence; and *third,* regarding the certainty effect.

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[30] Gary L. Wells, 'Naked Statistical Evidence of Liability: Is Subjective Probability Enough?', 62 J. Personality & Soc. Psychol. 739, p. 7.

[31] Supra, note 19, p. 257.

[32] *ibid*. Wells further confirmed that such results were not because the subjective probability required by judges while using circumstantial evidence was greater than 80%; as calculated by him, their mean subjective probability was a mere 70% - lesser than 80% and similar to those judging the direct evidence case.

A. Qualitative Difference

An important qualitative difference between direct and circumstantial evidence is that while the former is a clear verbal reproduction of the incident itself, the latter is mostly an abstract statement about an alleged connection between the accused and the crime. This makes it easier to imagine an inculpatory/exculpatory scenario based on direct evidence, than circumstantial. By providing a narrative representation, eyewitnesses make it easy for the judge to imagine a possible scenario. As proved by psychologists, such imagination happens automatically (akin to reading a book) in cases of direct evidence, whereas since circumstantial evidence provides no representation of the event itself, it cannot aid such imagination.[33] Moreover, even if the judge were convinced that a piece of circumstantial evidence is indeed proved, thus increasing the probability of guilt, it still does not aid the judge in imagining how the crime was actually committed. It merely provides one piece of the puzzle. For example, even if the judge believes that the footprints around the crime scene were the defendant's, it only helps in imagining the defendant around the area; not how he committed the crime.

Further, a judge will find it easier to follow direct evidence over circumstantial due to its cause-to-consequence reasoning. Direct evidence reverses the consequence-to-cause structure of a criminal trial where one attempts to determine the cause (perpetrator) after knowing the consequence (crime). Such temporary reversal, where the eyewitness identifies the cause (defendant) and reaches the consequence (crime), provides coherency to direct evidence. As explained by Kahneman, individuals find it *"more natural and easier to follow the normal sequence and reason from causes to consequences than to invert this sequence and reason from consequences to causes."*[34] Thus, direct evidence helps the judge imagine with greater clarity, the unfolding of events leading to the crime, providing one possible rationale for the psychological bias against circumstantial evidence.

B. Probabilistic Nature of Circumstantial Evidence

There also seems to be a self-perpetuating loop facilitating the bias against circumstantial evidence. As mentioned already, the standard for judging cases based on circumstantial evidence is that the facts must be incompatible with the accused's innocence, and inexplicable by any hypothesis other than that of guilt. However, this is an impossible standard to meet; circumstantial evidence, by its very nature, allows both exculpatory and inculpatory inferences. The two may not be equally probable, but they are possible. Moreover, the possibility of contradictory inferences is not a function of reliability. That is, even if the

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[33] Supra, note 19, p. 265.

[34] Amos Tversky and Daniel Kahneman, 'Causal Schemas in Judgments Under Uncertainty', *Progress in Social Psychology* 49, Vol. 1, Fishbien ed. 1980, pp. 50-51.

evidence is considered reliable, it will still provide multiple inferences. Thus, circumstantial evidence can never be *"absolutely incompatible with the innocence of the accused."*[35] This is in contrast to direct evidence, where unless reliability is challenged, it immediately proves guilt. In other words, confessions and eyewitnesses *"speak in one voice"*[36] that is consistent only with the defendant's guilt. Consequently, if there exist multiple inferences, then the probability (or probative value) of any inference is less than 1. That is, circumstantial evidence cannot ever unconditionally prove guilt.

Thus, having a standard for circumstantial evidence cases ('incompatible with innocence') that cannot logically be met, I posit, is a result of the bias as much as it is its cause. Once the judiciary creates a high standard due to its pre-existing bias, is it possible that the very standard strengthens the bias in future cases; since, it creates precedents and normalises circumstantial evidence, no matter how probative, being kept second to weak direct evidence. These precedents, used time and again, normalise the step-motherly treatment accorded to circumstantial evidence. For example, the judgement in *Daya Singh* has been relied upon over 70 times in the last 20 years.[37] The cases which rely on *Daya Singh*, will then be counter-cited in many other cases, forming a web of judgements that reinforce said bias. Thus, any further study of precedents will engrave the same bias in the reader's mind, making the test both the cause and the result of the bias; or in other words, form a self-perpetuating cycle against circumstantial evidence.

C. The Certainty Effect

The certainty effect[38] studies the effect of reduction of an event's probability from certain to probable. As mentioned earlier, due to its very character, the probative value of even the most reliable circumstantial evidence is necessarily less than 1, whereas that of reliable direct evidence is always 1. Even if the objective probability of guilt in a case based on circumstantial evidence is very close to 1, according to the certainty effect, the judge is more prone to be afraid of a false conviction in a circumstantial case with 0.95 probability of guilt than in a direct case with 1.0 probability of guilt. As explained by Kahneman, when individuals make decisions that could be wrong, they *"overweight outcomes that are considered certain, relative to the outcomes that are merely probable"*.[39] This causes miniscule probabilities to carry considerable weight.

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[35] *Ram Das* v *State of Maharashtra* (1977) 2 SCC 124.

[36] Supra, note 62, p. 268.

[37] Manupatra Timeline, *Daya Singh* v *State of Haryana,* (2001) 3 SCC 468 at: http://www.manupatrafast.in/itimeline/?manuid=MANU/SC/0111/2001 (plz chk whether manupatra details will be deleted|or not).

[38] Supra, note 19, 283. Refer: Daniel Kahneman and Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, in *Choices Values Frames*, 2000.

[39] *ibid*. p. 17.

Such a certainty effect is also greater when the decision is accompanied by emotions like fear and dread. For example, consumers discard Company X, and pay considerably more to buy a phone with zero risk of exploding from Company Y, even if the frequency of explosion in Company X's device is 1/100000. Since the possibility of a false conviction is indeed an emotionally powerful decision for a judge to take, the requirement of certainty is intensified, leading to an over-pronounced weighing of even insignificant probabilities. Meaning, that there exists a disproportionate psychological difference between 95% guilt and supposed 100%.

The bias induced by the certainty effect is then amplified by direct evidence providing judges with an added incentive: to blame the witness' reliability and minimise their own responsibility for a false conviction. They can thus reassure themselves that it was not them falsely convicting the accused, but the lying eyewitness, while in circumstantial cases, the complete responsibility is on the judges. Thus, relying extensively on direct evidence provides them with an easy scapegoat, should their certainty emerge to be unfounded.

V. CONCLUSION

The IEA creates no distinction between circumstantial and direct evidence, and mandates a similar process of inference for both. However, this paper argues that the judges show a bias against circumstantial evidence in such an inferential process, that is not cognitive but psychological. That is, they undervalue such evidence not because of its individual non-probative nature but because they are psychologically biased against all circumstantial evidence.

Part I showed that a bias exists; it does so by analysing Indian judgements using circumstantial evidence to show that the judges place circumstantial evidence on a lower pedestal as opposed to direct evidence, despite denying any probative difference between the two. Part II argued that such bias is psychological, and not cognitive. In support of which, it provided both theoretical and experimental reasoning; the former, through a simple probability analysis, and the latter, through the Wells Effect. Lastly, Part III attempts to reason out such bias in three ways. *First,* through the qualitative difference between direct and circumstantial evidence; *second,* through the probabilistic nature of circumstantial evidence; and *third,* through the certainty effect.

Whether such bias must exist, or whether it is in fact beneficial considering the probabilistic nature of circumstantial evidence, is not a question this article seeks to answer. Neither does it seek to provide a solution to such bias. Instead, it only shows the existence of such bias: a conclusion contrary to what the texts of the judgements seek to portray.

PROFESSIONAL ETHOS FOR LAW STUDENTS

—*Advocate Satyakam**

Abstract—*"Throughout my career at the Bar I never once departed from the strictest truth and honesty. The first thing which you must always bear in mind, if you would spiritualize the practice of law, is not* to make your profession subservient to the interests of your purse, as is unfortunately but too often the case at present, but to use your profession for the service of your country. … The Fees charged by lawyers are unconscionable everywhere. I confess, I myself have charged what I would now call high fees. But even whilst I was engaged in my practice, let me tell you I never let my profession stand in the way of my public service. . . . And there is another thing I would like to warn you against. In England, in South Africa, almost everywhere I have found that in the practice of their profession Lawyers are consciously or unconsciously led into untruth for the sake of their clients. An eminent English Lawyer has gone so far as to say that it may even be the duty of a lawyer to defend a client whom he knows to be guilty. There I disagree. The duty of a lawyer is always to place before the judges, and to help them to arrive at, the truth, never to prove the guilty as innocent."*

Mahatma Gandhi in Young India, 22-12-1927, pp. 427-28

A true lawyer is one who places truth and service in the first place and the emoluments of the profession in the next place only.

Mahatma Gandhi In Harijan, 26-11-1938, P. 351

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I. INTRODUCTION

The above two quotes from 'The Law and the Lawyers'[1] by M. K. Gandhi epitomises the principles of ethics and professionalism required of the legal profession. The inquiry is, whether these principles are principles of yesteryears and whether the students of law who join the legal profession wish to march with time would have to relook at these principles? These principles were as much part of the profession then as they are today. These principles were followed by those who contributed immensely in nation building then and they need to be followed to sustain those ideologies enshrined in the constitution in the present times. According to Granville Austin there were 21 important personalities associated with the Constituent Assembly who contributed the most in formulating the Indian Constitution.[2] A closer look at the list would show that 14 of the 21 were either Advocate, trained in law or an ICS judge[3].[4] The extent of balance needs to be examined between the autonomy and individual freedom of a lawyer and the commitment of the Legal professional towards public service, which is quintessential of this profession.

II. WHAT IS A PROFESSION, IN PARTICULAR, THE LEGAL PROFESSION?

It would be pertinent to refer to the Roscoe Pound's[5], analysis of the profession in his paper, 'What is a Profession-The Rise of the Legal Profession in Antiquity'.[6] Roscoe Pound says that there are three ideas involved in a profession; namely, Organisation, learning and a spirit of public service. These are essential and the fact that the profession may also be a means of livelihood is incidental. As to organisation, it is said that it should be inclusive and responsible. It is said that professionals are learned not from the art professed but because they have a culture or idea side which furthers the effective exercise of the art. It is said that the profession is practiced in a spirit of public service, an exercise beneficial to mankind whereas a trade may aim at personal gains. It is said that it is a misconception that the lawyers and grocers and traders are free to compete in order to acquire as much of the world's good as they honourably can. The professionals are not supposed to measure their services

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1 Gandhi Mz.K. and Kher S.B., *The Law and the Lawyers* (Navajivan Pub House, 1999).

2 Granville Austin, *The Indian Constitution Cornerstone of a Nation* (Oxford University Press, 2001) Appendix III Part A.

3 The ICS Judge, Sir Benegal Narsing Rau although was not a member of the Constituent Assembly played a pivotal role in the making of Indian Constitution. Also see, Granville Austin, *India's Constitution in the Making* (Allied Publishers, 1966).

4 *ibid*.

5 Roscoe Pound was a prominent American legal scholar and educator. He served as a dean of Harvard Law School from 1916 to 1936 and was known for his contributions to legal theory, particularly in the areas of sociological jurisprudence and legal realism.

6 Roscoe Pound, 'What is a Profession - the Rise of the Legal Profession in Antiquity' (1944) 19 Notre Dame L. Rev. 203.

in proportion to the reward it brings in monetary terms. The best service of a professional is often rendered for no equivalent. The profession, it is said, has a long and honourable history, high ideals and great traditions. It is as old as magistracy, as noble as virtue and as necessary as justice.

Learning the practice of law necessarily depends upon the tradition, and the word is often used in reference to the tradition of a particular bar or the tradition of a particular chamber etc., which helps one learn both the adversarial practice and the spirit of Public Service. In a way, it is also important for those passing on the tradition to the upcoming generation to behave in a manner consonant with the said tradition so that the teachings are clear and unambiguous for the impressionable generation.

III. THE VALUES REQUIRED OF A LEGAL PROFESSIONAL

The media recently covered certain speeches of Hon'ble the Chief justice of India wherein The Chief Justice was quoted as saying that "CLAT doesn't necessarily produce students of right ethos" and "Value based legal education is needed."[7]

In order to understand the values required of a legal professional/Advocate, a reference may be made to the Preamble to the Constitution of India. The Preamble solemnly resolves to secure to all its citizens Justice, social economic or political; Liberty of thought, Expression, belief, faith and worship; Equality of Status and of Opportunity; and to promote among them all Fraternity assuring the dignity of the individual. A study of the Constitution would show that the State will be under an obligation to secure the above to the citizens. In the event that the pillars of the State named executive or legislature fails, the Judiciary would step in. One of the conventional ways in which one is supposed to approach the judiciary is through the Advocate who is supposed to be learned and experienced in assisting the citizen in securing what is assured to them by the Constitution of India. As an officer of the court,[8] an Advocate plays an important and significant role in moving the wheels of justice without whom, one may say, the administration of justice might come to a grinding halt. This makes the Advocate a tool to secure justice for people in need. A closer look at the preamble would suggest that ensuring liberty, equality as well as ensuring dignity of individuals in a spirit of fraternity would be nothing but various facets of ensuring justice. Securing justice to people would

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[7] Gerard De Souza, 'CLAT Doesn't Necessarily Produce Students of Right Ethos: CJI Chandrachud' *Hindustan Times (*New Delhi,4 December 2022) <https://www.hindustantimes.com/india-news/clat-doesn-t-necessarily-produce-students-of-right-ethos-cji-chandrachud-101670149093713.html> accessed 16 May 2023.

[8] 'Rules on Professional Standards The Bar Council of India' <http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/> accessed 16 May 2023.

not require some mastery in adversarial system but much more than that, an ideological elevation which would require a professional to think in terms of achieving the constitutional goal demarcated by the framers of Indian Constitution wherein they believed that this profession has a pivotal role to play in nation building and possibly keeping that in mind the preamble for most of its part promises to its citizens justice in various forms which primarily have to be shouldered by the Bar with the help of the Bench.

Advocates are required to be an important instrument of social change, they have to be a medium of securing to the citizen, the constitutional guarantee. The legal profession can resurrect its identity by making its role, justice and people oriented.

Article 39-A of the Constitution of India requires the operation of the legal system in such a manner that it promotes justice. It provides for free legal aid to be provided and that justice to be not denied on consideration of economy or other factors. The Law Commission of India in its 131st Report makes a very pertinent observation in its conclusion. It says that the role of the legal profession in strengthening administration of justice must be in consonance with the intent underlying Article 39-A. The legal profession has a duty to ensure equal opportunity to all litigants seeking justice. Those who do not have economic wherewithal to seek justice must and are unable to incur necessary expenditure for securing justice should receive proper attention of the legal profession. Since the legal profession is an integral and inseparable adjunct of administration of justice it has a duty to ensure that even those with social disability are ensured equal opportunity in seeking justice. To discharge these solemn obligations, the services of the legal profession should be readily available to those who otherwise cannot afford to pay the cost of legal services. The profession must develop its own public sector. The Law Commission advises that ways and means must be devised so that the profession plays a meaningful role in promoting the quality of justice and to bring about such changes in society as are in consonance with the egalitarian goals, to which we are committed constitutionally.[9] The Commission gives an example of the Government Hospital and proposes that there should be a similar institution where justice is offered free of cost like in Government Hospitals medical services are offered free of cost.

The reference to the preamble is not merely to indicate that legal aid needed to be provided to those in need of such an aid. The Reference was imperative as the Constitution of India is a pathfinder for all the laws. The Code of conduct indicated in the Bar Council of India Rules[10] are the bare minimum standards that need to be followed by practicing professionals so that they don't offend those, at least, whereas the Constitution provides the principles which

[9] *ibid.,* para 3. 4.
[10] *ibid.*

could motivate not only the way of thinking of legal professionals but the ideals which could regulate the conduct of legal professionals. It is in the said anticipation and expectation from the Legal community that the Constitution framers heavily relied upon them in their indicators in the preamble which talks primarily about justice to be secured to the citizens.

Therefore, before attempting at teaching the ethical standards and values required to be performed, the law students should understand the value system from the constitution. A good deal can be learned from learning the course of framing of India's Constitution, some of the books that may help are - *The Constitution of India, a cornerstone of the Nation*[11] by Granville Austin, *Pilgrimage to freedom*[12] by K. M. Munshi, *Partition of India*[13] by H. M. Seervai and of course, the Constituent Assembly debates and Framing of India's Constitution, a collection of invaluable documents.

The Value system can never be an idea of a legal professional unless the professional has Character and Honesty. Justice Khalifulla in a Lecture[14] delivered in 2013 says that character is vital in all professions and walks of life, and in the legal profession Honesty is a matter of first importance. It is said that Character is the most essential component of ethics and is something which every advocate must develop and exercise. Chief Justice Marshal is further quote as saying that the fundamental aim of legal ethics is to maintain honour and dignity of legal profession, to secure a spirit of friendly cooperation between the Bar and the Bench in the promotion of higher standards of justice, to establish honourable and fair dealings with the counsel, with the clients, opponent and witnesses.

The law students can also learn from the tradition having been practiced by the Bar for several years. Although books are a second hand medium of learning, in order to understand the tradition and practice of the past, books are an excellent source. These may primarily include biographies written by eminent judges and lawyers. Some of them are *Roses in December,*[15] *My Life, Law and Other Things,*[16] *Famous Judges, Lawyers and Cases of Bombay,*[17] *Evoking H.*

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[11] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 2002).

[12] Kanaiyalal Maneklal Munshi, *Indian Constitutional Documents: Pilgrimage to Freedom, 1902-1950* (Bharatiya Vidya Bhavan, 1967).

[13] H.M. Seervai, *Partition of India: Legend and Reality* (Emmenem Publication, 1989).

[14] Nikam, S.S., 'Legal Profession: Challenges and Prospects & the Art of Advocacy' (2014) 1 LW (JS) 9.

[15] Vachha P.B., *Famous Judges, Lawyers and Cases of Bombay* (1st edn., Universal Law Publishing - An imprint of LexisNexis 2012).

[16] Setalvad Motilal C. *My Life: Law and Other Things* (Universal Law Publishing - An imprint of LexisNexis 2014).

[17] P.B. Vachha, 'Famous Judges, Lawyers and Cases of Bombay by – Lucknow Digital Library' <https://lucknowdigitallibrary.com/publications/famous-judges-lawyers-and-cases-of-bombay-a-judicial-history-of-bombay-during-the-british-period> accessed 16 May 2023.

M. Seervai,[18] *My own Boswell,*[19] *Neither Roses Nor Thorns,*[20] *Judges of the Supreme Court of India,*[21] *Court of India from Past to the Present.*[22]

IV. PROFESSIONAL SKILL & PROFESSIONAL VALUES

How to teach professional skills has been a matter of debate for a long time. The 14th Report of Law Commission of India on Reform of Judicial Administration,[23] among other provided that:

Only graduates should be eligible for legal studies.

The theory and principles of law should be taught in the law schools and the procedural law and the law of practical character should be taught by the Bar Council.

The university course should be for two years and the bar council training should be for one year.

The principal method of teaching being the lecture to be supplemented by tutorials, seminars, moot courts and case methods.

Admission to law schools should be restricted on merit and seriousness.

All India Bar Council should be empowered to ascertain whether law colleges maintain the requisite minimum standards and should be empowered to refuse recognition of law colleges.

There has been a constant debate on a balance between theory-oriented and a practice-oriented Legal Education. Since Christopher Columbus Langdell[24] introduced the case method, legal education has evolved to meet practical challenges. There have been revolutionary changes suggested by Justice Ahmadi Committee Report of 1994, Mac Crate Report of USA in 1992 a Report of Task Force on Law Schools and Profession: Narrowing the Gap, followed by

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[18] *Evoking H. M. Seervai: Jurist and Authority on the Indian Constitution, 1906-1966* (Feroza H. Seervai, 2005).

[19] Mohammed Hidayatullah, *My Own Boswell: Memoirs of M. Hidayatullah* (Universal Law Publishing Company, 2002).

[20] Hans Raj Khanna, *Neither Roses nor Thorns* (1st edn., reprinted, Eastern Book Co., 2003) <http://swbplus.bsz-bw.de/bsz34750115Xinh.htm> accessed 16 May 2023.

[21] George H. Gadbois Jr., *Judges of the Supreme Court of India: 1950–1989* (Oxford University Press, 2011).

[22] Supreme Court of India, *Courts of India: Past to Present* (Publications Division Ministry of Information & Broadcasting).

[23] 'Law Commission Report No. 14 - Reforms of The Judicial Administration-Vol (1) PDF Government Justice' accessed 24 October 2022.

[24] 'The Case Method in Legal Education: Upinder Dhar, Santosh Dhar, 2018' <https://journals.sagepub.com/doi/10.1177/2322005818780754> accessed 16 May 2023.

Report on Learning Professionalism sponsored by American Bar Association, Preparatory Skill by Law Society of England and Wales, Carrington Report on Training for public professions of the law (1971), and the curriculum prepared by the National Law School University of India, Bengaluru in 2001.[25] The ambit of the present paper is limited to the professional values. Mac Crate report refers to various legal skills to be developed by Law students like, Legal Research, Factual Investigation, Communication, Counselling, negotiation, Skill to advise the client of options of litigation, administrative skill to organise and manage legal work and Skill to recognise and resolve ethical dilemmas. The Report lists further fundamental skills of lawyers, as, diagnosing a problem identifying and formulating legal issues, determining the need for factual investigation, establishing counselling relationship, skill of negotiation, advising the client of option of litigation, skill of efficient management by formulating goals and principles in order to ensure that time, effort and resources are efficiently allocated and keeping familiar with nature and sources of ethical standards, the means by which ethical standards are enforced , the process for recognising and resolving ethical dilemmas.

Professional Values according to the Report requires training in professional responsibilities and involves more than following the model rules of professional conduct. The value of the profession shall include the obligation and accountability of a professional dealing with life and affairs of a client. These values are listed as:

The value of competent representation, analyzing the ideals to which a lawyer should be committed as a member of a profession dedicated to the service of clients,

The value of striving to promote justice, fairness and morality; the ideals to which a lawyer should be committed as a member of a profession that bears special responsibilities for the quality of justice,

The value of striving to improve the profession; explore the ideals to which a lawyer should be committed as a member of a ‘self-governing’ profession, the value of professional self-development, analyzing the ideals to which the lawyer should be committed as a member of a ‘learned profession’, the Report also refers to the relationship between the ‘skills’ and the ‘values’. The Report emphasises that skills and values both are essential for development of a student into a practicing professional.

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[25] Stephen David, ‘NLSIU Has Emerged as the Leading Indian Institution for Legal Education’ *India Today* (New Delhi, 21 May 2001) <https://www.indiatoday.in/magazine/cover-story/story/20010521-nlsiu-has-emerged-as-the-leading-indian-institution-for-legal-education-776158-2001-05-20> accessed 16 May 2023.

Thus, a student who is only trained in skill and fails to instil the values of the profession may develop into an incomplete professional and the effect of producing such professionals on mass scale can only be imagined.

V. INCULCATING PROFESSIONAL ETHOS IN LAW STUDENTS

Modulating Dr. Radhika Kapoor's factors for development of professional Ethics[26] for legal profession following factors emerge:

Understanding Human Values and Human Rights

Ethical consciousness and high professional competence leading to profession's integrity

The Professionals should treat each other with respect and provide equal treatment, irrespective of differences in opinion.

Adherence to confidentiality and information standards

Building of Trust in Relationships

Creating and participating in the Culture of Positive Co-operation

Respects the Competence of Other Professionals

John Corker suggests that Law school shall aim to produce lawyers with the value of duty towards public good and community service. Law students should be encouraged to do more *pro bono* work and other volunteer activities which would inculcate a culture of service to the community.

Warren Burger argues that law school is an immensely powerful force in defining, structuring and internalising professional norms, values and attitudes. The law school is uniquely situated to shape and form the habits of students during the period in which their professional ideals and standards of ethics, decorum and conduct are being formed. At this stage law students are more malleable and receptive than they will be after years of professional observation of bad habits of legal thinking, legal application or dubious ethics. He argues that a subject like professional ethics or professional responsibility should be given importance like constitutional law. It is said that students will learn professional responsibility if sensitized to the ethical issues as they arise

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[26] Kapur R., 'Moral Values and Professional Ethics in Education in India' (2019) <https://www.researchgate.net/publication/336511527_Moral_Values_and_Professional_Ethics_in_Education_in_India> accessed 13 May 2023.

in various courses in substantive and procedural law. It is important that students are exposed to legal practitioners who are open to discuss their professional dilemmas.[27]

Various Authors including Richard Moorhead of Centre for Ethics and Law, UCL, Faculty of laws, London conducted a survey,[28] and on the basis of analysis of data concluded that "if the law students are being socialised into being professional lawyers during law school, we would predict both stronger legal professional identification and greater commitment."[29]

It can be seen that almost all the prominent law schools have their Legal aid society through which students offer legal aid.[30]

S. no.	***University***	***Location***	***Committee***	***Activities***
1.	Delhi University	Delhi	Legal Aid Society	Legal Service Clinic (LSC) – providing service in 28 cases Awaaz -The Blog – to create awareness.
2.	NLSIU	Bangalore	Legal Services Clinic	Tie up with Karnataka Legal Service Authority Legal literary programs, conferences, seminars and research projects Open centre for legal help and online helpline
3.	Chanakya National Law University	Patna	CNLU Legal Aid Society	Works in Patna and other districts of Bihar
4.	NLU	Jodhpur	Centre for Legal Aid and Support Services	Undertaking training programs involving legal services authorities
5.	NLU	Delhi	Community Service and Legal Aid	Insaaf – provide intermediary level of legal aid services for those detained in various homes/jails in Delhi Project 39A

[27] Warren E. Burger, 'The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility' (1980) 29 Clev. St. L. Rev. 377.

[28] Richard Moorhead, Catrina Denvir, Rachel Cahill-O'Callaghan, Maryam Kouchaki and Stephen Galoob ' The Ethical Identity of Law Student' (2016) 23 Int'l J. Leg. Profession doi:1 0.1080/0965958.2016.1236146. (Plz chk).

[29] Richard Moorhead, Catrina Denvir, Rachel Cahill-O'Callaghan, Maryam Kouchaki and Stephen Galoob, 'The Ethical Ibidentity of Law Students' (2016) 23 Int'l J. Leg. Profession doi:10.1080/0965958.2016.1236146.

[30] The chart has been prepared for illustration purposes only and is compiled using the data available online over the websites of the presented law schools.

6.	Gujarat National Law University	Gandhinagar	GNLU Legal Service Committee	Established under Legal Service Authority act Motto – Assertion Awareness Action Mediation and conciliation training workshop
7.	West Bengal National University of Juridical Sciences	Kolkata	NUJS Legal Aid Society	Contact lawyers, conduct seminars and workshops, research work
8.	NALSAR	Hyderabad	NALSAR Legal Aid Cell	Teach India, Legal literacy and legal awareness, rehabilitation and conciliation centre, prison reforms and implementation of government schemes.
9.	Dharmashastra National Law University	Jabalpur	Vidhi Mitra – The Legal Aid Cell	Claiming campaigns in collaboration with State Legal Service Authority
10.	ILS Law College	Pune	Legal Aid Centre	Participation in Lok Adalats

As can be seen from the above chart students in almost each school are taking initiative through the Legal Aid society. It would have been of greater value if each of these programmes are studied and incorporated formally by the institutes into essential student activities, it may do a great deal in instilling the concept of public service in law students. The programme can be designed in collaboration with Legal Services Authorities, State Human Rights Commission and various non-government organisations. The Legal Services authorities at various levels, offer internships to law students and a large number of students are undergoing internship with them. These resources need to be exploited at the optimal level and instead of students going far off places for internship, they may be encouraged to train at the local institutions of this nature.

VI. CONCLUSION

It is no doubt apparent that modern society tends to encourage a competitive environment in every walk of life and the Legal profession does not remain untouched. However, consummate professionals know how to strike a balance between skill based professional commitment and commitment towards the larger good of the society. New generation of students are likely to be drawn to the competitive environment of the profession. They definitely need proper guidance and mature training in professional values. The value will have to be curated to achieve the constitutional ideals so that the vision of constitution framers of egalitarian society guided by Justice and Rule of law can be achieved.

FROM 'ISLAMIC REPUBLIC' TO 'ISLAMIC EMIRATE' OF AFGHANISTAN: RECOGNITION UNDER INTERNATIONAL LAW

—Atul Kumar Dubey & Aditya Tripathi***

Abstract—Afghanistan: "the graveyards of empires" made the US and its allies bogged down in this graveyard. The "respected" US pull-out to prevent the embarrassment of hanging chinook helicopter scenes from the Vietnam War has put the country into the hands of fundamentalists who were once funded by the CIA to fight against the Soviets. The same fundamentalists are attempting their social media handles to persuade the world that the regime will be different from the 1996 rule. The paper will take a ride through the troubling history of Afghanistan which includes the making of the Constitution, the Soviet-era along with the Taliban rule, and the US invasion and pull-out. The paper will also deal with the Montevideo Convention 1933 and its requirement for recognition. The next part of the paper will attempt to answer whether the present State of Afghanistan and its Taliban falls within the lines of the requirement of the Convention. Further, the paper will meticulously scan the role of the international community and organizations especially the United Nations. At last, the paper will also endeavour to answer India's concern regarding the present regime in Afghanistan.

Keywords: Afghanistan, International Law, Recognition

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I. INTRODUCTION

Afghanistan, a landlocked country, shaped in the form of a leaf in Central Asia lies east of Iran, north, and west of Pakistan, south of Turkmenistan, Uzbekistan, and Tajikistan along with the narrow Wakhan Corridor which extends to meet India. Although mired by wars and foreign invasions, Afghanistan is an ancient realm of extraordinary culture, landscape, and people. Surrounded by the rugged mountain ranges, away from the sea, the land is often called "the graveyards of empires". A country was torn apart by series of wars, which once hopeful, now distressed, is geographically isolated but located at the intersection of major trade routes connecting West Asia and Europe. Nearly fifty percent of the topography of Afghanistan is covered by high peak mountains dividing various provinces and their capital, thus isolated among each other. Afghanistan lying in the bowl of snow-bald, mournful mountains of Hindu Kush has a population of myriad ethnic, linguistic, and tribal groups. The main ethnic groups are Pashtuns (which are approx. 40%), Tajiks, Uzbek, Turks, Hazaras, Baloch, and Sikhs form the population of Afghanistan. The country also houses various nomadic tribes including the majority Kuchis, a Pashtun ethnic group. Although the population being majority Muslims are divided over various sub-tribes, ethnicity, cultural lines are not uniform, rather scattered. As Afghanistan sits at the heart of Central Asia, it had ascended the eyes of various rulers. Because of this, the land of Afghanistan is dominated by the long history of war, struggle, and foreign invasions. The land has earlier witnessed the military might of the British, followed by the Soviets and the US and its allies. Neither of them being able to satisfy its quest for ruling the land, it has been one of the most dangerous places in the world.

With this framework, the discussion will be set forth. The present analysis has been divided into various parts- Part I deals with the history of Afghanistan which is further divided into sub-parts discussing post-1919 independence, the Soviet invasion, the Taliban rule of 1996-2004, the US invasion of Afghanistan, followed by the US – Taliban agreement and fall of Kabul in 2021. Part II shares out the international convention related to recognition which will comprehend the requirement of the Montevideo Convention. Part III deals with the recognition of the State of Afghanistan on applying the test of international convention. The sub-part will deal will the recognition of the Taliban govt. Part IV deals with the way ahead of the international community followed by notes of concern and interest in Afghanistan for India. Followed by the analysis and concluding comments in Part V.

II. POST-1919 INDEPENDENCE

Afghans fought three British-Afghan Wars in the year 1838-42, 1878-90, and 1919-21. In the wake of World War I, Afghanistan achieved independence

with the signing of the Treaty of Rawalpindi, also known as the Anglo-Afghan Treaty. The treaty led to the recognition of sovereignty and independence of Afghanistan. Since the signing of the treaty, the country has been mired with various coups and rulers. First, among all, Emir Amanullah Khan declared himself as the monarch, thus attempting to establish authority over the Afghans till 1928. During the years 1921 and 1923, the King attempted to draft the Constitution with liberal ideas of secular laws, women right's relating to marriage, education and divorce. There was a rebellion against the liberal policies and King Amanullah Khan abdicated to British India. The rebellions headed by the Emir Habibullah Ghazi, a Tajik, attempted to rule Kabul. But in the year 1929, the *Waziri* tribesmen led by General Nadir Shah revolted and proclaimed himself as the King. The revolt to overthrow Nadir Shah by the Shinwari tribes in 1930 was crushed. King Nadir Khan brought into the Constitution which provided for a bicameral legislature – the National Assembly and the Council of State. The political violence and lust for the throne led to the assassination of King Nadir Shah and his son Zahir Shah became the new king in the year 1933. Zahir Shah, the last king, brought various reforms in the country, and with his liberal ideology ruled over the country for 40 years.[1]

During that the prime ministership was led by Mohammad Daoud, a Soviet inclined, who brought reforms modernizing the country was dismissed by Zahir Shah. The year 1964 saw a new Constitution was enforced to *re-organize the national life of Afghanistan*.[2] The Constitution made Afghanistan a constitutional monarchy, unitary and indivisible state.[3] It is important to note that Islam was considered as the sacred religion and religious rites shall be performed by the State under the Hanafi principles.[4] Non-Muslims were *free to perform their rituals within the limits determined by-laws for public decency and public spaces*.[5] The Constitution of 1964 provided for the *Shura* (Parliament) which *represents* the whole nation and manifests the *will* of the people.[6] Parliament was further divided into – *Wolesi Jirgah* (House of People) and *Meshrano Jirgah* (House of Elders) under art 42. Parliament under the 1964 Constitution was to enact laws per the provisions of the Constitution but no law can be enacted which was repugnant to the basic principles of Islam and other values embodied in the Constitution.[7] Significantly, the reforms included in the Constitution were balanced and the principles of either of the

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1 Hikmatullah Fayez, *Afghan Political and Social History*, Economic and Political Weekly, Vol. 51, Issue 3, (2016).

2 Preamble, Constitution of Afghanistan 1964, available at <https://www.constituteproject.org/constitution/Afghanistan_1964.pdf?lang=en> accessed 3 December 2021.

3 Constitution of Afghanistan of the Title I, Art. 1.

4 Constitution of Afghanistan of the Title I, Art. 2.

5 *ibid*.

6 Constitution of Afghanistan of the Title IV, Art. 41.

7 Constitution of Afghanistan of the Title IV, Art. 64.

liberal groups, as well as the conservative, were kept and locked together under this Constitution.

The Constitution with such a bright philosophy did not bring stability to the nation as Daoud Khan overthrew the King in 1973. The liberal policies continued in his reign too, but the economic conditions worsened and aggravated.[8] The term of Daoud Khan was short-lived and the communist factions led by Nur Mohammad Taraki overthrew him in April of 1978. The seizure of power in a coup came to be known as the Saur Revolution.[9] Simultaneously the neighbouring country Iran was too under turmoil and witnessed a revolution in the year 1979.

The year of 1919 and until 1978, the nation saw various coups inspired by ideological factions, lacking a uniform, pan-Afghan nationalism. Right at this time, the nation saw their leaders being avarice, destabilizing the country. Not only domestically, internationally too, the nation also remained as a prawn in the hands of two empires, the Russians and the British, what was termed by Rudyard Kipling as *The Great Game.*

A. Soviet Invasion of 1979

The Soviet Union intervened in support of the Afghan communist government against the Muslim guerrilla in the year 1979 by sending its troops. In an attempt to bolster the communist regime of Kabul, the Soviets controlled the cities, large towns and bombed the hideouts and rural places of mujahideen. The foreign-backed regime also took ruthless steps to curb dissidents and did various social reforms which were alien to the conservative societal standards of Afghans as per Islamic interpretations. The reforms related to marriage, land, and customs were not received well by the warlords and tribal heads. Against all these odds, the Islamic conservative ideological factions began adopting guerrilla warfare. The Mujahideens led by various factions mainly Ahmed Shah Masood, a Tajik, Gulbuddin Hekmatyar, a Pashtun were backed by Soviet Union's Cold War adversary United States and its allies including Pakistan, Saudi Arabia, Iran which provided funds and tactical support to fight against the Soviets. The Mujahideens were inspired by the war cry of *holy war* and further benefitted by the rugged mountainous terrains of the countryside, better known to the mujahideens. The loose federations of Mujahideens were funded and militarily supported by the US and its allies, and fought fiercely against the Soviets for 9 years. The United Nations General Assembly passed a resolution calling for maintaining and reaffirming the sovereignty and integrity

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[8] Country Profile, Library of Congress- Federal Research Division, (2008), available at <https://www.loc.gov/rr/frd/cs/profiles/Afghanistan.pdf> accessed 3 October 2021.

[9] Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System,* 2nd edn., (Yale University Press, 1995).

of Afghanistan.[10] Against the occupation, it further reaffirmed *the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside government.*[11] As time passed by the Soviets attempted to create a neutral State and withdrew from Afghanistan, thus creating a state of chaos.

Meanwhile, during the same time, Mikhail Gorbachev brought some social and political reforms to the Soviet Union, along with the process of withdrawal from Afghanistan. But the rising nationalism among various federations under the Soviet Union, unaccountability of political leaders and weakening economy disintegrated it into various independent republics. The cost of continued occupation, casualties and disintegration of the Soviet bulldozed the leaders to withdraw from Afghanistan. The Government of Pakistan and the Government of Afghanistan entered into the agreement desiring to normalize relations and promote good neighbourliness and co-operation.[12] The guarantors were the United States of America (USA) and the Union of Soviet Socialist Republic (USSR) thus providing for the framework for the withdrawal of the Soviet Union.

B. The Taliban Rule of 1996 and Us Invasion of 2004

The withdrawal of the USSR left the govt. of Mohammad Najibullah and his communist party on its own. The abrupt withdrawal created a vacuum in Afghanistan as the mujahideen factions which were tied through a common thread of anti-Soviet sentiments rather than ideology turned towards each other. This led to the civil war among the mujahideens and tribal leaders as each faction tried to assert its dominance against the other to control Kabul. This led to a grave humanitarian crisis with thousands of innocent Afghans being killed. This all-out war allowed the fundamentalist militia group known as the Taliban formed by Mullah Omar. The rise of the Taliban was based on the premise of providing stability and security to the Afghans by forming the Islamic Emirate of Afghanistan. The Taliban in the Pashto language – *Talib* means students.[13] The members were young Pashtun-dominated tribesmen who not only fought against the foreign intervention of the Soviets but also studied conservative religious courses and education in Afghanistan and Pakistan's Pashtun-dominated tribal area of Khyber Pakhtunkhwa.[14] The people were so frustrated with the lawlessness and hoped for stability, initially marched in support of the Taliban. The movement which started from Kandahar south of Afghanistan soon reached the capital in the year 1996. They declared

[10] United Nations General Assembly Resolution, ES-6/2, (14-1-1980).

[11] *ibid.*

[12] Agreement on the Settlement of the Situation Relating to Afghanistan, *between* the Republic of Afghanistan and the Islamic Republic of Pakistan (April 14, 1988).

[13] Zachary Laub, The Taliban in Afghanistan, Council For Foreign Relations, (2014) available at <https://www.files.ethz.ch/isn/177335/p10551.pdf> accessed 3 October 2021.

[14] *ibid.*

Afghanistan as 'Islamic Emirate' and enforced a strict interpretation of Sharia law and removed any western influences over the culture and lives of the people. The formation of the 'Islamic Emirate' and its govt. headed by the Taliban were recognized by Saudi Arabia, Pakistan, and UAE at that time.[15]

Initially, it was well-received by the people of Afghanistan after the four years of conflict from 1992-1996. In other words, the failure of mujahideen leaders to bring a stable govt. after Soviet withdrawal gave hope to millions whose lives have been ravaged by war. The Taliban movement which started at Kandahar swiftly took control over the territories and prominent cities like Mazar-e-Sharif, Herat, and Kabul with little or no resistance. With the hopes of reviving the lives of common Afghans, the Taliban danced on this victory march. The expectations fell on their head and medieval era interpretation of laws and customs were forced upon like banning music, cinema, television, football, education, and employment for girls and women. The Taliban are known for putting harsher restrictions on women, requiring them to remain in veil, barring access to public places including health centers. During the rule, they established Kabul *Shura* consisting of ministers and acting members to represent the Taliban govt. They had also established the Ministry of Enforcement of Virtue and Suppression of Vice homologue to Saudi Arabia responsible for guidance and moral control as per Islamic terms.[16] Acts like public beheading, chopping off hands and feet, and death by stoning as a form of punishment were common forms of punishment. The Taliban during their rule imposed a strict interpretation of Islam, using a swift summary trial style highly influenced by the movement of Deobandi and the philosophy of Wahhabism.[17] Political killings, rape, torture, illegal detentions, abduction, and kidnapping for ransom were done by local commanders and warlords.[18]

The Taliban were also accused of harbouring hard-line international terrorist organizations including *Al Qaeda,* which planned the notorious 9/11 attacks on US soil.[19] The United Nations Security Council also passed the resolution condemning *"the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al Qaeda network……"*[20] In the aftermath of the attack, the US vowed to take revenge against the organization declared *"War on Terrorism"* and invaded Afghanistan in 2004. President GW Bush authorized the use of force against those who were responsible for the 9/11 attacks

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15 Barnett R. Rubin, *Afghanistan under the Taliban,* Vol. 98, Issue 625, pp- 79-91 (University of California Press, 1999).

16 *ibid.*

17 Supra, note 13 at 6.

18 *Afghanistan Report on Human Rights Practices for 1996,* Bureau of Democracy, Human Rights and Labor, US Department of State (1997).

19 *Al Qaeda, The Taliban, and other Extremists Groups in Afghanistan and Pakistan,* Committee On Foreign Relations, United States Senate, May 24,2011 available at https://www.govinfo.gov/content/pkg/CHRG-112shrg67892/html/CHRG-112shrg67892.htm> accessed 3 October 2021.

20 United Nations Security Council Resolution, 1378, Nov 14, 2001.

by signing *Authorisation for Use of Military Force* into a law. The invasion was supported by the Northern Alliance of non-Pashtuns fighting against the repression of the Taliban rule. The war on terror for the United States became one of the longest wars in its history, starting from the toppling of the Taliban govt. aimed to bring stability in the form of Western-style democracy, alongside receiving heavy casualties.

C. Us Taliban Peace Deal and Fall of Kabul

With mounting negative public opinion about fighting the war, the change of administration at Washington was keen to strike a deal with the Taliban and withdrew its troops. To enter into an agreement with the group, the US and its allies required a permanent address rather than to stumble along the porous-mountainous bordering areas of Afghan-Pak. Doha, the capital of Qatar was chosen as a political office for the Taliban. The country has cordial relations with both the militant group as well as the USA. The office was not merely a venue but was a once such significant step towards the dignified withdrawal of troops by the Americans. The administration led by President Mr. Trump (as he was then) bypassed the National Unity Government of Mr. Ashraf Ghani and engaged in direct talks with the Taliban. The deal was signed by the US Special Envoy Mr. Zalmay Khalilzad and Taliban political chief Mullah Abdul Ghani Baradar with US Secretary of State Mr. Mike Pompeo as witness.

The legal document titled *Agreement for Bringing Peace to Afghanistan* was signed on Feb 29, 2020, was divided into four parts.[21] The first partdeals with the prevention of the use of Afghanistan soil against the United States and its allies. The second part guarantees the announcement of timely withdrawal of foreign forces. The third part states the start of intra-Afghan negotiations with the Afghan side. The fourth part states about the permanent and comprehensive ceasefire. The full text of the agreement explicitly and rhetorically notes that *'Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban…'* and ironically the same text seeks the security guarantees from the non-state actor referred therein as the Taliban. Deciphering the text of the agreement it becomes crystal clear that the Islamic Emirate of Afghanistan i.e. the Taliban in spite of not being recognized by the US as a state expects that the land controlled by the Taliban shall not be used against the US. The phrase *"….. to use the soil of Afghanistan to threaten the security of the United States…."* is the manifestation of de facto recognition that the group controlled the territory of Afghanistan.[22] The agreement further seeks cooperation and *positive relations* among both the contracting parties.[23]

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[21] Agreement for Bringing Peace to Afghanistan, *between* the Islamic Emirate of Afghanistan and the United State of America (Feb 29,2020).

[22] *ibid*, Part 2.2.

[23] *ibid*., Part 3.2.

Ironically, the text bestows the authority over starting the intra-Afghan negotiations upon the group along with the United States starting the diplomatic engagement at the United Nations Security Councils. Traditionally, the treaties and agreements on subjects of security are normally signed between state actors and not within non-state actors.

Despite the assurances by the group, the offensive attitude against the Afghan forces did not change. As the date of the US withdrawal came closer and closer the Afghan National Army either surrendered without any resistance or fled to the neighbouring countries and during the same time, the President fled the country along with the senior officials. Most of the provincial capitals as well as the border crossings of Pakistan, Iran, and Turkmenistan fell to the offensive of the Taliban fighters even before the complete withdrawal of US troops. The whole military forces crumbled and cities like Herat, Jalalabad, Mazar-e-Sharif, Kunduz, and Lashkar Gah fell like a deck of cards. The control of all major cities as well as the border crossing choked Kabul and created a chaos at the fortified Green Zone. As the Taliban advances towards Kabul, thousands attempted to flee the country with an uncertain future. The sunrise of Aug 15, 2021, saw the fall of Kabul at the hands of ultraconservative fundamental Islamist terror groups in the face of spending billions and unmatched loss of life of civilians and the security forces. The present remains 'tensed' and the future is 'imperfect'.

III. INTERNATIONAL RECOGNITION

The "dignified" exit of the US and its allies from the prolonged war in Afghanistan was a catastrophe for the Western-backed govt. at Kabul. The "democratic" govt. could not withstand the Taliban gaining ground with little or no fight. Everything- be it civilians, militarized weapons and camps, and more the future of Afghanistan was left over to the Taliban and its fighters. It was for the hardliners to form govt. in Kabul with no opposition or little by Panjshir fighters led by Ahmad Massoud. Later, the interim govt. was announced and Afghanistan became the "Islamic Emirate". The new govt. is all-male dominated hardliners and senior figures, known for their notorious planned attack in the name of jihad. The interim govt. is headed by the UN-blacklisted Mullah Mohammad Hasan Akhund whereas the other Ministers include FBI-wanted Sirajuddin Haqqani, Mullah Yakub son of the founder of the group.

For any entity in general and the aforesaid group as specific, of being called as a state and to enjoy the rights and perform its obligations, the existing states must take a note of the awareness of its potentiality of being called and recognized as a state. In these circumstances, the part will discuss the recognition of the govt. where the key post in the interim govt. is allotted to such notorious figures who find themselves on the list of most wanted.

A. Montevideo Convention: A brief Discussion

Recognition under international law is governed under the terms of the Montevideo Convention on Rights and Duties of States 1934. Under the international legal system recognition is the formal acknowledgment of existing states that a political group or non-State actors have the trait of statehood. Recognition within itself attaches two distinct acts – a political act and a legal act.[24] In other words, it is an acceptance of the existence of an entity attributed to the requirements of the state. It is essentially a matter of intention of the existing states. The concept of recognition can be either in form of expressed or implied recognition.[25] The method or the mode of recognition does bear much significance under international law. Express form of recognition can be in a form of a formal declaration indicating the existence of the state as a personality under international law. Under this model, a formal method includes treaties and agreements, diplomatic notes, and messages. The other means of recognition include implied actions of the State in form of a certain act other than the official declaration. The sole determining factor for recognition is the fulfillment of statehood. Article 1 lists out four qualifications or the elements of statehood for the state to be recognized under international law: *apermanent population, a defined territory, government, and capacity to enter into relations with the other States.* Article 4 envisages that the political existence of the state is independent of the existence of the other states. Article 6 provides the effect of recognition under the Convention. It states that the recognition merely signifies the acceptance of the personality with rights and duties determined by international law.[26] Therefore, the instrument mandates the pre-requisites in form of a permanent population, defined territory, government, and capacity to enter into relations with other States, for recognition. It is significant to note that the Convention directs that the recognition must be unconditional.[27]

As the govt. is one of the essences for recognizing statehood, the recognition of the state is different from recognizing the govt. of that state. The govt. of a particular state changes due to elections, the fall of govt. or revolution. Recognition of the govt. means recognizing the govt. as a sole representative of that state on an international platform. Recently in 2019, the US, as well as European Parliament, recognized the interim govt. of Juan Guaido as the President of Venezuela whereas Turkey, China and Russia recognized the govt. headed by Nicolas Maduro. In 2011 the countries like Canada, Germany declared that the National Transnational Council was the legitimate representative of Libyan people against that of Gaddafi's govt. which at that

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[24] Hans Kelsen, Recognition in International Law: Theoretical Observations, The American Journal of International Law, Vol. 35, Issue 4 (1941).

[25] Article 7 of the Montevideo Convention.

[26] Article 6 of the Montevideo Convention.

[27] *ibid*.

time-controlled Tripoli. Similarly, Pakistan, UAE, and Saudi Arabia were the only countries that recognized the govt. of Taliban in Afghanistan during 1996. It is imperative to mention that the recognition of the govt. is per se depends on the political and national considerations. Explicitly, there is a lack of common consensus among nations while recognizing the govt. Willingness and the capacity of the govt. in need of the recognition to fulfill and adhere to the international obligations are relevant considerations. But each of the decisions is moved by the political and national interests. There are various forms of recognition – *de jure* and *de facto recognition. De facto* recognition is in a form of provisional or temporary recognition coupled with the condition of recognizing unconditionally upon fulfillment of international obligations like human rights, rule of law, principle, and objectives of the UN Charter to name a few. Simply put, it is a form of wait-and-watch policy where the recognizing state delays the recognition on future considerations. Prof G Schwarzenberger notes that when a state wants to delay the *de jure* recognition, it may at the first stage grant *de facto* recognition. Thus, in *de facto* recognition the group claiming to be the legitimate govt. does not satisfy the conditions of *de jure* recognition.[28] *De Jure* recognition results in the form of a formal declaration of the recognizing state for the govt. possessing all the attributes of being eligible for political and diplomatic relations. According to Prof Phillips Brown, *de jure* is the final form of recognition of the govt. and once attached cannot be withdrawn. Comparing both, the *de facto* recognition is weak as the legal relationship established between the States is provisional, and once the fulfillment of all legal preconditions the *de facto* gets converted to *de jure.*

The Court in *Bank of China* v *Wells Fargo Bank & Union Trust Co.*[29] noted that *withholding of recognition may cast a mantle of disfavour over a government. But it does not necessarily stamp all of its acts with disapproval or brand them unworthy of judicial notice.* Even if the govt. of paramount force is not recognized by the govt. its existence cannot be completely ignored.[30] Limited recognition of unrecognized govt. has been approved by the courts way back in *Thorington* v *Smith.*[31] Chief Justice Chase in *Texas* v *White*[32] remarked that the *"extent of actual supremacy, however unlawfully gained, in all matters of the government within its boundaries, the power of insurgent government cannot be questioned. Acts that would be valid if by a lawful government, should be regarded as valid coming from an actual, though unlawful government."* This observation was referred with approval in *United States* v *Insurance Companies.*[33] Concerning recognizing Soviet Russia in 1933 the New York Court of Appeals observed that refusing the recognition of the govt.

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[28] Eugene F. Kobey, International Law – Recognition and Non-recognition of Foreign Governments, Marquette Law Review, Vol. 34, Issue 4 (1951).

[29] 104 F Supp 59 (ND Cal 1952).

[30] *Banque de France* v *Equitable Trust Co.*, 33 F 2d 202 (DCNY, 1929).

[31] 19 L Ed 361: 8 Wall1: 75 US 1 (1868).

[32] 19 L Ed 227: 74 US 700 (1868).

[33] 22 L Ed 816 :22 Wall 99: 89 US 99 (1874).

maintaining internal affairs is to *give fictions an air of reality which they do not deserve*.[34] When there is a change in the govt. even by force, all affairs are given legitimacy by the rule of new govt., howsoever the rule may lawful and unlawful, and thus, the existence of such facts and rules cannot be ignored.[35]

IV. THE STATE OF AFGHANISTAN AND THE TALIBAN: RECOGNITION UNDER INTERNATIONAL LAW

The State of Afghanistan has been taken over by the extremist group called the Taliban to bring pure Islamic law as per the Shariat interpretations. The fall of govt. backed by the Western democracies paved a way for the change in the govt. The future of the people of Afghanistan remains tense. After the takeover of the capital, the group has been formally being in control over the whole country and has formed a new interim govt. headed by Mullah Mohammad Hasan Akhund. The names in the interim govt. find themselves in the United Nations sanction list as well as the US list of designated terrorists. The interim govt. announced by the Taliban are all men dominated by the Pashtun community neither includes the women representation nor minorities.[36]

Against this backdrop, we analyse the recognition of the Islamic Emirate of Afghanistan formed by the Taliban. Under the international legal regime, the Montevideo Convention holds the water in recognizing newly formed States. Article 1 puts out four qualifications with the regard to a State being a person under international law which includes *apermanent population, a defined territory, government, and capacity to enter into relations with the other States.* As per the data available with the United Nations Statistics Division, the country has a population of 3370000 in 2016 and a surface area of 65.2 sq. km sitting in Central Asia with a well-recognized border with its neighbours. Therefore, it has a permanent population along with a territory that is defined on the world map. Earlier, the govt. was headed by Mr. Ghani and had bilateral as well as multilateral relations with other States. Therefore, the recognition of the State of Afghanistan is incontestable and fell within the bracket of the Convention's requirement.

The entitlement of the Taliban as a legitimate govt. of the State of Afghanistan to represent later's international relations assumes significance. The group which is in control of Afghanistan must need to show evidence that the entity enjoys the status of govt. under international law. The answer to this question is not simply a legal one but has political consequences as

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[34] *M. Salimoff and Co.* v *Standard Oil Co.*, 262 NY 220: 186 NE 679 (1883).

[35] Supra, note 26, at 12.

[36] Joint Media Statement of the United Nations Security Council, available at <https://www.un.org/press/en/2021/sc14628.doc.htm> (Sept 9,2021).

well. Ordinarily, the change of power in a State comes either through elections, coup, or revolution which may be smooth or armed rebellion. For international law, how the govt. came into existence or formed, the tenure of the govt., the ideologies, and the political system on which the govt. is based has no legal relevance in deciding the issue of recognition. Accordingly, whether the govt. is a democratic, autocratic, or authoritarian does not concern the existing states to recognize the govt. Around the world, there are authoritarian regimes in North Korea, Syria, Saudi Arabia, etc., partly democratic countries are Egypt, Iran, China to name a few, are well recognized by nations and international organizations. Therefore, the political system of the govt. is of no concern to the recognizing States under international law.

The govt. of Afghanistan led by the militant group which is fundamentalist does concern the existing States and their govt. It is important to note that the Fall of Kabul is not due to the resistance by the Afghan population rather it is more largely due to the US pull-out and the Afghan force's lack of intent to resist against the Taliban. The recognition largely depends on the fulfillment of the principles and philosophies embodied under international law. Concerning the same, there are news reports which bring out the gruesome violations of human rights and international law. This has kept most of the States coming forward and formally recognizing the govt., although some of the States have maintained some form of contact with the govt. headed by the group. As per international law, the Taliban is under the full control of the nation and its population with some resistance from the Islamic State, Hazaras militants, and urban women protesting. But there is a question over the recognition of the govt. until it fulfills the commitment of inclusive govt. At the cost of repetition, legally speaking, the nature of the political system does not concern recognition, but the govt. must show or attempt to pledge towards fulfilling the commitments of international charters and agreements.

Therefore, the recognition of the govt. led by the Taliban hangs in the middle. Although it is pretending to be a stable and legitimate govt., its commitment to fulfilling the principles and the philosophies of the international instruments remain uncertain. Thus, the recognition of the govt. in Afghanistan can wait until its assurance and implementation of international agreements.

V. WAY AHEAD FOR THE INTERNATIONAL COMMUNITY AND ESPECIALLY INDIA

The way ahead of the international community largely depend on the interest and benefits it wants to pour out from Afghanistan. The statement made by the international community has been cohesive with an emphasis on protecting the rights of citizens especially women and minorities. The Taliban has been in

a dire need of recognition for the funds, investments to come in and allow its members an easy passage around the world without fear of being detained. But neither of the States have opened up their cards for recognizing the govt. led by the Taliban. Pakistan has been the most influential country which also took the USA on a ride to strike a deal with the Taliban. A Pakistani element is also present within the Taliban and this is evident from the presence of the ISI chief before forming the govt. as well as the inclusion of the Haqqani network within the govt.[37] Moreover, Pakistan has been accused of harbouring terrorists and its military establishment has been providing training to the international designated terror outfits. Qatar, which hosted the political office of the Taliban was the first nation to send aids and technical workers to manage Kabul airport after foreign troops left. The country has been in the good books of the Taliban as well as the United States. While Russia, China, and Iran did not shut down their embassies and are in indirect talk with the leadership of the Taliban.[38] Recently, for pouring aid to Afghanistan, Russia hosted the leaders of the Taliban at Moscow Format Dialogue on Afghanistan and got backing concerning the same from ten regional States like India, China, Pakistan, Iran, Tajikistan, Turkmenistan, etc. This is the first formal meet between the delegation representing the Taliban as well as representatives from such several nations. A large part of the world is either skeptical of recognizing the govt. rather adopting an approach of 'talk first and recognize later'. Each country has been trying to carter the influence since the US left. The international community must acknowledge the fact that the Taliban movement and its leaders are one of the most wanted and recognizing them will mean stamping its actions violating human rights as legitimate. The international community must put pressure on the group to recognize the importance of human rights, inclusive govt. and stable governance, and must not allow the Afghanistan soil to be used by other terrorist groups to launch attacks.

India has been largely out of the chessboard where the Afghanistan game was being played. But it enjoys goodwill and connection with the people of Afghanistan through its use of soft power. There are investments worth billions in Afghanistan and helping Afghans in the fields of education, health, and infrastructure, but a large part of these actions is in limbo and subsequently fail as the Pakistanis have the say in the Taliban. With the taking over of Afghanistan by the Taliban, Pakistan has got "strategic depth" in confronting India. The actions in Afghanistan will have a spill-over effect as the jihad is will end up in Jammu and Kashmir which will be a cause of concern for New Delhi. Therefore, India cannot allow this spill-over effect and must engage informally with the group by filtering out the Pakistani element. As India does

[37] Shubajit Ray, *As Taliban* Factions Bicker, ISI Chief in Kabul to Find Berths for Haqqanis, *The Indian Express*, available at <https://indianexpress.com/article/world/pakistan-powerful-intel-chief-arrives-in-kabul-7488925/> accessed on 22 October 2021.

[38] Tom O'Connor, 'Russia, China, Iran, Pakistan Extents Hands to Taliban Now in Control of Afghanistan', *The Week*, available at <https://www.newsweek.com/russia-china-iran-pakistan-extend-hands-taliban-now-control-afghanistan-1620335> accessed on 22 October 2021.

not have much leverage within Afghanistan, it can use its influence as far as the Sanctions Committee of the United Nations Security Council is concerned as India presides over the Committee. From accessing financial assets to institutions, removing members of the group from the sanctions list, and allowing a representative of the Islamic Emirate in the United Nations, India calls the shot. Therefore, New Delhi can use its influence to protect its strategic interest in Afghanistan.

VI. CONCLUSION

Beyond the bombs, lie in the hidden treasure of Central Asia, a country and its populations ravaged by war and humanitarian crisis. The recent takeover of Afghanistan may have freed the Afghan population from the foreign troops dictating the terms of their govt., but it is yet not over. The pluralistic society controlled by tribals in the provinces may take Afghanistan towards a path of civil war. As the saying goes for Afghanistan, it will be difficult for the Taliban to provide a stable govt. with the resistance from Panjshir, Badakhshan. The notorious Islamic States Khorasan are using the Shia-Sunni divide to boil and pave a way for a full civil war. The concern of world as well as New Delhi is the use of Afghanistan territory for launching attacks. Summing up the issue of recognition of Islamic Emirate of Afghanistan flows from its assurance as well as commitment towards respecting international law, rights of people with special emphasis on women, children and minorities. The recognition of Afghanistan as a State has not changed because of the change of power; it is the question of legitimacy of the group leading the govt. The present of Afghanistan is imperfect while the future of Afghanistan remains tensed.

UNDERSTANDING DIGITAL MONEY AS A NEW MODUS OF MONEY LAUNDERING: LEGAL INTROSPECTION IN INDIA

*—Tissy Annie Thomas**

Abstract—Digitisation has revolutionised the daily interactions of individuals, business organisations and the State authorities among themselves. Cryptocurrency is a product of this digitisation which has taken the world by storm. Cryptocurrencies offer anonymity and decentralisation- a total turnaround from the conventional centralised financial systems. Therefore, every discussion on or around cryptocurrencies begins on the premise that they have been designed to bypass the centralised financial mechanism of the State. Every technological development has its boon and bane. Similarly, while cryptocurrency is a lucrative technology, there is a need to regulate the same, especially in view of the money laundering activities facilitated by the said means. Therefore, this paper shall analyse how digital money, particularly cryptocurrency, has become a means of money laundering and the regulatory shortcomings concerning cryptocurrency in India. This paper aims to recommend precautionary measures based on the findings of this analysis.

Keywords: Cryptocurrencies, digitisation, blockchain technology, investing.

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I. INTRODUCTION

This era of the digital economy, furthered by fin tech, marks the beginning of a new epoch. Technology is beginning to revolutionise the financial system, making it more accessible and less tardy, thus empowering consumers to hold the leash of their financial life.[1] The Digital India campaign launched in 2015 by the Government of India to transform the Indian economy by digitally empowering our society was a necessary step due to this digitisation which has taken the world by storm. The protagonist of this paper- Cryptocurrency, is a fintech,[2] product of this age of the digital economy.

Cryptocurrency is digital money based on cryptography, which is operated through blockchain technology. While it is not the money traditionally regulated by governmental authorities, its value is represented in terms of money[3]. Opposed to the common perception that cryptography and blockchain is a recent invention, the first signs of cryptocurrency appeared in 1985, when David Chaum created 'Digi-Cash'- a medium of electronic cash transactions maintaining the anonymity of its user[4]. He introduced the role of private and public key,[5] which serve as the foundation of the encryption technologies used today.[6] Following David Chaum's lead, Nick Szabo unveiled 'Bit Gold', a blockchain-based electronic money system that requires users to fulfil a 'proof of work' function.[7] A tacit watershed moment was the silent launch of Bitcoin in 2008 by Satoshi Nakamoto, a pseudonymous individual/group.[8] With its initial valuation at $1[9], it has come a long way within a decade, catching the attention of both small and large-scale investors. The rising value of Bitcoin has indeed been a head-turner. Today, more than 19,000 cryptocurrencies share the market space with Bitcoin[10]. For example, Ethereum, Ripple, Bitcoin, Litecoin, NEM, BBQCoins, dogecoins, etc.

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1 Aanchal Srivastava and Sadaf Yahya, Cryptocurrency: Decoded in the Indian Ecosystem, 129 taxmann.com 348 (2021).

2 *ibid*.

3 Vallari Dubey, *Cryptocurrency* – "A SEBI and FEMA perspective", 88 taxmann.com 297 (2017).

4 Shashank Agarwal and Jyoti Rao, Caution: Cryptocurrency Frauds Ahead, 143 taxmann.com 316 (2022).

5 *ibid*.

6 Supra, note 3.

7 *ibid*.

8 Krishna V. Iyer and V.V. Ravi Kumar, Blockchain, Bitcoin and Cryptocurrency Explained, Economic and Political Weekly (Jan. 13, 2018) available at: <https://www.epw.in/engage/article/block-chain-evolution-money-through-cryptocurrency>accessed on 9 December 2022.

9 Meena Gupta, *Cryptocurrencies in India: Time to Tax High Amounts of Gains*, 88 taxmann.com 301 (2017).

10 Arjun Kharpal, *Crypto Firms Say Thousands of Digital Currencies will Collapse, Compare Market to Early Dotcom Days*, *CNBC* (Jun. 3,2022) *available at*: <https://www.cnbc.com/2022/06/03/crypto-firms-say-thousands-of-digital-currencies-will-collapse.html> accessed 9 December 2022.

One may safely presume that the vogue of cryptocurrency only began with the rising value of Bitcoin, as both terms are more often used interchangeably. Even though Bitcoin has existed for more than a decade, it is only recently that cryptocurrencies have caught the attention of governments worldwide and have been at the center of debates. As cryptocurrencies continue to grapple with world economy, this new innovative technology is being received by regulatory authorities with skepticism. With the construction of decentralized exchanges that do not involve governments or middlemen and also provide some degree of anonymity, cryptocurrencies like Bitcoin have the potential to fundamentally alter the way that money is exchanged around the world. Investors, business owners, speculators, and criminals have flocked to this financial technology, attracted by its potential. However, at present, neither Bitcoin nor the countless other virtual currencies it inspired are fully regulated. Undoubtedly, inconsistent and delayed regulatory responses have not only promoted innovation and disruption in the financial industry, but they have also aided threats to national security, including terrorism and financial crime.[11]

The Reserve Bank of India, in its Concept note on Central Bank Digital Currency, has acknowledged that the increasing crypto-assets pose a substantial danger in terms of money laundering and terrorism financing.[12] It was highlighted that the continued usage of crypto assets poses a risk to the goals of monetary policy since it could result in the development of a parallel economy, which would likely weaken the transmission of monetary policy and the stability of the domestic currency.[13] It further noted its negative impact on foreign exchange controls, particularly when it comes to how easily capital flow restrictions are evaded.[14]

Henceforth, this paper shall analyse how digital money, particularly cryptocurrency, has become a means of money laundering and the regulatory shortcomings with respect to cryptocurrency in India. The paper shall begin with understanding the terminologies- virtual currency and cryptocurrency, which fall under the umbrella term digital money. Thereafter, the emergence of cryptocurrencies will be traced, followed by an attempt to understand the nature of cryptocurrency and the underlying functioning process involved in blockchain technology. Subsequently, the paper will explore how this peculiar technology facilitates money laundering, and a brief glimpse on the global response. Thereafter, the author shall focus on examining the existing legal regime in

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[11] Groden, Claire, Edoardo Saravalle, and Julia Solomon-Strauss, *Uncharted Waters: A Primer on Virtual Currency Regulation Around the World*, Center for a New American Security (2018) available at <http://www.jstor.com/stable/resrep20458> accessed 9 December 2022.

[12] Reserve Bank of India, Concept Note On Central Bank Digital Currency (2022) available at <https://rbibidocs.rbi.org.in/rdocs//PublicationReport/Pdfs/CONCEPTNOTEACB531172E0B4DFC9A6E506C2C24FFB6.PDF> accessed 9 December 2022.

[13] *ibid*.

[14] *ibid*.

India and whether the anti-money laundering regulation adequately addresses the new modus of money laundering, i.e., through cryptocurrencies.

II. UNDERSTANDING DIGITAL MONEY

Digital money can be understood as a currency that solely exists in digital form and does not have a physical shape. However, it should not be confused with the amount of money (legal tender) stored in e-wallets or accessed through online banking services. Digital money can include[15]-

1) Cryptocurrencies- dealt through a distributed and decentralised system controlled only by an open-source cryptographic protocol, and;
2) Virtual currencies- which are issued and governed by a central server- the Central Bank.

Digital money is the invention of the present-day digital economy, which proposes to serve the function of conventional money as traditionally understood, i.e., facilitate commerce in goods and services, act as a measure of market value for goods and services, and potential to retain value under specific conditions.[16] Therefore, in addition to being able to be saved in an electronic wallet and exchanged between users, digital money can be used to purchase any digital or physical good.[17]

While digital money may be so understood, as stated above, governmental reluctance has prevented cryptocurrencies from being used as legal tender,[18] though there have been exceptions[19]. The reluctance of State authorities reflected through their policy statements is the result of the inability of the State to regulate the decentralised network, which offers anonymity to its users, as will be explained hereinafter. However, cryptocurrencies have been so in vogue, prompting States to reconsider their decision and develop their own virtual currency to prevent a parallel financial structure that bypasses the State's control and surveillance. India is one such country itself, which seeks to develop a virtual currency regulated by state machinery, a Central Bank

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15 Nicola Bilotta and Fabrizio Botti, *Libra and the Others: The Future of Digital Money*, Istituto Affari Internazionali (2018) available at <http://www.jstor.com/stable/resrep19691> accessed on 9 December 2022.

16 *ibid*.

17 *ibid*.

18 Supra, note 11.

19 Nelson Renteria, Tom Wilson and Karin Strohecker, *In a World First, El Salvador Makes Bitcoin Legal Tender*, *Reuters* (Jun. 10, 2021) *available at*: <https://www.reuters.com/world/americas/el-salvador-approves-first-law-bitcoin-legal-tender-2021-06-09/> accessed 9 December 2022. Also see Deutsche Welle, *Bitcoin Boom Spikes Amid Perceived Risks*, *Frontline* (May 06,2022) available at <https://frontline.thehindu.com/dispatches/bitcoin-boom-spikes-amid-perceived-risks/article65395978.ece> accessed 9 December 2022.

Digital Currency (CBDC)- the 'Digital Rupee'.[20] As a step towards the goal, the Reserve Bank of India launched its first pilot for retail digital Rupee on December 01, 2022.[21]

Notwithstanding the attempts of the State to develop virtual currencies, in view of statistical data,[22] it is inadvisable to assume that a State sanctioned virtual currency can completely eliminate the cryptocurrencies already in circulation around the globe. Henceforth, while studying the problem at hand, both- unregulated cryptocurrencies and State sanctioned virtual currency; should be taken into consideration. However, since there is no State sanctioned virtual currency in full scale circulation, the present study shall limit itself to the use of cryptocurrency as a modus of money laundering.

III. THE EMERGENCE OF CRYPTOCURRENCY

Human society thrives through interdependency. Trade transactions are manifestation of this interdependency, which also brings out the cooperative and competitive nature of the social animals called humans.[23] With time, the nature and method of such trade transactions evolved. The socio-economic transactions which began with the barter system experienced a sea of change. The introduction of money as a common medium of exchange expanded trade, necessitating the emergence of banking and accounting professionals.[24] As domestic industry expanded, the need to promote transnational business transactions arose. Subsequently, the perfectly timed invention of the internet facilitated digitization and e-commerce. The age of technology revolutionized the way of life.

Though e-commerce facilitated transnational commercial transactions, establishing the identity and trust between the parties became a hurdle, thus giving rise to 'trusted intermediaries'.[25] This new species- 'the trusted intermediaries', took upon the role of record keepers and gradually turned its 'user' into its 'product'. In an age when information is power, 'trusted entities' such as banks, internet service providers, online retailers, social media enter-

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[20] PTI, 'India's Digital Currency to Debut by Early 2023', *The Economic Times* (Feb. 06,2022) available at https://economictimes.indiatimes.com/news/economy/policy/indias-digital-currency-to-debut-by-early-2023/articleshow/89379626.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed 9 December 2022.

[21] Ministry of Finance, India – One of the Pioneers In Introducing CBDC (2022) available at https://static.pib.gov.in/WriteReadData/specificdocs/documents/2022/dec/doc2022121139301.pdf accessed 9 December 2022.

[22] 115 Million Indians have Invested in Cryptocurrency with a Sentiment to Gain Long-Term Returns: Report,*Financial Express* (Aug. 23,2022) available at <https://www.financialexpress.com/blockchain/115-million-indians-have-invested-in-cryptocurrency-with-a-sentiment-to-gain-long-term-returns-report/2641525/> accessed 9 december 2022.

[23] Supra, note 8.

[24] *ibid*.

[25] *ibid*.

prises, and the like thrive on the profits derived by hoarding and exploiting user-generated information.[26] Blockchain technology, which enables cryptocurrencies to function, has upset this economic paradigm since it enables a new way of keeping records of transactions without the need for trusted entities.[27]

An introspection reveals, with the emergence of information technology, as banks and financial institutions became the reliable third-party transfer agents, they also added a layer to transactions, increasing costs while also controlling the services.[28] This led to the concentration of power in the hands of financial intermediaries and strengthened centralised financial systems.[29] It is in this context that cryptocurrency is believed to have emerged.

Some financial analysts assert that the creation of Bitcoin, a cryptocurrency, was a response to the global financial crisis of 2008.[30] They propose that while the breakdown of the financial systems all over the world questioned the conventional centralised architecture of the financial systems across the world, the creation of cryptocurrency at the same time was an attempt to rebuild this structure.[31] An attempt to eliminate from the financial mechanism every actor and feature which makes a financial system centralised. Addressing the issues involved in a centralised financial system, cryptocurrency provides an alternative by eliminating the trusted third party through the revolutionary fusion of decentralised procedures and newly developed digital signatures.[32] It can be concluded that cryptocurrencies have been designed to bypass the centralised financial mechanism of the State by further ensuring the anonymity of the users.[33]

IV. UNDERSTANDING THE MECHANISM OF BLOCKCHAIN TECHNOLOGY AND CRYPTOCURRENCY

Blockchain and cryptocurrency together constitute a dynamic mechanism. Blockchain technology serves as a new record-keeping medium as it is online, open, decentralised, and transparent in recording all dealings in cryptocurrency.[34] It is a virtual logbook which records every transaction with respect to cryptocurrencies. It is a 'peer-to-peer distributed time stamp server to generate

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26 *ibid*.
27 *ibid*.
28 Supra, note 4.
29 *ibid*.
30 *ibid*.
31 *ibid*.
32 *ibid*.
33 *ibid*.
34 Supra, note 8.

computational proof of the chronological order of transactions'[35], which is operated through nodes[36] in the network. Cryptocurrencies function through this domain of blockchain technology. With blockchain technology, cryptocurrency is a peer-to-peer version of digital money that can be sent directly from one party to another without going through a financial institution. In simple words, blockchain is the book of accounts and cryptocurrency is the item maintained in these books.

In a blockchain, by hashing transactions into an ongoing chain of hash-based proof-of-work, the network timestamps transactions, creating a record that cannot be modified without redoing the proof-of-work.[37] The longest chain provides evidence for both the order of events and that it was produced from the largest pool of CPU power.[38] The nodes that are not working together to attack the network will produce the longest chain and outperform attackers as long as they control the bulk of the CPU power.[39] Furthermore, nodes can leave and rejoin the network at any time, accepting the longest proof-of-work chain as evidence of what transpired while they were away.[40]

A. How does Blockchain Technology function?

Satoshi Nakamoto gave a theoretical overview of the working system of cryptocurrency and its underlying record-keeping technology, blockchain,[41] in the Bitcoin white paper published in 2008.[42] Fig. 1 below provides a step-by-step layout of the process involved in blockchain, as elucidated by Satoshi Nakamoto.

Fig. 1 – A step-by-step process involved in Blockchain.[43]

Nakamoto proposed incentivising the miners in order to encourage nodes to execute POW by using their computing resources. There are two methods for incentivising the miners to validate the transactions and ensuring complete

[35] Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System (2008), available at <https://bitcoin.org/bitcoin.pdf> accessed 9 December 2022.

[36] In cryptography, nodes are referred to as the participating computers in the network used to run the software, record keeping and valiate the transactions. Also See, Decrypt, What are the Different Types of Bitcoin Nodes? How the Bitcoin Network is Maintained (Jul 13,2022) available at https://decrypt.co/resources/what-are-the-different-types-of-bitcoin-nodes-how-the-bitcoin-network-is-maintained accessed 9 December 2022.

[37] Supra, note 35.

[38] *ibid*.

[39] *ibid*.

[40] *ibid*.

[41] *ibid*.

[42] Archie Chaudhary, 'Reflecting on Satoshi Nakamoto's Manifesto: The Bitcoin White Paper', *The Bitcoin Magazine* (31-10-2022) *available at*: <https://bitcoinmagazine.com/culture/reflecting-on-satoshi-white-paper> accessed 9 December 2022.

[43] Supra, note 35.

accuracy. First, a unique transaction that launches or creates a brand-new coin that the mining node will hold for executing the POW. Second, the payment of voluntary transaction fees by users in exchange for grouping their transactions into a block.[44] The idea of incentivising the miner/node moves from the notion that a miner who has 'ownership' in the system will be motivated to protect the network and keep an eye out for attackers once it has earned some currency.[45] Some analysts are of the opinion that Blockchain integrates advances in game theory, encryption, and software engineering[46], and rightly so.

It is worthwhile to also take note that a miner/node must go through a specified number of transactions before they are qualified to receive block rewards.[47] As mentioned before, these transactions are verified by resolving a mathematical puzzle (the proof-of-work), and to earn the block reward; each miner competes to be the first to find the solution—or the closest one—that is accurate. The procedure is fiercely competitive and demands a lot of computing and electric power. Consequently, as this technology becomes more mature, the financial resources at one's disposal will play a deciding role in determining who can mine and who cannot. It is even speculated that this may lead to a monopoly in mining cryptocurrency.[48]

Nonetheless, the benefit of the POW system is that when more blocks are added, the likelihood of an attacker catching up with the cumulative work of other nodes to propagate an incorrect transaction or block decreases exponentially as long as the network is majority controlled by honest nodes.[49] It is computationally hard for an attacker to reverse a transaction once it is, say, eight blocks deep. In order to change a previous block, an attacker would need to repeat the proof-of-work for that block and all subsequent blocks, then catch up with and outperform the work of the honest nodes.[50] In light of this innate safety mechanism in blockchain technology, it acts as an effective countermeasure against cybercrimes, thus making it a lucrative technology that can be put to other uses too.

However, another feature of this cryptographical system, which is beneficial and, at the same time offers a safe-haven for criminals, is that the entries in the blockchain are pseudo-anonymous. A hashed code, or a string of numbers and letters without any information about the user's identity or location, is all

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44 Supra, note 8.
45 *ibid*.
46 *ibid*.
47 Dhananjai Dhokalia, Bitcoin Mining: Charge ability under the Income Tax Act, 1961, 126 taxmann.com 142 (2021).
48 Supra, note 8.
49 Supra, note 35.
50 *ibid*.

that the recorded public address is.[51] Additionally, individuals have unlimited access to generate fresh public addresses using their private key.[52] Therefore, it becomes more difficult for an outsider to link individual wallets to transactions that are recorded on the blockchain.[53]

B. How does Cryptocurrency function?

The term 'cryptocurrency' is a portmanteau made of two words, 'crypto'- meaning 'concealed' and 'currency'- meaning 'money'. Consequently, cryptocurrency is alternatively termed digital money, though it is not a legal tender. However, the value of a cryptocurrency is represented in terms of money (legal tender).[54] A cryptocurrency is a composition of cryptographic protocols. As a result, the units are encrypted and untraceable, enabling anonymous transactions.[55] The system is designed such that it is impossible for anybody to crack, copy, or fake the currencies secured by the protocols.[56]

However, it is not merely anonymity offered by cryptocurrency; rather, its speculative valuation which has drawn the reluctance and scepticism of governmental authorities. As opposed to conventional currencies- fiat money, whose value is determined by the Government, or non-fiat money, driving its value from the underlying asset- the value of a cryptocurrency is driven by pure market forces.[57] The cryptocurrency market is very volatile since its value is determined by market factors such as demand and supply rather than any underlying asset.[58]

From its onset, cryptocurrencies have not been governed by governmental authorities. Control over cryptocurrencies is decentralised.[59] The transactions with respect to cryptocurrencies are synchronised by utilising the blockchain technique[60] elucidated above. Thus, trading in cryptocurrencies is enabled through cryptocurrency exchanges, which function similarly to stock market platforms.[61] However, lately, on account of the statistics, indicative of the ever-increasing investments in cryptocurrencies and the lurking danger

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51 Stefan Mbiyavanga, Cryptolaundering: Anti-Money Laundering Regulation of Virtual Currency Exchanges, 3 JACL 1 (2019).
52 *ibid*.
53 *ibid*.
54 Supra, note 3.
55 *ibid*.
56 *ibid*.
57 Sarthak Juneja and Nikhil Bhandari, Cryptocurrency – A Revolution in Money, 89 taxmann.com 214 (2018).
58 Mridula Tripathi, 'Decoding The Legal Standpoint of Cryptocurrencies in India', 122 taxmann.com 190 (2020).
59 Supra, note 3.
60 Supra, note 58.
61 *ibid*.

that the speculative bubble might burst to leave the world economy to limp[62], have prompted a few countries to craft regulations.[63] However, the difficulty presently faced by policymakers is that with such disparate characteristics, it becomes difficult to categorise a cryptocurrency as a commodity, money, coin, security, item, or service.[64] Nevertheless, this dilemma on the part of the policymakers has not stopped cryptocurrency owners and prospective investors from dealing with cryptocurrency. The acquisition of cryptocurrency through mining, as a gift, consideration for goods or services, and trading through a cryptocurrency exchange[65] has only led to a wider circulation of cryptocurrency in the economy.

As a result, Cryptocurrency is often seen as a phenomenal departure from conventional fiat money transactions throughout the world.[66] Interestingly, as this mechanism bypasses the centralised mechanism of the State's financial system,[67] it establishes a parallel borderless, anonymous[68] economic structure.

V. CRYPTOCURRENCY AS THE MODUS FOR MONEY LAUNDERING

Apart from the volatility of cryptocurrencies, their potential to facilitate money laundering is another major concern countries across the world face today. Therefore, it is essential to understand how cryptocurrencies facilitate money laundering in order to articulate intervening measures.

The Prevention of Money Laundering Act, 2002 begins with the acknowledgement in its introduction that money laundering is not merely a threat to the country's financial system but also to its integrity and sovereignty. An agonizing reminder of this threat is the attack on the Parliament in 2001, in which subsequent investigation revealed that the consideration amount received by Afzal Guru was laundered into the country through multiple channels.[69]

Money laundering is the process by which wealth amassed through illegal means is coated with the shine of legitimacy to conceal its true source of origin. It is a method through which criminals leave a trail of money to change the illegal and illegitimate income they have obtained through criminal conduct into lawful income.[70] Necessarily, money laundering is

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62 Supra, note 4.
63 Supra, note 11.
64 Supra, note 3.
65 Supra, note 57.
66 Supra, note 4.
67 *ibid*.
68 *ibid*.
69 Abhimanyu Bhandari and Kartika Sharma, *A Critique of the Prevention Of Money Laundering Act, 2002* (2020) (E-Book).
70 *ibid*.

preceded by a predicate offence. Money laundering essentially involves three stages- 'Placement' of illegal assets in the financial system, 'Layering' of the assets for obfuscation of their origin and then 'Integration' of the assets into the legal economy.[71] Criminals use the income that has been laundered to make it appear legitimate so that they can live normal lives in society without worrying that their underlying illicit activities would be discovered.[72] Criminals thus conceal their illicit income from the government and amass it for their own gain with the aid of money laundering.[73] The necessity to enact appropriate regulations to address the threat of money laundering was driven by the urgency to stop the flow of funds available to terrorists and illegal drug dealers.[74] However, the regulatory structure that developed throughout the countries went beyond merely tracking down and seizing cash used for terrorism and drug trafficking, covering all types of criminal activity and its proceeds within its ambit.[75]

There are multiple ways through which the proceeds of criminal activities can be laundered and converted to 'white money'.[76] The most recent of them is through cryptocurrencies. In view of the threat posed by money laundering, it is pertinent to explore how cryptocurrencies can be potentially used for the purpose of money laundering, and identify the gaps in the legislation which hence fails to regulate and punish such a modus operandi.

1) As already stated above, blockchain uses pseudo-anonymous entries. The recorded public address is nothing more than a hashed code, or a collection of numbers and letters without any indication of the user's identity or location.[77] Additionally, anyone can create new public addresses using their private key at any time.[78] As a result, it is more challenging for an outsider to connect specific wallets to transactions that are listed on the blockchain.[79] However, linking cryptocurrency transactions to the user's Internet Protocol (IP) addresses is possible.[80] To avoid this, a user can access the cryptocurrency network through the Onion Router (TOR).[81] TOR conceals online behaviour by wrapping the user's identity in multiple encryption levels, similar to an onion's layers.[82] Therefore, money, once invested in cryptocurrency, would stay undetected and unlinked to the offender for as long as the offender

71 Vijay Kumar Singh, *Law Relating to Money Laundering in India — Due For a Change*, 3 MLJ Crl 1 2009.
72 *ibid*.
73 *ibid*.
74 *ibid*.
75 Supra note 69.
76 B.R. Sharma, *Bank Frauds Prevention & Detection*, (2016) (E-Book).
77 Supra, note 51.
78 *ibid*.
79 *ibid*.
80 *ibid*.
81 *ibid*.
82 *ibid*.

wants. Furthermore, mixers or tumblers, which provide anonymizing services, are capable of processing enormous amounts of transactions at unpredictable intervals and between numerous wallets.[83] They combine incoming transactions with numerous others and reroute transactions through intricate, semi-random chain of dummy transactions.[84] These mixing services are undoubtedly a very helpful tool for launderers, making it more difficult for investigators to track the transaction's path.

2) As people are beginning to use cryptocurrency as a medium of exchange despite the lack of legal recognition, offenders may also choose to accept the proceeds of the crime in cryptocurrencies.[85] Encashing the cryptocurrencies after layering them with multiple transactions. Launderers may even choose not to reconvert the laundered money and instead buy moveable or immovable assets using the laundered cryptocurrencies.[8687]

3) Large, regulated custodial exchanges have recently started requesting specific personal details for account authentication.[88] To conceal their identity, however, launderers sometimes avail services of 'straw men' or middlemen with good records.[89] This has, in turn, led to a market for properly confirmed accounts.[90]

4) To create a trail of money that is nearly impossible to follow, money can be transferred from one cryptocurrency to another over digital currency exchanges.[91] In the process, offenders would use cryptocurrencies which are the least regulated. Further, by blending an initial coin amount with additional cryptocurrencies, they conceal the source and receipt of cryptocurrencies.[92] Thereafter, monies are incorporated into

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83 *ibid*.

84 Supra, note 51.

85 Alexandra D. Comolli and Michele R. Korver, Surfing the First Wave of Cryptocurrency Money Laundering, 69 (3) Department of Justice Journal of Federal Law and Practice 183 (2021).

Also See, Rolf van Wegberg, Jan-Jaap Oerlemans and Oskar van Deventer, Bitcoin Money Laundering: Mixed Results?: An Explorative Study on Money Laundering of Cybercrime Proceeds Using Bitcoin, 25(2) Journal of Financial Crime 419 (2018).

86 Supra, note 51.

87 Gadgets 360, *Cryptocurrency Payments are Being Accepted in India by These Companies* (Aug. 11,2021) available at <https://www.gadgets360.com/cryptocurrency/features/cryptocurrency-payments-india-accepted-companies-unocoin-highkart-bitrefill-sapna-purse-rug-republic-suryawanshi-restaurants-2508146> accessed 9 Deecmber 2022.

Also See, WazirX, *List of Partners Accepting Crypto as Payments. Can Indians also Buy From Here?* (16-6-2022) available at https://wazirx.com/blog/list-of-partners-accepting-crypto-as-payments-can-indians-also-buy-from-here/ accessed 9 December 2022.

88 Supra, note 51.

89 *ibid*.

90 *ibid*.

91 Coinmonks, *The Use of Cryptocurrency for Money Laundering* (Dec. 29,2019) available at <https://medium.com/coinmonks/the-use-of-cryptocurrency-for-money-laundering-e94131748cc7> accessed 9 December 2022.

92 *ibid*.

the legal, financial system once the source of money has been sufficiently obscured.[93]

5) Launderers may also employ privacy coins, such as Monero and Zcash-digital currencies which are built to improve anonymity.[94] Privacy coins are a specialised class of cryptocurrency which do not provide public access to previous transactions.[95] For instance, Monero uses a blockchain that automatically generates bogus addresses to mask the identity of the true sender while encrypting the recipient's public address.[96]

6) A few entities in the private sector have created or are under the process of creating their own cryptocurrencies, which would operate exclusively within their customer base. For instance, Telegram has launched Toncoin[97], Facebook has been on its heels to launch its Cryptocurrency since 2019,[98] and it is speculated that Walmart will soon roll out its own cryptocurrency too[99]. Once such private virtual currencies are launched, criminals would invest in these cryptocurrencies to park their black money. They may then undertake transactions within the exclusive customer circle of these private entities to realize the money so parked or cover the trail of money with multiple layers of transactions. Subsequently, encashing the crypto coins in the pretence of exiting the private entity's customer circle.

7) Additionally, to hide the cash and evidence which attributes the offender to the crime, from law enforcement authorities, and rapidly and conveniently transfer the proceeds from one jurisdiction to another, fraudsters convert the funds received from the victim in fiat to cryptocurrency.[100] Recently, the Enforcement Directorate was able to unravel money laundering activities of fraudulent digital lending apps facilitated through cryptocurrencies.[101] It was discovered that the shell compa-

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93 *ibid*.

94 *ibid*.

95 Supra, note 51.

96 *ibid*.

97 Here's how Telegram Users can Quickly Enable Crypto Payment, *Indian Express* (May 02,2022) available at <https://indianexpress.com/article/technology/crypto/heres-how-telegram-users-can-make-crypto-payment-via-toncoin-7898050/> accessed 9 December 2022.

98 Sowmya Ramasubramanian, 'A Brief Look at Facebook's Digital Currency Venture', *The Hindu* (Dec. 03,2020) available at <https://www.thehindu.com/sci-tech/technology/facebooks-libra-currency/article33240527.ece> accessed 9 December 2022.

99 Jack Kelly, Walmart Plans Launch of NFTs Cryptocurrency and Tokens as it Dives into the Metaverse and Virtual Reality, *Forbes* (Jan. 17,2022) available at <https://www.forbes.com/sites/jackkelly/2022/01/17/walmart-plans-launch-of-nfts-cryptocurrency-and-tokens-as-it-dives-into-the-metaverse-and-virtual-reality/?sh=1a0c071373c7> accessed 9 December 2022.

100 Alexandra D. Comolli and Michele R. Korver, Surfing the First Wave of Cryptocurrency Money Laundering, 69 (3) Department of Justice Journal of Federal Law and Practice 183 (2021).

101 C.P. Chandrasekhar, ED Raid on Loan Apps Reveals Strong Chinese Presence in Crypto Crimes, *Frontline* (Nov. 20,2022) available at <https://frontline.thehindu.com/columns/loan-apps-in-crypto-crimes/article65780036.ece> accessed 9 December 2022.

nies created to run these apps got their funds/profits in rupee wallets, which were then used to convert earnings into cryptocurrency.[102] Then, these cryptocurrencies were moved to digital currency wallets located abroad.[103]

8) Third-party money launderers may also be used by transnational criminal groups to convert cash proceeds of crime into cryptocurrencies so that the money can be conveniently transferred among conspirators or across international borders.[104]

9) Tax evaders may convert their undisclosed income into cryptocurrencies, parking the said funds in an attempt to remain undetected from the radar of the tax authorities.[105]

10) Crypto ATMs[106] offer another means of laundering money through cryptocurrency. The money launderer can buy cryptocurrencies using the 'black money' anonymously, safely parking the amount undetected from the radar of the law enforcement agencies.

VI. GLOBAL RESPONSE TO REGULATION OF CRYPTOCURRENCY

The way that cryptocurrencies are regulated has varied greatly throughout the world. Governments have adopted a variety of definitions of what digital money is. They have also addressed several legal and policy issues brought up by these technologies, such as how they should be taxed, how they may affect anti-money laundering measures, how to disclose such activities, and how financial institutions should behave while using them.[107] Yet, the global community has no universal agreement on how digital money should be defined or handled.[108]

Since there is a lack of uniformity in a universal understanding of what constitutes digital money/virtual asset/virtual asset service providers, money launderers will identify and take advantage of any regulatory loopholes

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Also See, "Here's how Bengaluru Firm used Crypto Route for Money Laundering, ED Explains after Raids", *Live Mint* (Aug. 13,2022) available at <https://www.livemint.com/news/india/heres-how-bengaluru-firm-used-crypto-route-for-money-laundering-ed-explains-after-raids-11660352348058.html> accessed 9 December 2022.

[102] *ibid*.

[103] *ibid*.

[104] Supra, note 100.

[105] *ibid*.

[106] Shayak Majumdar, Crypto ATMs: Over 39,000 Machines Installed In 78 Countries, Including 2 In India, *ABP Live* (Aug. 08,2022) available at <https://news.abplive.com/business/crypto/crypto-atm-coinatmradar-machines-installed-in-india-us-countries-around-the-world-1547069> accessed 9 December 2022/.

[107] Supra, note 11.

[108] *ibid*.

globally.[109] As cryptocurrencies are a borderless technological commodity, it is pertinent to know how countries across the world regulate them. For instance, countries like El Salvador and the Central African Republic have recognised Bitcoins as legal tender.

Many countries, including the United States, have attempted to incorporate virtual currencies into current legal frameworks by overtly or subtly expanding the scope of current laws.[110] A few countries, on the other hand, have noted the scope of a first-mover advantage and thus developed frameworks conducive to cryptocurrencies.[111] Others are actively thinking about implementing new regulatory frameworks to promote the regulated expansion of cryptocurrencies.[112] In contrast, a small number of nations have outright outlawed cryptocurrencies.[113] Consensus is difficult to come by even within countries: different departments of the same administration may take opposing stances.[114] Therefore, the unclear legal status of cryptocurrencies may lead to the imposition of unforeseen regulations.[115] Similar obstacles have prevented the development of multilateral frameworks in the world arena due to differences among parties.[116] Divergent policymaker interests have prevented attempts to forge an international agreement on cryptocurrency regulation, such as during the G20 summit in March 2018, from leading to any real action.[117] It is vital that the international community recognise that in order to effectively regulate the cryptocurrency market, international coordination and cooperation are as vital as it is important for the numerous domestic agencies to do so.

Nonetheless, the instability of the cryptocurrency market[118] and its potential for money laundering have emerged as a common element to be addressed in the international response to the growth of cryptocurrencies. It has been acknowledged within the scholarly circle that digital money cannot be regulated without countries with cryptocurrency activity coordinating and cooperating with each other.[119] Herein, the reports and guidelines of the Financial Action Task Force (FATF), a global organisation largely in charge of establishing non-binding worldwide anti-money laundering regulations, act as a beacon of light amidst the existing lack of consensus. The Financial Action Task Force

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[109] Gabrielle Chasin Velkes,'International Anti-Money Laundering Regulation of Virtual Currencies and Assets', 52(3) New York University Journal of International Law and Politics 875 (2020).

[110] Supra, note 11.

[111] *ibid*.

[112] *ibid*.

[113] *ibid*.

[114] *ibid*.

[115] *ibid*.

[116] *ibid*.

[117] *ibid*.

[118] *ibid*.

[119] Malcolm Campbell-Verduyn, 'Bitcoin, Crypto-Coins, and Global Anti-Money laundering Governance', 69(2) Crime, Law and Social Change 283 (2018).

(FATF) has tried to standardise the terms 'virtual assets' and 'virtual asset service providers', and issued guidance notes for implementing the money travel regulation on virtual currencies as an anti-money laundering measure.[120]

The FATF began issuing anti-money laundering guidelines to regulate digital money from 2014 onwards.[121] Its primary focus then was limited to regulating the intersections where digital money and the traditional banking system interacted, leaving a huge number of cryptocurrency-to-cryptocurrency transactions unregulated.[122] In 2018, the FATF extended the money travel rule to digital money, thus requiring mandatory customer identification for transactions beyond the threshold limit.[123] It also introduced a new vocabulary- 'Virtual Asset Providers', which includes entities involved in the transfer of virtual assets, the safekeeping of virtual assets[124], financial services related to an issuer's offer[125] or sale of a virtual asset, conversion of digital money to fiat and fiat to digital money, thereby expanding the coverage of the anti-money laundering measures.[126]

'European Parliament Report on Cryptocurrencies and Blockchain', published in 2018, explored the ways to detect and deter money laundering through cryptocurrencies.[127] It creates three target points for regulation- the user, digital money exchange platform, and wallet provider.[128]

Users- target users, such as buyers and sellers of goods and services that use virtual currencies as a kind of investment or as a medium of exchange. According to the report, the anonymity of the users can be lifted by requiring mandatory/voluntary registration of users. Although this option would not completely eliminate anonymity, it would enable law enforcement agencies battling financial crime to quickly confirm registered users' identities.[129]

Digital Money Exchange Platform- They can be mandated to follow KYC norms and be subjected to licensing obligations for regulated entities, thereby

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120 Supra, note 109.
121 *ibid*.
122 *ibid*.
123 *ibid*.
124 Similar to regular asset custodians, virtual asset custodians are essentially responsible for the safekeeping and the handling of transactions involving their clients' assets.
125 Projects can raise money via a new method called an Initial Coin Offering (ICO), in which they sell their own cryptocurrency which can be later used as an investment instrument, a means of payment, or as a utility token alone.
126 Supra, note 109.
127 European Union, European Parliament Report on Cryptocurrencies and Blockchain – Legal Context and Implications for Financial Crime, Money Laundering and Tax Evasion (Jul. 05,2018).
128 *ibid*.
129 *ibid*.

requiring a minimum capital, safeguarding requirements, and consumer protection rules.[130]

Custodian Wallet Providers- According to the research, custodian wallet providers are conceptually very similar to financial organizations holding bank or payment accounts because they have custody of the user's public and private keys. They, therefore, demand increased regulatory focus.[131]

It is pertinent to note that all the anti-money laundering measures, by far, only regulate the points where a cryptocurrency is converted to fiat currency or vice versa. Consequently, transactions or exchanges from cryptocurrency to cryptocurrency are largely unregulated and hence require attention.

VII. LEGAL STATUS OF CRYPTOCURRENCY IN INDIA

Cryptocurrency has been a hotly debated topic in the country, covered under clouds of uncertainty. Unfortunately, there is no official position as to how the new fintech is to be treated- as a commodity, asset or legal tender. As the Reserve Bank of India (RBI) comes nearer to a full-scale launch of the Central Bank Digital Currency- E-Rupee, the intention of the government not to treat cryptocurrencies as legal tender has become clearer than ever. Nonetheless, the ambiguity continues to exist as the RBI officials have time and again iterated the position that the crypto market cannot be regulated by a financial sector regulator.[132] The international nature of cryptocurrency transactions, the lack of technological solutions to ensure the FATF's 'Travel Rule', the issue of 'non-custodian wallets', the fact that peer to peer transactions do not involve any entity subject to anti-money laundering regulations, the inability to identify the management behind a cryptocurrency (as is the case in Bitcoin) are a few of the factors supporting such a position.[133]

Although the Reserve Bank of India has expressed concerns about the possible financial, legal, and security risks associated with cryptocurrencies since 2013, the RBI promulgated a circular in 2018 that forbade banks from offering financial services that involved cryptocurrencies[134]. An Inter-Ministerial Committee on Virtual Currencies was also established by the Ministry of

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130 *ibid*.

131 *ibid*.

132 Keynote address delivered by Shri T. Rabi Sankar, Deputy Governor, Reserve Bank of India, on February 14, 2022 at the Indian Banks Association 17th Annual Banking Technology Conference and Awards, available at <https://rbi.org.in/Scripts/BS_SpeechesView.aspx?Id=1196#:~:text=As%20discussed%2C%20cryptocurrencies%20are%20not,by%20any%20financial%20sector%20regulator> (last visited Dec. 09,2022).

133 *ibid*.

134 RBI/2017-18/154, Prohibition on Dealing in Virtual Currencies, Reserve Bank of India (April 06,2018) available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF> accessed 9 December 2022.

Finance, and its report was published in 2019.[135] It raised a number of pertinent issues, such as the need to protect consumers from fraud and risks, the vulnerability of the financial system, and the necessity to stop criminal activity.[136] As a result, the Committee presented the Draft 2019 Bill to Ban Cryptocurrency and Regulate Official Digital Currency, which advocated a total prohibition on cryptocurrency.[137]

Furthermore, the Hon'ble Supreme Court of India quashed the RBI circular in *Internet and Mobile Assn. of India* v. *RBI*[138] (hereinafter IMAI judgment) relying on the principle of proportionality and upheld the contention that denying access to banking facilities to cryptocurrency users would be tantamount to denying the right guaranteed under Article 19(1)(g) of the Constitution to carry on any trade or profession. In the IMAI judgment, the Supreme Court acknowledged that RBI might notify cryptocurrencies to qualify as 'currency' under the Foreign Exchange Management Act of 1999.[139] So, it would be presumed that those who utilise cryptocurrencies are engaging in activity under RBI's control.[140] The Court additionally ruled that the Payment and Settlement Systems Act, 2007, is not applicable to cryptocurrencies because they do not have any inherent monetary worth.[141] The Court did, however, acknowledge RBI's authority to oversee cryptocurrencies under the said Act.[142] Furthermore, it is worthwhile to reproduce the Court's observation with respect to digital money, highlighting the need to regulate this fintech on an urgent basis-

> *"113. It is clear from the above that the Governments and money market regulators throughout the world have come to terms with the reality that virtual currencies are capable of being used as real money, but all of them have gone into the denial mode (like the proverbial cat closing its eyes and thinking that there is complete darkness) by claiming that VCs do not have the status of a legal tender, as they are not backed by a central authority. But what an article of merchandise is capable of functioning as, is different from how it is recognised in law to be. It is as much true that VCs are*

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135 Ministry of Finance, Department of Economic Affairs, Report of the Committee To Propose Specific Actions to be Taken in Relation to Virtual Currencies (Feb. 28,2019) available at <https://dea.gov.in/sites/default/files/Approved%20and%20Signed%20Report%20and%20Bill%20of%20IMC% 20on%20VCs%2028%20Feb%202019.pdf> accessed 9 December 2022.

136 *ibid*.

137 Draft Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019,available at <https://prsindia.org/files/bills_acts/bills_parliament/Draft%20Banning%20of%20Cryptocurrency%20%20Regulation% 20of%20Official%20Digital%20Currency%20Bill,%202019.pdf> accessed 9 December 2022.

138 (2020) 10 SCC 274.

139 *ibid*.

140 *ibid*.

141 *ibid*.

142 *ibid*.

> *not recognised as legal tender, as it is true that they are capable of performing some or most of the functions of real currency."*

Banning cryptocurrencies is equivalent to shutting the eyes to the security concern it raises than resolving it. Subsequent to the judgment, the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021, was drafted, with the goal of outlawing all private cryptocurrencies operating in India.[143] This step is believed to have been taken to facilitate the launch of RBI's digital currency[144], with the aim to replace private cryptocurrencies. To perceive that a Central Bank Digital Currency would eliminate private cryptocurrencies is foolhardy. Such a perception would only facilitate money laundering as private cryptocurrencies would continue to exist and be unregulated. Today there is no clear rule governing cryptocurrencies in the country, which increases ambiguity and concern about their legality in India. Furthermore, numerous banks have warned their customers of restrictions if they engage in cryptocurrency dealings, adding to the legal ambiguity of cryptocurrencies.[145]

While no unified legislation regulates cryptocurrencies, attempts have been made to regulate cryptocurrencies within the existing regime. For instance, following the Supreme Court's decision, the RBI issued a circular on Customer Due Diligence for Transactions in Virtual Currencies to clear the air surrounding its previous circulars.[146] Financial institutions were directed to conduct proper due diligence in accordance with guiding norms for anti-money laundering, know-your-customer, combating terrorism financing, and regulated entities' obligations under the Prevention of Money-Laundering Act, 2002, and ensuring compliance with relevant provisions under the Foreign Exchange Management Act, 1999 for overseas remittances.

Additionally, on March 24, 2021, the Ministry of Corporate Affairs mandated that businesses dealing in cryptocurrencies publish their profit or loss from transactions, the quantity of cryptocurrencies they now possess, and any deposits or advances they have received from other parties.[147] Companies were required by the notification to declare their cryptocurrency trading and

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[143] Jai Anant Dehadrai and Tasnimul Hassan, 'Cryptocurrency in India: An Unregulated Safe Haven for Money Laundering?' 2021 SCC OnLine Blog OpEd 149.

[144] *ibid*.

[145] Ridhima Saxena, 'HDFC Bank, SBI Card Warn Customers of Restrictions if they Deal in Cryptocurrencies', *BloombergQuint* (May 29,2021) available at: <https://www.bloombergquint.com/crypto/hdfc-bank-sbi-cardwarn-customers-of-restrictions-if-they-deal-in-cryptocurrencies> accessed 9 December 2022.

[146] DOR. AML.REC 18/14.01.001/2021-22, Customer Due Diligence for Transactions in Virtual Currencies (VC), Reserve Bank of India (May 31, 2021).

[147] Amendments in Schedule III to the Companies Act, 2013, Ministry of Corporate Affairs (Mar. 24, 2021) available at https://www.mca.gov.in/Ministry/pdf/ScheduleIIIAmendmentNotification_24032021.pdf accessed 9 December 2022.

investing activity during the fiscal year.[148] Some see the decision as a light of optimism that heralds new taxing standards.[149]

Further, the Finance Minister while presenting the Annual Budget 2022-23, announced the introduction of tax on transfer 'Virtual Digital Assets' as a measure to monitor the cryptocurrency market, which would come into effect from April 01, 2023.[150] The new amendment defines VDA to include cryptocurrency and non-fungible tokens, with an intent to include any such future digital assets within its ambit.[151] Any revenue from the transfer of VDA will be taxed at a rate of 30%.[152] A taxation regime may have acted as a deterrent against money laundering, however, fixing liability serves no purpose in so far as the identity of the person liable is not known.[153] For although a blockchain is a ledger-a record of all the cryptocurrency transactions, it does not link the transaction to a physical individual.

As regards the effort to deter money laundering, the existing regime falls short as[154] the focus is limited to the interaction between financial institutions and cryptocurrencies. In other words, rules and regulations of the day can only detect money laundering when cryptocurrencies are converted to legal tender or vice versa, and fail to monitor the transactions that begin and end in cryptocurrencies.

VIII. CONCLUSION & RECOMMENDATIONS

Digitisation has revolutionised the daily interactions of individuals, business organisations and State authorities among themselves. Cryptocurrency is a product of this digitisation which has taken the world by storm. Cryptocurrencies offer anonymity and decentralisation- a total turnaround from the conventional centralised financial systems. Therefore, every discussion on or around cryptocurrencies begins from the premise that they have been designed to bypass the centralised financial mechanism of the State. This capability of cryptocurrencies to bypass the centralised financial mechanism of the State makes it more suspicious, and a feasible way to launder money.

Banning cryptocurrencies is akin to closing one's eyes to the security concerns they raise rather than addressing them. Additionally, it would be naive

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148 *ibid*.

149 Swarnendu Chatterjee and Yashika Bhardwaj, 'Will the Year of Cryptocurrency ever Arrive in India?' 2021 SCC OnLine Blog OpEd 122.

150 Ashesh R. Safi, Kripa Ray and Karan Vakharia, 'Budget 2022: Introduction of Crypto Tax', 135 taxmann.com 149 (2022).

151 *ibid*.

152 *ibid*.

153 *ibid*.

154 Edgar G. Sanchez, 'Crypto-Currencies: The 21st Century's Money Laundering and Tax Havens', 28(1) University of Florida Journal of Law and Public 167 (2017).

to believe that a Central Bank Digital Currency would eliminate private cryptocurrencies. Such an attitude would only serve to facilitate money laundering, as private cryptocurrencies would continue to exist unregulated. There is currently no clear rule governing cryptocurrencies in India, which increases ambiguity and concern about their legality. The problem with cryptocurrency is not merely that it is not issued by the government and is thus unregulated, the regulatory issue is that it behaves as both a currency and a security simultaneously. Nevertheless, as noted by the Hon'ble Supreme Court in the IMAI judgment, not conferring cryptocurrency the status of legal tender does not change the fact that it is being treated as a legitimate part of the financial system.

Evidently, the anonymity offered by cryptocurrencies makes it a safe haven for money launderers. Sans anonymity, money laundering can be effectively eliminated from the network. While the element of anonymity in cryptocurrencies cannot be eliminated completely, measures can be taken to reduce its effect. The Prevention of Money Laundering Act, 2002, fails to address money laundering through cryptocurrencies in its present form. A few amendments to the definition, as suggested by some legal practitioners and academicians, can cover the actors in the cryptocurrency market within the anti-money laundering regime[155]

Amending Section 2(*sa*) of the Act to include persons engaged in cryptocurrency business (cryptocurrency exchange, wallet service providers, etc.) within the category of 'person carrying on designated business or profession';

An amendment to Section 2(*wa*), bringing the cryptocurrency exchange platforms within the meaning of 'reporting entity';

Amending Rule 9 of Prevention of Money Laundering (Maintenance of Records) Rules, 2005, making it mandatory for wallet providers and exchange platforms to abide by 'client due diligence/KYC' requirements.

The aforesaid amendments would make it mandatory for the cryptocurrency exchanges and wallet service providers to maintain a record of the transaction along with customer details for facilitating law enforcement agencies. Maintaining KYC records would substantially reduce the instances of money laundering through cryptocurrencies. While these regulatory measures will not completely eliminate the element of anonymity, it will facilitate the law enforcement agencies to counter money laundering activities.

Apart from the amendments as mentioned above, the following measures may also enable in combating money laundering through the new modus-operandi While the Central Bank Digital Currency (E-Rupee) shall become a

[155] Supra, note 143.

legal tender, cryptocurrencies may be recognised as virtual assets/securities. Furthermore, as none of the existing financial market regulators are willing to regulate the cryptocurrency market, another autonomous organisation should be formed to monitor and regulate the market of this new fintech. Such a regulatory authority would be responsible for laying guidelines and supervising the cryptocurrency platforms, users and wallet providers.

International cooperation among countries also has a key role to play in combating money laundering through cryptocurrency. Towards this end, establishing an international authority would be beneficial. Mandating all organisations facilitating cryptocurrency engagements to register with such an international organisation will enable them to keep track of the cryptocurrencies and their movements. This would enable us to ensure that no unregulated cryptocurrencies are in circulation or converted to legal tender.

Money laundering is not merely a threat to the financial stability of a country but also to national security, integrity and world peace. Technological advancements have both positive and negative impacts on society. While we must retain the positive aspects of cryptocurrency and blockchain technology, it is pertinent to take necessary measures to reduce the negative impact of this fintech. No doubt, how we decide to treat cryptocurrency may be another defining moment which establishes a new world order.

INTER-RELATIONS OF METAVERSE AND ITS IMPORTANCE IN COMPETITIVE MARKET

—*Aranya Nath* & Srabani Behera***

Abstract—Since the development of the Internet in the 1990s till date, there has been considerable progress in the virtual environment. The Internet has opined ways for users to use cyberspace through social "media platforms" and has brought digital transformation from cell phones to Smartphones and Artificial Intelligence. The Metaverse is a step ahead of the internet age to create a virtual reality for the user within their physical world and will continue to transform how the virtual world is perceived. It will change how a current business conducts, and the experiences shared between users and companies, creating a distinct and thin line between the physical and virtual life.

The development of Metaverse and the creation of virtual reality will impose on companies the need to extract more resources to have a first-mover advantage. It might create an artificial entry barrier and impact various industries. The question arises, will the current regulation be sufficient to deal with the hinge that the Virtual space will impose and make it accessible to more users and industries? Will the Metaverse create a virtual artificial market with only a few players entering and accessing the market as a cartel? What will be the impact of abusive dominance in the Metaverse world in the coming years? The biggest question that will impose is the use of data by the owners of Metaverse, making the entry or expansion of competitors more difficult.

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The whole Research examines and discusses the regulatory transformation that the Metaverse will lead to in various countries, how will it impact the competition in multiple industries and regulatory reforms about the data accessed by the metaverse data users.

Keywords: Virtual Environment, Cyberspace, Artificial Intelligence, Virtual artificial market, Cartel, Competition Law, IT Sectors.

I. INTRODUCTION

The term "metaverse" is a combination of the words "meta" and "universe." It alludes to a digital world developed with technologies like blockchain,[1] computer vision,[2] pervasive computing,[3] scene understanding,[4] and ever-present interfaces.[5] In Web 3.0, a special strain of the Internet will evolve as the real essence of the user alters. For the general public, video games, and e-gaming are seen as an entry point into the Metaverse. The rapidly expanding Indian gaming sector can seize this chance to develop metaverse technology and become a worldwide leader. Neal Stephenson coined the term 'metaverse' in his 1992 sci-fi book "Snow Crash."[6] With Sensorama, the very first VR machine, in 1956, the infrastructure and technology to bring the Metaverse into reality progressed significantly. Following that, "Second Life" was the first project that resembled the Metaverse,[7] was followed subsequently by a slew of additional platforms, including AR/VR services, which increased the reach of the Metaverse. Experts predict that AR/VR and the Metaverse will continue to

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1 'Blockchain Facts: What is it, How it Works, and How it can be Used' (*Investopedia*) <https://www.investopedia.com/terms/b/blockchain.asp> accessed 28 December 2022.

2 'What is Computer Vision? IBM' <https://www.ibm.com/in-en/topics/computer-vision> accessed 28 December 2022.

3 'What is Ubiquitous Computing (Pervasive Computing)?' <https://www.techtarget.com/iotagenda/definition/pervasive-computing-ubiquitous-computing> accessed 28 December 2022.

4 François Bremond, 'Scene Understanding: Perception, Multi-Sensor Fusion, Spatio-Temporal Reasoning and Activity Recognition' (Thesis, Université Nice Sophia Antipolis, 2007) <https://theses.hal.science/tel-00275889> accessed 28 December 2022.

5 'What is Ubiquitous Computing (Pervasive Computing)?' *supra* note 3.

6 'The Creator of the Term 'metaverse' Wants People to Know he has "Nothing to Do" with Facebook's Meta Plans *Business Insider India* <https://www.businessinsider.in/tech/news/the-creator-of-the-term-metaverse-wants-people-to-know-he-has-nothing-to-do-with-facebooks-meta-plans/articleshow/87382659.cms> accessed 26 November 2022.

7 'Zuckerberg's Metaverse: Lessons from Second Life *BBC News*' <https://www.bbc.com/news/technology-59180273> accessed 26 November2022.

advance shortly. Open new doors and drastically alter digital economies, working environments, and social experiences.[8]

While there is still a need to clarify "what this new digital capability entails and how it should grow in governance, many people believe that the Metaverse will be the next big internet iteration, penetrating our social element." Since it's novel subsequently, it requires extensive research to comprehend the regulatory framework for protecting the Metaverse in the competitive market. So, the researchers decided to conduct exploratory research. In this study, the researcher is trying to evaluate the Metaverse and Artificial Intelligence in a competitive market. Over here, the researcher uses the doctrinal method of research, where the authors collected all the information related to the research from various articles, journals, e-books, and other secondary sources. Secondly, the researchers have applied Exploratory Research tools to analyse the competition laws and their regulatory framework in Metaverse.

A. How precisely would the Metaverse perform?

The Metaverse is the next evolution of the web, enabling creatives to work together and provide integrated, immersive experiences depending on activities. From what we can tell, two distinct Metaverses exist: one is a closed, centralized platform controlled by Big Tech, while the other is a decentralized one that uses Cryptocurrencies, non-fungible tokens, and DAOs are all examples of open protocols and blockchain technologies.

The two versions differ regarding interoperability, sovereignty, decentralized administration, and financial systems.[9] In this study, we have methodically examined present trends and the many legal and regulatory frameworks that must adapt and adjust to fit the improvements of the Metaverse. Before an in-depth analysis of its impact on a select group of crucial organizations, the article briefly introduces several topics related to convergence in the Metaverse. We also considered potential legal and tax difficulties that could occur in the future.

II. METAVERSE AND ITS CONVERGENCE

The Metaverse creates a seamless experience for the user by integrating actual and virtual environments. The use of an "Avatar"[10] created by

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[8] 'Investing in the Metaverse: New Opportunities in Virtual Worlds' (Morgan Stanley) <https://www.morganstanley.com/articles/metaverse-opportunities-virtual-reality-augmented-reality-technologies> accessed 26 November 2022.

[9] OV-Metaverse-OS<https://outlierventures.io/wp-content/uploads/2021/08/OV-Metaverse-OS_V6.pdf> accessed 26 November 2022.

[10] 'Opportunities in the Metaverse.Pdf' <https://www.jpmorgan.com/content/dam/jpm/treasury-services/documents/opportunities-in-the-metaverse.pdf> accessed 26 November 2022

you. Experts like Jon Radoff have identified seven components that support the Metaverse: the " Experience," "Discovery," "Creator Economy," "Spatial Computing," "Decentralization," "Human Interface," and "Infrastructure."[11]

Augmented and virtual reality, artificial intelligence, non-fungible tokens, blockchain, and the Internet of Things contribute to realizing the Metaverse, bringing the various layers of Metaverse to completion.

A. Augmented Reality/ Virtual Reality

Augmented and virtual reality technologies have enhanced the immersiveness of the Metaverse by expanding the possibilities of spatial computing and improving human interaction beyond the limitations of legacy technology. Emerging technology known as Mixed Reality combines elements of virtual reality (VR) with augmented reality (AR), creating a new mixed experience ("MR").[12]

In theory, MR technology might let users have an experience that fuses their virtual, augmented, and digital environments in real time. All of these methods and tools have seen extensive use in the past. Immersive experiences within Metaverse platforms are available on Oculus Quest 2, Samsung, and PlayStation VR headsets. Consumer products like the HTC Vive Flow advance wearable technology to the next level of the Metaverse's human interface by transforming virtual reality (VR) gear from a bulky headpiece into a lightweight, detachable set of goggles.[13]

Businesses like Snapchat, IKEA, and Pokémon have also used AR technologies to help consumers place digital aspects on their physical reality (bodies, houses, and streets). And enabling holographic technology through products like Microsoft's HoloLens 2 would only increase its use in fields like "education, healthcare, engineering"; etc.

B. Internet of Things (or "IoT")

There is a substantial part of the "Metaverse's infrastructure that relies on the Internet," and this connectivity is further extended into the real world by the Internet of Things (IoT). While doing so, its function blends digital and physical elements, bridging the gap between the two. For this reason, the

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[11] Jon Radoff, 'The Metaverse Value-Chain. Trillions of Dollars are Pouring Into' Building the Metaverse *Medium* <https://medium.com/building-the-metaverse/the-metaverse-value-chain-afcf9e09e3a7> accessed 26 November2022.

[12] 'What is Mixed Reality? – Mixed Reality' <https://learn.microsoft.com/en-us/windows/mixed-reality/discover/mixed-reality> accessed 26 November2022.

[13] 'VIVE Flow – VR Glasses for your Metaverse Journey United States' <https://www.vive.com/us/product/vive-flow/overview/> accessed 26 November 2022.

"Internet of Things" results from any convergence of perfect technologies that can talk to one another and do tasks that are ultimately valuable to humans. Sensors in home appliances like thermostats and "voice-activated speakers" collect & respond to a wide range of data thanks to the Internet of Things, which connects thousands of devices and the massive amounts of data obtained from the virtual online world of the Metaverse. Build the infrastructure of a more interconnected world & the platform. One possible use of IoT is a "Digital Twin," a virtual duplicate that shares many of the same characteristics as the original but updates in near-real time.[14]

In conclusion, IoT allows for the smooth integration of various physical objects into a 3D setting. It is the factor whose convergence is crucial for expanding the Metaverse. Once complete compatibility achieves, imagining the correct scale may only be possible.[15]

C. Artificial Intelligence

Immersion in the Metaverse entails several different components, such as exploration, creator economics, spatial computing, and infrastructure, all of which might be fuelled by artificial intelligence. Through the intelligent evaluation of data inputs like "speech through Alexa or textual/visual inputs using NVIDIA's GauGAN2", AI algorithms may help automate IT processes, intelligently network, process language, make personalised recommendations, and allow for total immersion within the digital realm.[16] Organizations contribute to AI development with initiatives like self-supervised learning and gesture detection.

It envisages the Metaverse giving a more realistic virtual experience by monitoring eye and body movement.[17] Another use of AI in the Metaverse is producing Avatars or digital personas.

D. Blockchains

Blockchain is critical to preserving digital security and identity checks and running smart contracts (digital contracts created and performed on

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[14] Leonard Lee, 'How to Leverage Internet of Things (IoT) Opportunities in the Metaverse' <https://accelerationeconomy.com/Metaverse/how-to-leverage-internet-of-things-iot-opportunities-in-the-Metaverse/> accessed 26 November 2022.

[15] Bruce Grove, 'From the IoT to Metaverse', Polystream <https://polystream.com/from-the-iot-to-Metaverse/> accessed 26 November 2022.

[16] Isha Salian, 'GauGAN Turns Doodles into Stunning, Realistic Landscapes' (*NVIDIA Blog*, 18 March2019) <https://blogs.nvidia.com/blog/2019/03/18/gaugan-photorealistic-landscapes-nvidia-research/> accessed 26 November 2022.

[17] 'Meta Describes how AI will Unlock the Metaverse' (*VentureBeat*, 2 March2022) <https://venturebeat.com/technology/meta-describes-how-ai-will-unlock-the-metaverse/> accessed 26 November 2022.

the blockchain) for Metaverse trading. This technology widely uses on platforms such as VRChat, which runs virtual markets, and Crypto voxels, which organizes virtual art exhibits. Another critical use case for blockchain in this expanding technical area is preserving individuality and property rights to boost the creator economy via NFT-based businesses.

III. USAGE OF METAVERSE IN VARIOUS INDUSTRIES

A. Gaming

The gaming industry has been pushing other sectors to adopt cutting-edge technologies such as "Augmented reality (AR), virtual reality (VR), video streaming, real-time 3D rendering, NFTs, blockchains, cryptocurrencies, and compatible architecture." Approximately 40% of the world's population, or 3.24 billion people, are gamers.[18]

We may already enjoy games like Axie Infinite, Fortnite, Roblox, and plenty more. "Axie Infinity," a game that aims to gather "Smooth Love Potions," which works closely to bitcoins and may be exchanged or sold in the future, has over 350,000 daily active participants.

Furthermore, "Epic Games' Fortnite" is an online platform where users may design customized landscapes & fight zones, with a record-breaking 15 million people logging in simultaneously. In this context, Metaverse gaming is more versatile since players will have more latitude for customization in creating virtual locations and establishing sub-games within a bigger game. Indeed, the ability for users to create their microgames that other users' Avatars may play in exchange for Roblox's virtual currency, called "Robux," was a major factor in the platform's meteoric rise to prominence. Players are given a variety of in-game tokens, cryptocurrencies, and NFTs as rewards, proving that Game-Fi (Game Finance) is an integral aspect of gaming in Metaverse. Unlike conventional video games, this idea predicts a play-to-earn model, allowing players to take their virtual possessions with them when they leave the game.

B. Real Estate

Over $500 million was transacted in the Metaverses' virtual real estate markets,[19] predicted to grow to over $1 billion in 2018. To generate revenue for the platform, developers create massive property maps that split into tiny digital real estate "parcels." For instance, the Decentral platform supports the buying

[18] David B. Black, 'Cartoons and Video Games Evolved into Bitcoin and NFTs' *Forbes*, <https://www.forbes.com/sites/davidblack/2022/05/05/cartoons-and-video-games-evolved-into-bitcoin-and-nfts/?sh=6633a9ff316e> accessed 26 November 2022.

[19] Robert Frank, 'Metaverse Real Estate Sales Top $500 Million, and are Projected to Double this Year' (*CNBC*) <https://www.cnbc.com/2022/02/01/metaverse-real-estate-sales-top-500-million-metametric-solutions-says.html> accessed 29 December 2022.

and selling of digital land plots with the cryptocurrency MANA. The parcel's value is its usefulness, proximity to amenities, population, and demand-supply dynamic. When you have virtual property, you can use it however you like, including developing software, displaying NFTs, displaying adverts, hosting events, or renting it out to others who need virtual space. Brands like Adidas, Clinique,[20]and Forever 21[21] are expected to be among the competitors of digital real estate.[22]

The leader in Metaverse and NFT investments, Republic Realm, reportedly paid $4.3 million for a plot of virtual real estate. Ninety of the estimated 1.1 million "dream islands" built in the Sandbox Metaverse, each with a house, a boat, a jet ski, and other amenities, sold on the first day for roughly $15,000., with a few others selling for $100,000. While Metaverse is likely to grow in the future, there are still many unknowns, such as if a Metaverse platform goes offline, it may permanently delete all assets saved on it. If these challenges are addressed, meta-estate will become firmly established in the real estate sector.

C. Healthcare

Technological innovation and healthcare collaboration is not an entirely novel concept. Other uses of mobile devices, telemedicine, e-pharmacies, electronic medical professionals, etc., are accessible throughout the health technology sector. Following the opening of Metaverse, the healthcare sector has the potential to broaden the healthcare uses of AI and AR/VR technologies to enhance patient intake and expand development and research efforts.[23] Several medical professionals and digital health companies in India are looking into the viability of establishing meta-hospitals, virtual reality-mediated operations, and health wellbeing platforms in the Metaverse.[24] GOQii, for illustration, recently launched a Metaverse ecosystem that encourages positive behaviours and

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[20] 'Metaverse Like Us Clinique <https://www.clinique.com/metaverselikeus> accessed 29 December 2022.

[21] 'Forever 21 x Barbie Launches In-Store, Online and in the Metaverse Business *Wire* <https://www.businesswire.com/news/home/20220607005321/en/Forever-21-x-Barbie-In-Store-Online-and-in-the-Metaverse> accessed 29 December 2022.

[22] Ankitt Gaur and Anshul Dhir, 'Virtual Real Estate in the Metaverse is Booming, be a Part of it Now!' *Times of India* <https://timesofindia.indiatimes.com/blogs/voices/virtual-real-estate-in-the-metaverse-is-booming-be-a-part-of-it-now/> accessed 29 December 2022.

[23] Neetu Chandra Sharma, 'Healthcare Companies are Entering the Metaverse. But can it Help the Sector?', *Business Today* <https://www.businesstoday.in/crypto/story/healthcare-companies-are-entering-the-metaverse-but-can-it-help-the-sector-338719-2022-06-22> accessed 26 November 2022.

[24] Neetu Chandra Sharma, 'Healthcare Companies are Entering the Metaverse. But can it Help the Sector?', *Business Today* <https://www.businesstoday.in/crypto/story/healthcare-companies-are-entering-the-metaverse-but-can-it-help-the-sector-338719-2022-06-22> accessed 29 December 2022.

augmented physical tasks.[25] Counselling and psychotherapy therapies for psychological issues are a significant field of attention for health care professionals. Companies like Moody Link[26] use the Metaverse platform to expand their reach for mental health courses and support programs.

Joint remote operations and therapies constitute some of the more complicated Metaverse utilizes in healthcare. Robot-assisted surgeries are becoming routine to carry out complex operations with precision and flexibility. By integrating such current technologies with the Metaverse, surgeons might perform remote surgeries more effectively. In May 2022, the Metaverse enabled a remote breast cancer operation.[27] The realm of the Metaverse anticipates establishing a foothold in medicine. It could make way for the development of an immersive and interactive online medical school environment, enabling medical students to gain practical knowledge in medical procedures through simulations at a cheaper cost and with fewer resources. The augmented reality environments may assist practising healthcare professionals with continuing medical education or healthcare equipment training.

IV. COMPETITION OF METAVERSE IN INDUSTRIES

India's gaming sector is expanding, with mobile and computer video games accounting for a substantial percentage. Only China will have more than 450 million subscribers by 2020. In 2021, the mobile-based casual-gaming market will create roughly US$0.7 billion, while the e-sports sector will make US$26 million. The Indian gaming and animation industries have taken the first step toward creating content that is distinctive to the country. Loka, for example, is a start-up established in New Delhi that is the country's first multiplayer gamified virtual Metaverse.

In March 2021, OneCare will launch its first play-to-earn food metaverse game. "Zion Verse's" NFTs again for the Metaverse is "Trimurti, based on Hindu goddesses, and the Lakshmi Zion Verse" claims to have sold over 5,000 NFTs in 19 days.

A. Possible Issues

As governments investigate the value of this technology, they will face their possible issues.

[25] GOQii, 'GOQii to Launch Health Metaverse in Partnership with Animoca Brands' (*GOQii*, 29 March2022) <https://goqii.com/blog/goqii-to-launch-health-metaverse-in-partnership-with-animoca-brands/> accessed 26 November 2022.

[26] 'Moody Mink Society NFT' (*Moody Mink Society*) <https://www.moodymintedminks.com> accessed 29 December 2022.

[27] Nicole Buckler, 'Surgery in the Metaverse, Doctor is 900 Kilometres Away' (*BeInCrypto*, 12 May 2022) <https://beincrypto.com/surgery-in-the-metaverse-doctor-is-900-kilometers-away/> accessed 2 May 2023.

i. Security

Even before Meta's Metaverse went worldwide, an assault on a beta tester in its VR social networking platform Horizon Worlds warned users about the technology's dark side. Bullying might occur throughout the virtual world because the Metaverse blurs the line between virtual reality and reality and is largely unmanaged and uncontrolled. According to the first report of a VR-related death from Moscow, a 44-year-old man died after falling through a pane of glass while wearing an HMD headset. As more individuals engage in immersive technology, early user protection will benefit both individuals and the platform, addressing the trust imbalance. Companies in immersive technology can be motivated to create more apps for a safer metaverse environment, allowing a larger demographic to experience the technology. Because the Metaverse is seen as an appealing entertainment arena for youngsters, keeping kids safe while using technology will be a big task. Time spent alone in the open social Metaverse could expose them to exploitation.

Furthermore, because the barrier between reality and the virtual world is blurred, even adults are exposed to the hazards that VR might create during her first metaverse encounter in "Altspace, Lousie Eccles" of the Sunday Times, for example, was presented with virtual sexual and sex-related remarks. Racist, homophobic, transphobic, and virtual groping are more likely to occur in multiuser social settings in the Metaverse[28]

ii. Interoperability and confidentiality

Another worry is that the Metaverse will dominate by a few Big Tech businesses such as Google, Amazon, Meta, Apple, and Microsoft. The economics behind Metaverse, therefore, will be connected to the acquisition of user data, making privacy protection a significant concern.

V. USE OF ANTITRUST AND COMPETITION LAWS

The Metaverse is a virtual world where people may communicate and collaborate in real-time within a computer-generated setting. As a result of its rising popularity, competition regulators in countries like the United States and India are starting to take notice. The Competition laws for Metaverse are a relatively new concept for the countries to adopt. However, existing antitrust laws can be applied to promote competition in the Metaverse. The unusual characteristics of the Metaverse have made it difficult to enforce established legal norms without causing friction. As long as a metaverse exists,

[28] Pankaj Wajire, 'Exploring the Metaverse: Challenges and Opportunities for India in the 'Next Internet'' (*ORF*) <https://www.orfonline.org/research/exploring-the-metaverse/> accessed 2 May 2023.

antitrust preoccupies with ontological conundrums. The enforcement of competition rules in the United States is under the purview of the Federal Trade Commission (FTC). The Federal Trade Commission (FTC) worries that antitrust issues will emerge as the Metaverse grows in popularity. The Federal Trade Commission is concerned, in particular, that dominant firms would use their market dominance to unfairly disadvantage or even eliminate their competitors.[29]

The Competition Act of 2002 prohibits any agreement, combination, or conspiracy intending to restrain trade and any agreement, combination, or conspiracy to dominate, attempt to control, or monopolize any market. Unreasonable restrictions are also prohibited. Therefore, it may invoke this act if multiple competing apps are in a market and one unfairly dominates or threatens to become a monopoly. The FTC has proposed applying competition law concepts in the Metaverse in the same way that they are involved in traditional markets to solve these issues. It means market leaders shouldn't engage in price fixing, collusion, or exclusive dealing that hurt consumers and competition. However, the Metaverse's fundamental structure and the blockchain make identifying and penalizing such activities difficult, allowing businesses to participate in such techniques without fear of repercussions. The following essential components are part of the metaverse technology's operating system:

1) Virtual Worlds: Creating intensely immersive and interactive virtual worlds or universes is at the heart of metaverse technology.[30] These virtual worlds are created using cutting-edge technologies like augmented reality (AR) and virtual reality (VR), which provide consumers with an extremely lifelike and captivating experience of the actual world.[31]

2) Decentralization: A key element of metaverse technology is decentralization. Decentralization refers to distributing ownership and control over the virtual environment among participants. Users now have more control over the virtual world's content and can add updates and trade items there.

3) Blockchain: Blockchain technology, which enables secure and open transactions in virtual worlds, is frequently the foundation of metaverse technology. In the virtual world, blockchain technology can produce unique digital assets, including virtual currency, virtual real estate, and virtual collectibles.

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[29] 'Glossary: The Metaverse and its Key Components–*XR Today* <https://www.xrtoday.com/virtual-reality/glossary-the-metaverse-and-its-key-components/> accessed 6 May 2023.

[30] Toshendra Sharma, What is Metaverse? A Beginner's Guide to the Virtual World' <https://www.comearth.world/blog/what-is-metaverse-a-beginners-guide-to-the-virtual-world/> accessed 6 May 2023.

[31] Onkar Singh, The Key Technologies that Power the Metaverse <https://cointelegraph.com/explained/the-key-technologies-that-power-the-metaverse> accessed 6 May 2023.

Technology for the metaverse is intended to be interoperable, which enables it to cooperate with other systems and platforms. It allows users to interact with and access the virtual world through various platforms and devices, including mobile phones, desktop computers, and gaming consoles.[32]

Private blockchains enable anti-competitive businesses to share price-related and other commercially sensitive data. These blockchains are confidential and can only be viewed by those the blockchain's owner has granted access. While law enforcement won't be allowed to eavesdrop on these communications and bring criminal charges, they still have the right to request similar data following applicable regulations. Unlike the current system, where authorities can obtain evidence by visiting business locations, this new system does not allow such inspections. The Competition Commission of India (CCI) is in charge of monitoring compliance with Indian antitrust regulations. Before following the US's lead and regulating the Metaverse, the CCI can explore its potential effects on business in India and its economy. The CCI should work with international competition regulators to standardize their approach to Metaverse regulation and share best practices.

Guidelines for the Metaverse that encourage competition, innovation, and consumer protection should be developed by the CCI in collaboration with industry stakeholders. These recommendations should include preventative measures to guarantee new entrants have access to the market and stop dominant businesses from engaging in anti-competitive behaviour.

In conclusion, competition regulators in the Metaverse have new obstacles but should apply the same competition law principles as they do in traditional marketplaces. The US FTC has issued some recommendations on using competition law in the Metaverse; the CCI should follow these recommendations to keep the Metaverse open and accessible to consumers.

A. How will Metaverse change the future of business?

The future beholds the growth of virtual reality, and the continuous shift of business and its growth potential unleashed by companies shows that shortly. Metaverse will change the business dynamics with top players ruling the market and using it to the best of their potential to regulate real and virtual reality.[33]

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[32] (PDF) Metaverse Marketing: How the Metaverse will Shape the Future of Consumer Research and Practice <https://www.researchgate.net/publication/365635681_Metaverse_Marketing_How_the_Metaverse_Will_Shape_the_Future_of_Consumer_Research_and_Practice> accessed 6 May 2023.

[33] Deepak Syal, 'How Will Metaverse Change the Dynamics of Business in the Future?' *The Times of India* <https://timesofindia.indiatimes.com/blogs/voices/how-will-metaverse-change-the-dynamics-of-business-in-the-future/> accessed 14 January 2023.

In recent events, if we consider Facebook changing its name to Meta,[34] the decision underscores CEO Mark Zuckerberg's intention to refocus his Silicon Valley firm on what he sees as the next digital frontier. Integrating various digital realms into something termed the Metaverse. At the same time, changing Facebook may help the firm separate itself from the numerous social networking difficulties it faces, such as how it uses to disseminate hate speech and misinformation.

B. Investment from Nike in the RTFKT fashion label

NIKE, INC. has taken the lead by purchasing RTFKT, a leading brand that employs cutting-edge innovation to produce next-generation collectibles that blend culture and gameplay

The plan is to put money into the RTFKT name so that they can better serve and expand their inventive and artistic customer base., and to broaden Nike's digital reach and capabilities, accelerating Nike's digital transformation. It enables us to serve athletes and creators at the crossroads of sport, art, gaming, and culture and take a step forward into Metaverse".[35] Also, major tech players are entering the market, and the competition has started. Still, the current scenario of Metaverse shows very few prominent players ruling the market and creating an entry barrier to the other players needing more infrastructure.

The question now arises whether the current Competition legislation is enough to curtail the growing competition in Metaverse to deal with the reserve market and artificial entry barrier. Will the current legislation suffice the needs of virtual reality and its market space and deal with the players to ensure fair competition and business growth?

Let us understand the growth and reach of Metaverse with a few real-life examples of companies using Metaverse to ease their business.[36] However,other industries are finding creative uses for ARAR -6.2% and VR to provide clients with the experience of trying on or testing out the products they sell. Ferrari, a manufacturer of high-end automobiles, uses augmented reality to present its models to customers, allowing them to "walk" around them and even examine their mechanical components. Using Metaverse, companies like Chili and AniMedi can offer patients more comprehensive post-operative care and assistance. Robotic and remote surgery and immersive instruction are all aids by

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[34] The Metaverse is the Future of Digital Connection Meta <https://about.meta.com/metaverse/> accessed 14 January 2023.

[35] 'Nike Enters Metaverse, Buys Digital Footwear Maker Rtfkt', CNBCTV *18.com* <https://www.cnbctv18.com/technology/nike-enters-metaverse-buys-digital-footwear-maker-rtfkt-11827542.htm> accessed 14 January 2023.

[36] Elena Canorea, 'What Companies Use Metaverses for and why the Big Tech Companies are so Interested' (*Plain Concepts*, 16 November2021) <https://www.plainconcepts.com/metaverse-companies/> accessed 14 January 2023.

the Metaverse., and tailored care in the medical profession, which is undergoing a technological transition. Signzy's VR-based onboarding technology makes it possible to open a bank account without leaving the house, reducing travel time and fees by 90% and 80%, respectively.[37]

The automotive industry, like other industries, will experience the Metaverse in all its grandeur. As the viability of self-driving cars increases, the time spent travelling will be accessible for content consumption. Holoride is a firm that facilitates the transformation of vehicle rides into virtual reality-based amusement parks. The experience is tailored to distance, driving style, and velocity.[38]

Online Clothing Trends Many well-known brands have established physical locations in the virtual world. However, these fashion icons are only some of the first to venture into the Metaverse; have you ever heard of Space Verse? Space Runners claims their Space verse is the first in the Metaverse of clothing. The garment business is ready to embrace Metaverse technology fully.[39] With a metaverse-based campus and a social component incorporated into its curriculum, Metaversity is redefining digital education. It tries to deliver work-based learning experiences directly to students' desktops, guaranteeing that they receive "actual" rather than merely textbook-based knowledge.[40]

Although the industry must overcome enormous obstacles to allow the technology, the Metaverse has a promising future. The start-ups, large technology businesses, and even venture capital firms investing in the AR world today will undoubtedly yield billionaires and trillion-dollar companies in the future.

Many of the competition legal concerns that the Metaverse may face in the future are already present, even though it may be the next phase of the Internet. Companies conducting metaverse R&D should consider competition law implications in related areas, such as licensing agreements. Companies who do business in the Metaverse will need to carefully consider several competition law problems, which will depend on the Metaverse's future development. It's feasible that one corporation can develop a single metaverse that most users will use. If that is the case, the corporation will likely have a

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[37] Akhil George, 'Signzy's Gets US Patent for Banking Tech in Metaverse' *The Times of India* (30 March 2022) <https://timesofindia.indiatimes.com/city/bengaluru/signzy-gets-us-patent-for-banking-tech-in-metaverse/articleshow/90528305.cms> accessed 14 January 2023.

[38] Holoride is an Aftermarket Solution for In-Car VR, and it has its Own Metaverse <https://www.coindesk.com/web3/2023/01/07/audi-backed-startup-holoride-is-bringing-vr-to-the-car/> accessed 14 January 2023.

[39] 'Space Runners Raises $10m to Develop Fashion Metaverse' <https://www.fxempire.com/news/article/space-runners-raises-10m-to-develop-fashion-metaverse-926685> accessed 14 January 2023.

[40] Chandrakar, An Analysis on Law and Metaverse.Pdf Indian Journal of Integrated Research in Law <https://ijirl.com/wp-content/uploads/2021/12/AN-ANALYSIS-ON-LAW-AND-METAVERSE.pdf> accessed 14 January 2023.

dominating position and thus have a specific obligation not to misuse its market dominance. It must evaluate how its actions may affect the end user and other businesses in various ways.

It could be illegal, for example, for the dominant corporation to refuse to allow other businesses to join the metaverse economy, withhold access to data, or favour its products and other services in the Metaverse. Any alternative markets that develop within or have ties to the Metaverse are another consideration for the dominating firm. The company may run a marketplace in the Metaverse where users can buy and sell digital goods.

As in the case of Amazon -To establish if Amazon is unjustly favouring its businesses or suppliers that use its fulfilment services over third-party sellers, the European Commission and the UK CMA are now reviewing Amazon Marketplace. Similar problems might easily arise in the Metaverse.[41]

VI. ISSUE ARISES TO ESTABLISH FAIR COMPETITION IN METAVERSE

There are numerous metaverses, given the financial possibilities of the Metaverse. More than one will emerge. After all, several platforms are already claiming to be Metaverse (for example, Decentraland and The Sandbox; Roblox is also moving in that direction, albeit without including AR/VR at present).

One of the most exciting parts of several metaverses is whether or not it will be possible to travel seamlessly across many metaverses. Imagine a user who wants to use the same avatar in both the Microsoft and Meta metaverses to go from a business meeting to a social gathering in the other. It's easy to imagine that consumers would prefer to use the virtual reality headset or other metaverse-specific purchases they make in any other metaverses they frequent. It is already the case with existing gaming platforms, as evidenced by the fact that Fortnite skins and V-bucks in-game currency are available to players on all platforms.

However, interoperability between metaverses is necessary for such frictionless data transfer. Metaverses can share data and have meaningful conversations by agreeing on a single set of technical specifications. It would require each Metaverse company to reveal proprietary knowledge about their Metaverse design's function or how future metaverses should function.

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[41] Amazon and EU Reach Antitrust Agreement over Third-Party Sellers *The Verge* <https://www.theverge.com/2022/12/20/23518569/amazon-european-union-eu-antitrust-third-party-sellers> accessed 14 January 2023.

Having more companies share their technical know-how can only benefit the market. To enable interoperability and tackle such issues, companies involved in all facets of the mobile phone ecosystem, from network infrastructure to chipsets to phones, work together to produce standards that each piece of equipment must satisfy.

However, it is often anti-competitive to disclose proprietary business information. As in the event when automakers shared data and agreed on things like AdBlue tank sizes to avoid competition on deploying superior, cleaner technology, the European Commission fined them more than €875 million in 2021 for conspiring on emission-related technical developments.

Companies operating in the Metaverse need to prove that their customers will benefit from the interoperability and that they only share data that is strictly necessary to develop the required technical standards or disadvantage rival businesses. It can be possible that certain metaverse businesses would fight against standardization to "lock in" customers to their system by making it the preferred choice of as many users as possible.[42]

Many new, ground-breaking technology from start-ups have been developed using the metaverse. Potentially successful early-stage companies in the development pipeline for the Metaverse expect to attract the attention of large Metaverse companies, which may lead to acquisition offers relating to more sophisticated avatar technology or better movement tracking. Even though these purchases could boost competition by extending access to cutting-edge technology, there is a risk that the buyer could utilize that technology to wipe off the competition.

Proactive regulation opposes reactive competition enforcement, which some say is too late to be successful, and is currently enjoying strong support in Europe.[43] The Digital Markets Act enacts across the European Union. It will impose stricter regulatory requirements on the most popular online "gatekeeper" platforms. Laws like this could also extend to the Metaverse or serve as the basis for new regulations. Competition authorities have shown an interest in digital marketplaces, as seen by various current enforcement cases in the digital arena. One example is the CMA's probe of Apple for banning cloud gaming services from the App Store. Because of their potential reach, any effective metaverse(s) could affect competition and draw scrutiny from antitrust regulators. It means that metaverse businesses will perpetually have to think about competition law.

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[42] Bristows LLP, Matthew Hunt, 'Competition/Antitrust in the Metaverse' (*Lexology*, 13 October 2022) <https://www.lexology.com/library/detail.aspx?g=1fef6574-9ba4-4f3e-8682-ce78154524c2> accessed 14 January 2023.

[43] Jack Schickler, 'EU Antitrust Officials are Worried about Competition in the Metaverse' *CoinDesk* <https://www.coindesk.com/policy/2022/10/19/eu-antitrust-officials-are-worried-about-competition-in-the-metaverse/> accessed 14 January 2023.

VII. LEGALITY OF METAVERSE

Additionally, several concerns concern the reliability of the Metaverse technology and the potential civic ramifications. The Metaverse has encountered various obstacles, from appropriating a feminine representation to selling assets for billions of euros. Yet, this is only the beginning of the internet's upheaval, and it may take another ten to fifteen years to fully comprehend the Metaverse's conception. However, authorities must act rapidly to guarantee that technology improvements in the Metaverse comply with data security rules. It necessitates the implementation of Metaverse laws as soon as feasible, allowing for the growth of creativity within the boundaries of the law.

1) **Data security:** Because the metaverse relies on collecting and using personal data, there may be worries about the misuse of such data to gain unfair advantages. The CCI would ensure that corporations do not participate in anti-competitive practices such as using personal data.

2) **Platform dominance:** As dominant platforms emerge in the metaverse, it may be necessary to guarantee that such platforms do not misuse their dominating position to damage competitors. The CCI would ensure that dominant players do not engage in anti-competitive behaviour such as exclusive dealing, tying, or predatory pricing.

3) **Regulation of Antitrust and Competition Laws:** Because of the Metaverse's distinctive characteristics, it has proven challenging to apply present laws. Antitrust has been contending with unanswerable concerns since the Metaverse's inception. The Competition Act of 2002,[44] which administers the antitrust laws, outlaws a contract, combination, or conspiracy to block commerce, as well as monopolization and attempted monopolization. Unreasonable restrictions are also prohibited. Consequently, this regulation can be employed if numerous apps compete in a business or one unjustly leads or threatens to lead.

To summarise, there currently need to be specific regulations in India that reasonably control Metaverse, posing significant risks to its users. There is a legislative gap ahead of us as it involves guaranteeing the secure functioning of that novel system. Authorities should intervene now while the world of Metaverse is still developing. At the same time, the technology develops because waiting will make it more difficult to manage when there is a larger level of user dependency.[45] Although new technology such as VR, AR, blockchain, and others offer significant potential in various applications, there is still the question about how they will impact existing regulations. Controlling modern technology would be difficult and would need an integrated strategy.

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[44] 'The Competition Act, 2002' <https://www.mca.gov.in/Ministry/actsbills/pdf/ The_competition_Act_2002.pdf> accessed 6 May 2023.

[45] Sarthak Mishra, 'IP and Metavers' IIPRD (29 July2022) <https://www.iiprd.com/ip-and-metaverse/> accessed 6 May 2023.

VIII. CONCLUSION

The Economy of the Virtual. The ambiguity around the currency for the metaverse centres around the degree to which one can trust cryptocurrencies to serve as money and the innovation required to modify it for virtual reality. Furthermore, because virtual world users will be real-world citizens, the twin virtual and real economies will necessarily be interwoven and should not be considered as two distinct entities. As a result, a comprehensive approach should take while assessing what the virtual economy genuinely implies for the metaverse ecosystem.

Last but not least, tech behemoths like Apple and Google have lofty goals for the evolution of the Metaverse. Our digital duplicates, or "virtual worlds," will look very different over the next few years as we integrate new technologies and develop and refine the ecosystem. Our digitalized future will be more participatory, alive, embodied, and complex now that powerful computing devices and smart wearables are readily available. However, we must overcome many obstacles before the Metaverse fully incorporate into our everyday lives and the physical world. Since we anticipate the Metaverse coexisting with our current world, we argue for a holistic strategy toward its development. We aimed to stimulate more discussion among those interested in the Metaverse by providing an in-depth analysis of recent works across various technological platforms. The fundamental issues and research agenda that will shape the future of the Metaverse in the coming decades are determined by reflecting on the important topics we covered.

COMMERCIALISATION OF SURROGACY IN INDIA - A CRITICAL ANALYSIS

—*Spandana Reddy Bommu**

Abstract—India has a thriving market for surrogacy for couples worldwide because of the many surrogate mothers involved and the considerably lower process expense. Furthermore, the absence of laws regulating surrogacy has resulted in greater acceptability of commercial surrogacy in India. Nevertheless, a significant concern is needed, such as surrogate woman victimisation and surrogate child desertion, which has resulted in increased regulations in this area. This research paper critically studies the Surrogacy (Regulation) Bill 2016 and its potential impact on India's surrogacy practice. The paper examines the changes that the new surrogacy bill of 2020 will bring to the existing surrogacy laws in India and its compatibility with the Indian constitution.

Additionally, the researcher explores the issue of women's exploitation in commercial surrogacy, the after effects of the ban on Indian surrogacy for gay couples, and whether altruistic surrogacy is harmful to women. The paper also discusses the significance and limitations of surrogacy agreements, including questions about their legal validity and enforceability. The researchers suggest that effective regulation of surrogacy is necessary to protect the interests of surrogate mothers and prevent their exploitation. The paper concludes by calling for the development and execution of more onerous restrictions to address the current loopholes and limitations in the Surrogacy (Regulation) Act 2020.

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Keywords: Surrogacy, Exploitation, Regulation, India, Altruistic Surrogacy.

I. INTRODUCTION

Surrogacy is the process of a woman carrying and giving birth to a child for another person or couple, who will become the child's legal parents. It is a complex and controversial issue that raises ethical, legal, and social questions about reproduction, family, and the role of women in society. At present, Surrogacy laws vary widely around the world. In India, commercial surrogacy was banned in 2015, and since then, surrogacy has been limited to altruistic arrangements. In countries like the United States, surrogacy is legal and practised widely, while in others like France, Germany, and Italy, it is completely banned. Some countries, like Canada, allow altruistic surrogacy but prohibit commercial surrogacy.[1]

Surrogacy has arisen as an innovative scientific breakthrough in reproduction, using a woman's womb to make offspring for another woman. Surrogacy has been a blessing for families unable to produce children. It is a form of assisted reproduction in which a woman bears another woman's baby in her womb and then delivers the child to an intended couple. Surrogacy can be classified into two forms relying on monetary compensation.

In an altruistic surrogacy, the surrogate receives no remuneration for carrying another woman's child in her womb apart from health care expenditures. The surrogate must be a close family member. In commercial surrogacy, the surrogate mother receives remuneration from the couple whose baby she carries in her womb. The surrogate mother isn't required to be a close relative[2].

Since the case of *Baby Manji Yamada* v *Union of India and Others*[3], commercial surrogacy has increased in India. In this decision, the Supreme Court authorised commercial surrogacy while emphasizing the legislation's need to regulate it. As a result, this judgment significantly made India a global center for commercial surrogacy, not just in India. Another element that has aided the spread of surrogacy is the inexpensive price of the entire treatment procedure compared to other nations. Consequently, surrogacy aided medical tourism while providing careers to underprivileged women in India.

1 Courtney G. Joslin, '(Not) Just Surrogacy', 109 Cal. L. Rev. 401 (2021).

2 Girish Murugesh, 'Critical Analysis of the Surrogacy (Regulation) Bill, 2016' (2018) 04 International Journal of Legal Developments and Allied Issues<https://thelawbrigade.com/wp-content/uploads/2019/05/Girish-Murugesh.pdf> accessed 15 April2022.

3 *Baby Manji Yamada* v *Union of India*, (2008) 13 SCC 518.

Commercial surrogacy has negative consequences, such as victimising underprivileged women who are somehow compelled to be surrogate mothers by their families for financial gain. To complicate things further, they would not obtain the payment upon delivering a baby because the married couple gets divorced or refuses to welcome the baby. Not only are women abused in such situations, but children are also deserted, like in *Jan Balaz* v *Union of India*[4]. Furthermore, women's well-being suffers as a result of the entire procedure. In India, a significant portion of the population considers commercial surrogacy unethical, and the entire procedure is called "womb renting"[5].

Finally, to curb the mistreatment of women and children, The Surrogacy (Regulation) Act, 2021[6] was enacted, effectively barring commercial surrogacy and authorised altruistic surrogacy with restrictions and disciplinary actions. However, due to multiple discretionary elements that will be examined later in this research paper, it is ambiguous how far this act will substantially aid in combating the surrogacy-related exploitation of women.

This paper will critically examine the practice of surrogacy in India, focusing on the Surrogacy (Regulation) Bill of 2016 and the updated version of the bill in 2020. The researcher will discuss the potential impact of the new bill on India's surrogacy practice and its alignment with the Indian constitution. The paper will also explore the issue of exploitation of women in commercial surrogacy, the lack of surrogacy laws in India, and the after effects of the ban on Indian surrogacy for gay couples. The researcher will examine the significance and purpose of surrogacy agreements, their limitations and loopholes in the bill, and their legal validity and enforceability. Finally, the researcher will discuss the inconsistency of commercial surrogacy agreements with the essentials of valid legal contracts and the tenets of distributive justice.

II. A CRITICAL STUDY OF THE SURROGACY [REGULATION] BILL 2016

India has a thriving business for surrogacy to partners worldwide because of the many surrogate mothers involved and the considerably lower process cost. Furthermore, no surrogacy regulations have resulted in greater acceptability of commercial surrogacy in India. Nevertheless, notable issues, like surrogate woman extortion and surrogate kid desertion, must be acknowledged, contributing to rising regulations in this domain. Though the Surrogacy (Regulation) Bill 2016 appears to be a viable instrument for regulating surrogacy, it has limitations. For example, the proposal directly conflicts with the rights to equality

4 *Jan Balaz* v *Anand Municipality*, (2010) AIR 2010 21.

5 Katherine B. Lieber, 'Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?' (1992) 68 Indiana Law Journal. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1466&context=ilj> accessed 14 April2022.

6 The Surrogacy (Regulation) Act, 2021 (Act No. 47 of 2021).

and life and ultimately prohibits commercial surrogacy instead of effectively limiting the practice.

In India, a considerable portion of the population considers commercial surrogacy ethically wrong, and the entire practice is alluded to as "womb renting."[7] In India, a lack of statutory provisions often results in adverse consequences of commercial surrogacy, like the victimisation of poor women who are often persuaded to become surrogates by their families for financial gain; to minimise this mistreatment, rules controlling commercial surrogacy are essential. In the case of "Baby Manji Yamada v Union of India and Others"[8], the Highest Court approved commercial surrogacy while simultaneously requesting that the legislature drafted legislation to ensure the rights of parties to surrogacy.

A. The New Surrogacy Bill of 2020: What changes will the new Surrogacy Bill have on India's Surrogacy Practise?

Since the birth of Kanupriya alias Durga, India's first IVF (In Vitro Fertilisation) and the world's second baby, in Kolkata on October 3, 1978, to the Baby M case[9], in which a conventional surrogate opted to maintain the baby after having given birth, resulting in the intended parents possessing custodial rights, to the 2016 bill recommendation, and eventually, the modern proposal on surrogacy,[10] a great deal has transformed in contexts of surrogacy laws.

Surrogacy is a scientific accomplishment that enables couples to have their child. Still, it has been exploited by many for the individual benefit at the cost of surrogate mothers and surrogate children, as evidence suggests there have been documented instances of questionable activities in the procedure of surrogacy, including the death of surrogate mothers, mistreatment of surrogate mothers, deserting of babies conceived through surrogacy, and indeed the transfer of human embryos and gametes.[11] As a result, the proposed bill's objective is to address these socio-ethical concerns.

Commercial surrogacy (stipulated under section 2(f) of the new bill), formerly proposed in the Law Commission of India's 228th Report, has become entirely prohibited, and only altruistic surrogacy is authorised. This indicates

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7 *ibid*.

8 *Baby Manji Yamada* v *Union of India*, (2008) 13 SCC 518.

9 *Baby M., In re*, 537 A2d 1227: 109 NJ 396 (1988).

10 Bhumitra Dubey and Yash Tiwari, 'Analysis of the Surrogacy (Regulation) Bill, 2020' (2021) India Law Journal <https://www.indialawjournal.org/analysis-of-the-surrogacy-regulation-bill.php> accessed 16 April 2022.

11 Sidak Kalra, 'Surrogacy (Regulation) Bill of 2020: Balancing Interests' (*Latest Laws*, 2020) <https://www.latestlaws.com/articles/surrogacy-regulation-bill-of-2020-balancing-interests/> accessed 13 April 2022.

that the surrogate mother will not receive monetary incentives or rewards for her gestation, excluding essential hospital expenditures and health insurance. According to the proposed legislation, commercial surrogacy is prohibited, as is the buying and selling of gametes and human embryos.[12] The concept of 'infertility,' which was previously characterised as *"the inability to conceive after five years of unprotected coitus or other established medical condition prohibiting a couple from conception"* (specified under section 2(p) of the 2019 bill), has now been withdrawn. The review panel acknowledged that waiting five years was unreasonable for a couple that wanted a child through surrogacy. The statutory provision in the 2020 law currently declares- *"When an intending couple has a medical indication demanding gestational surrogacy"*.

Furthermore, the National Surrogacy Board (established under section 15(1) of the bill), the State Surrogacy Board (established under section 24(1) of the bill), and relevant agencies for Union Territories (established under section 33(1) of the bill) have all been founded for the regulatory frameworks of surrogacy. Numerous duties, commitments, and operations have been assigned to the forums, including administrative roles in surrogacy matters of policy, managerial roles over different entities established under the 2020 bill, organisational duties for establishing rules of conduct to be followed by employees at surrogacy centres, and so on (as provided for in sections 23(a), 23(e), 23(f), and 23(c) respectively). Surrogacy's scope has indeed broadened; previously, only Indian married couples might elect for surrogacy; presently, an "intending woman," defined as an Indian woman who is a divorced or a widow between the ages of 35 and 45 and "a willing woman" can become a surrogate mother (as provided for in sections 2(s), 4(ii)(a), 4(iii)(b)(II) of the bill), could indeed avail for surrogacy. Furthermore, surrogate insurance has been enhanced, and the legislation incorporates penalties for surrogacy-related violations. All of these modifications made possible by the proposed policy establish a far more reliable regulatory environment for surrogacy practice in India than in the 2020 bill regarding recommendations and legislative changes.

B. The Indian Constitution and The Surrogacy (Regulation) Bill 2020: How close is the new Bill to The Indian Constitution?

The legislation is centred on patriarchal thinking or, to put it another way, an outdated age when individuals didn't even believe in living relationships or transgender privileges. First and foremost, this perspective is now out of date in the twenty-first century, in which the Highest Court has acknowledged transgender rights[13], living relationships, and the ability of a single mother to adopt children. This would lead to discrimination premised on sex, marriage, and citizenship. Recently, the Supreme Court emphasised the significance of

[12] Govind Hari Lath, 'Surrogacy (Regulation) Bill, 2020: The Way Forward' <https://blog.ipleaders.in/surrogacy-regulation-bill-2020-way-forward/> accessed 13 April 2022.

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

transgender people being recognised as a third gender. As a result, if they are legally accepted, they should not be deprived of any constitutionally protected freedoms, such as the freedom to reproduce or the right to privacy20. The interrelationship between the Surrogacy (Regulation) Bill 2020's principles and the Indian Constitution, particularly the "Golden Triangle[14]" of Articles 14, 19, and 21, will be explored in this section.

The right to life is perhaps the most essential of all, as stated in Article 21 of the Indian Constitution[15]. The right to a livelihood is included in the definition of 'life' within Article 21[16]. Surrogate women who are ordinarily from impoverished or financially poorer segments of the social structure and who contribute to the procedure for financial compensation and also to acquire financial resources to sustain themself and their households will find it challenging to yield any revenue if a blanket or nearly complete restriction on commercial surrogacy is levied, as presented in the 2020 proposal. It might result in a fall in the number of possible surrogate women willing to participate. Furthermore, confining surrogacy to heterosexual couples or widowed and divorced women of a specified age range contradicts the Constitution's freedom to reproduction, which is recognised and supported in Article 21[17]. Surrogacy is closely associated with an individual's right to privacy under Article 21, which guarantees individual sovereignty over one's body, intellect, and decision-making ability[18]. As a result, interfering with a person's reproduction effectively breaches their right to privacy. Additionally, the state has offered no justifications or grounds for prohibiting or restricting the choice of surrogate reproduction for unmarried or childless women, which could violate Article 21 of the Constitution.

Article 14 assures all people equality before the law and equal protection under the law[19]. This convention provision guarantees lawful, rational categorisation as long as they are grounded on comprehensible differentia and have a rational connection to the objective of the statutory provision[20]. The Surrogacy (Regulation) Bill 2020 provides surrogacy based on marriage and other factors, such as being a widow or divorcee of a specified age group. Excluding others from surrogacy is unreasonable, especially when non-married individuals can adopt. Section 377 of the IPC[21] has been repealed, decriminalising consensual sexual encounters between individuals of the same gender.

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[14] *Minerva Mills Ltd.* v *Union of India*,(1980) 3 SCC 625: AIR 1980 SC 1789.

[15] Mahendra Pal Singh*, V.N. Shukla's Constitution of India* (13thedn., EBC Publishing (P) Ltd.) 210.

[16] *Consumer Education and Research Centre* v *Union of India*, (1995) 3 SCC 42; *Olga Tellis* v *Bombay Municipal Corporation.*, (1985) 3 SCC 545: AIR 1986 SC 180.

[17] *K.S. Puttaswamy* & Anr. v *Union of India& Ors*., (2017) 10 SCC 1.

[18] *B.K. Parthasarathi* v *Govt. of A.P.*, 1999 SCC OnLine AP 514: (1999) 5 ALT 715.

[19] The Constitution of India, Art. 14.

[20] *State of W.B.* v *Anwar Ali Sarkar*, (1952) 1 SCC 1: AIR 1952 SC 75.

[21] *Navtej Singh Johar* v *Union of India*, (2018) 10 SCC 1.

The 2020 bill's stringent requirements leave out transgender people classified as a third gender.[22] Article 14 applies to citizens and non-citizens because the word "person" is used; nonetheless, foreigners are not permitted to use surrogacy.[23] The fact that unmarried individuals, same-sex couples, transgender people, and foreigners are not eligible for surrogacy is not an understandable distinction, nor does it connect to the bill's objective of lowering exploitation in the surrogacy industry. In this regard, it can be claimed that Bill's principles do not entirely comply with Article 14 of the Indian Constitution.

Article 19(1)(g) of the Indian Constitution ensures "freedom of trade and profession"[24], which is not an absolute right and therefore is subject to limitations, such as in the general welfare. To achieve a reasonable balance between Article 19(1)(g) and Article 19(2), the constraints indicated should not be arbitrary or excessive. However, prohibiting commercial surrogacy is unbalanced because there is a clear breach of Article 19(1)(g) with no grounding from Article 19(6). Commercial surrogacy is a source of revenue for surrogate women and innumerable surrogacy institutions. Still, this legislation intended to advance the public's interests jeopardises and threatens many stakeholders' economic interests.

III. ARE WOMEN BEING EXPLOITED THROUGH COMMERCIAL SURROGACY?

India heavily influenced the global surrogacy industry, surpassing the United States as the most significant global surrogacy destination for infertile and gay individuals around 2002, when it initially approved commercial surrogacy, and till its eventual suspension in 2016.

However, with its new competitors, the worldwide surrogacy market has been marred by shady dealings. An Australian couple with an agreement with a Thai surrogate mother supposedly deserted one of their twins born to the Thai surrogate mother in 2014 because the baby had Down syndrome.[25] Several other controversies followed, halted when India outlawed commercial surrogacy in 2016. The Indian government was more concerned about surrogate moms than the children. The prohibition on commercial surrogacy was presumably enacted to safeguard Indian working-class women from subjugation.

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[22] *National Legal Services Authority* v *Union of India*, (2014) 5 SCC 438: AIR 2014 SC 1863.

[23] Aparajita Amar and Arjun Aggarwal, 'The Emerging Laws Relating Surrogacy: A Procreational Right for Single Parent, Transgenders and Foreigners' (The SCC Online Blog) <https://www.scconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/> accessed 10 April 2022.

[24] The Constitution of India, Art. 19(1)(g).

[25] *ibid*.

A. The Lack of Surrogacy Laws in India

From the commercialisation of surrogacy in 2002 through its eventual restriction in 2016, a sequence of legislation suggested measures and policies directed the commercial practice of offering money for women's gestational activities. The "National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology" ("ART") Clinics, established in 2005 by the Indian Council for Medical Research, were the earliest collection of principles to govern surrogacy.[26] The Assisted Reproductive Technology (ART) Regulation Bill of 2008, the very first bill to supervise surrogacy, was believed to have been in the discussions for three years until it was made public; nonetheless, it didn't become legislation even after a considerable disagreement, demonstrations, and counter-protests.[27] Another bill, the 2010 ART Regulation Bill, was beaten back.

All gay couples and single women were prevented from entering India for surrogacy in 2012[28]. This prohibition was enacted not through legislation but rather via different visa restrictions forwarded to the Foreign Regional Registration Office, which stated that only married foreign couples would be granted visas for surrogacy commutes in the future. The Assisted Reproductive Technologies (Regulation) Bill of 2013, the third bill to be introduced, failed to execute the House of Parliament vote. India still had no legislation controlling surrogacy even decades after it became commercialised. The fourth bill, the first to suggest a restriction on foreigners coming to India for surrogacy, was introduced in 2014 but was also defeated.

Public interest litigation was initiated by Ms Jayashree Wad in the Apex Court in 2015 to prevent international surrogacy customers from traveling to India.[29] "Ms Wad claimed that India had become a "baby factory" for Western couples seeking surrogates who were inarticulate, needy, and abused for money.[30] Surrogacy, she claimed, was indeed an infringement of humanitarian law.[31] The Supreme Court of India has ordered the legislative administration to acknowledge the concern of whether commercial surrogacy is enslavement and whether this is a disgrace to women's integrity.

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[26] Government of India: Ministry of Health and Family Welfare, National Guidelines for Accreditation, Supervision and Regulation of Art Clinics in India (2005), <http://icmr.nic.in/art/PrilimPages.pdf>.

[27] 'N.B. Sarojini and Aasta Sharma, The Draft ART Regulation Bill: Whose Interest?' 6 Indian J. Med. Ethics 36 (2009)."

[28] Tariq Ahmad,'India: Draft Legislation Regulating Assisted Reproductive Technology Published', Libr. Cong. Glob. Legal Monitor (Nov. 2, 2015).

[29] Rudrappa, S. (2018), 'Reproducing Dystopia: The Politics of Transnational Surrogacy in India', 2002–2015. Critical Sociology, 44(7–8), 1087–1101. <https://doi.org/10.1177/0896920517740616>.

[30] *ibid*.

[31] *ibid*.

The Indian government proceeded even further in August 2016, paving the way for a comprehensive restriction on commercial surrogacy. Notwithstanding the ban, analysts say trading operations persist in various country regions, including Ahmedabad, Mumbai, and Bangalore.

B. The Aftereffects of the Ban on Indian Surrogacy for Gay Couples

Nearly 10,000 overseas clients sought fertility procedures in India in 2012. Nearly a third of these customers reported as unmarried or LGBT.[32] The Indian Ministry of Home Affairs banned individuals, gay couples (who mostly were men), and unmarried heterosexual couples from acquiring medical visas for the intention of surrogacy in India in 2012; this had a detrimental effect on the sector.[33]

Due to the sheer negative impact of these homophobic legislative changes on Indian working women, a few surrogacy agencies, notably those in Delhi, ascertained that if customers couldn't travel to India, Indian surrogate mothers could be relocated to Nepal to ease the operation[34]. Gay couples sent their frozen sperm to services in Delhi that were subsequently utilised to fertilise eggs from Indian donors. These men's embryos were transplanted into Indian surrogate mothers who travelled across international boundaries to Kathmandu, Nepal. Surrogate moms will further give birth there, and consumers can pick up their babies.[35]

Surrogacy prohibitions, such as the one enacted in India in 2012 against gay clients, place women in considerably more challenging scenarios. With these restrictions, worldwide surrogacy is beginning to resemble a problem of sexual trafficking. Yet, the fear is not just that surrogacy comes closer to human trafficking. Another worrying aspect is that the Indian government solely allows altruistic surrogacy, in which women are not paid for their biological reproductive labour. The suggested surrogacy law in India has sparked controversy. It would permit heterosexual couples who are infertile due to health issues to use altruistic surrogacy. The surrogate mother must be a couple's "close relative," wedded and have given birth to a typical baby. She can only be a surrogate

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[32] Vidya Krishnan, 'India's Draft Surrogacy Bill Bars Homosexuals, Live-in Couples'*, Live Mint*, <http://www.livemint.com/Politics/ZsS2zs7KvqHlk4FCguWOEN/Draft surrogacy-Bill-bars-homosexuals-livein-couples.html> [https://perma.cc/3FM5- A49Y].

[33] Tariq Ahmad, '*India: Draft Legislation Regulating Assisted Reproductive Technology Published'*, Libr. Cong. Glob. Legal Monitor (Nov. 2, 2015), <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating assisted-reproductive-technology-published/> [https://perma.cc/Q2UP-RZV2]. *See* The Assisted Reproductive Technology (Regulation) Bill, 2014, No. V.25011/444/201 1-HR (Proposed).

[34] Sharmila Rudrappa, Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002-2015', Critical Soc. 2 (Nov. 17, 2017).

[35] *ibid*.

mother once and cannot be paid for her service because she is generous in providing gestational service. Unqualified for surrogacy are gay couples, single women, unmarried couples and men, foreigners, and married couples with children, either naturally or through adoption.[36]

C. Is Altruistic Surrogacy Harmful to Women?

Commercial surrogacy is a competitive reproduction transaction that is profoundly unethical, but banning it is much worse. At first glance, India's prohibition on commercial surrogacy appears reasonable, supported by the government's notion that reproductive marketplaces should not be tainted by financial gain. However, substituting it with altruistic surrogacy entails a threat to women.

Sushma Swaraj, then India's External Affairs Minister, emphasised that the prohibition on commercial surrogacy was a "revolutionary step" toward women's welfare.[37] However, the reality is that the family is the centre of the materialisation of significant inequities and physical abuse for a substantial number of women across the globe, not just in India.[38] As a result, families aren't entirely protective zones from the market's corrupting pressures; contrary, it reinforces gender subjugation.

The Government reinstates an idealised notion of the conventional heterosexual household that dictates stringent gender expectations by positioning altruistic surrogacy within close relationships as the road to women's prosperity. Gender standards are considered fundamental biological expressions in this idealisation of the household, such as women are inherently compassionate, cooperative, and unselfish; they are born with these characteristics. As a result, the State's support for altruistic surrogacy is built on the concept that women are intended to undertake gratuitous social and biological reproduction labour within their closed connections.

It can be stated that surrogacy restrictions are harmful to women for two primary reasons. Firstly, the position of women in circumstances that constitute the surrogacy sector similar to other sectors that rely on trafficking women, such as sexual exploitation. Secondly, the administration essentially eliminates compensation as a negotiating point for women by forcing them to participate for non - payment reproductive labour, termed altruistic surrogacy.

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[36] Sunil Shroff, 'Legal and Ethical Aspects of Organ Donation and Transplantation', 25 Indian Jurol. 348, 348-55(2009).

[37] Ministry External Aff., Gov't India <http://www.mea.gov.in/eam.htm> [https://perma.cc/8X-JG-QN5J]. 106 Rami Lakshmi, 'India to Propose a Ban on Commercial Surrogacy, Ending a Lucrative Business', *Wash. Post* (Aug. 24, 2016), accessed on 11 February 2018.

[38] Interview by Theodora Ooms with Michael Johnson, PhD, at Building Bribidges: Marriage, Fatherhood, and Domestic Violence Conference (May 2006), <https://www.clasp.org/sites/default/files/public/resources-and publications/states/03 14.pdf>.

Additionally, it limits women's ability to create associations outside their families, making it even more difficult to build solid bonds with individuals apart from their relatives.

In these instances, reintroducing commercial surrogacy may be the optimal choice for women, but the government must control it.

For example, Sex workers in Calcutta and Mumbai have established influential collaborative banks where community participants can transfer their revenues.[39] Instead of prohibiting surrogacy, the state-owned Life Insurance Corporation of India provides insurance coverage for female sex workers in Calcutta through a policy designed exclusively for sex workers."[40] Suppose the Indian government profoundly cares about surrogate mothers' legal protections. In that case, it must acknowledge surrogacy as a valid form of employment and broaden the different protections that democratic countries offer to their working population. This included healthcare plans, the opportunity to form unions, the establishment of cooperatives and partnerships, and the protection of mothers' negotiating privileges on earnings and workplace conditions. Instead of advocating for altruistic, free reproductive exchanges among kin connections, these parameters can assist commercial surrogacy in India in fulfilling the reproductive rights of customers and employees in this worldwide reproduction economy.

IV. LEGALISATION OF COMMERCIAL SURROGACY AND THE SURROGACY AGREEMENT

Under Section 2(cc) of the ART Bill 2010, a surrogacy agreement is described as *"a contract between the person(s) availing of assisted reproductive technology and the surrogate mother."* A surrogacy agreement, in simple terms, is "a comprehensive document that lays the foundation for governing the relationship between the commissioning couple and the surrogate, including rights, liabilities, responsibilities, details about the need for surrogacy, purpose and situation of both parties, the terms under which the surrogate has agreed, compensation, payment schedule, and so on."[41]

A. Significance and Purpose of Surrogacy Agreement

The aim, as well as the relevance of this surrogacy agreement, are outlined in the ART Bill. Surrogacy agreements incorporate the minimum requirement

[39] 'India Sex Workers Get Life Cover', *BBC News* (May 1,2008), 94 Vol. XLIIIN.C. J. Int'l L. <http://news.bbc.co.uk/2/hi/southasia/7376762.stm>.

[40] 'Indian Sex Workers Get Life Insurance', *Econ. Times* (May 19, 2008).

[41] "Mother and Baby, Womb in Your Heart", *News.advisen*, 9-3-2014, available at <http://news.advisen.com/documents/AMX/20140903/08/201409030816CONTIFY NEWS 0012 073484.xml> accessed on 15 April 2022.

of individuals for the agreement, rendering them legally contractual and executable, and attempt to be controlled by the Indian Contract Act. The ART Bill explicitly indicates that a surrogacy agreement must always be entered between the surrogate mother and the couples obtaining surrogacy utilising assisted reproductive technology. The contract should therefore be enforceable by law.

Surrogacy agreements have been the sole legislative mechanism that governs the terms of the contract of assisted reproduction without a comprehensive legal precedent. It specifies the participants' contractual obligations, responsibilities, and financial remuneration to consent as surrogate mothers. Furthermore, it includes all expenditures for the gestational surrogate, encompassing pregnancy and post-delivery treatment, as well as the transfer of parenthood of the surrogate child to the intended parents. In many international surrogacy case scenarios, such as "*T (A Minor),In re*[42] and *P. (Surrogacy: Residence), In re,*"[43], the paramount importance of the circumstance is encapsulated by reiterating that "the surrogate child is born as a result of the surrogacy agreement," asserting all of the provisions, circumstances, stakeholders or parties, and the commitments made to each other respectively which eventually led to the birth of the surrogate child.

B. Limitations and Loopholes in the Art Bill's Surrogacy Agreement

Although the ART Bill outlines and specifies regulations for parties or stakeholders to enter into surrogacy agreements, the Bill also tends to give legally binding effect and elaborates a few of the requisite primary components of the very same; the Bill tends to leave numerous inconsistencies that are criticised as limitations and lacunas in the Bill, leading to several inconsistencies and ethical violations in the practice of surrogacy in India, several of which arose from the ART Bill.

i. No uniform standard monetary compensation

Though the ART Bill unambiguously indicates that monetary reward may be awarded to the surrogate mother; however, neither ART Bill nor the Regulations determine the lowest or highest amount that can be compensated. The Bill is quiet on the nature of legally authorised expenditures that may be reimbursed or addressed under the contract. As a result, the surrogate mother's compensation fluctuates, and the value set for each case is discretionary. Conversely, surrogate mothers have been paid inappropriately and inconsistently.

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[42] 2011 EWHC 33 (Fam).
[43] (2008) 1 FLR 177.

In the lack of a uniform, determined price, it's been observed that surrogate mother payments vary depending on their fair skin colour, caste origin, education, proficiency in English, and economic class[44]. In addition, surrogate mothers who conceive twins, eat healthily, put on weight, have nutrient-dense or favourable test results, or other indicators of a successful delivery are rewarded an extra amount of money (about 25%).[45] It's also been demonstrated that gestational surrogate payments vary from place to place; therefore, there is no consistency in surrogate mother payments, instead of prejudice and unfairness.[46]

ii. *Non-enforceability within India*

The contractual enforcement of such surrogacy contracts is a matter of contention, as evidenced by the "*Baby Manji Yamada* v *Union of India*"[47]case, in which the participants' surrogacy contract was declared null illegitimate and without lawful authority. Since this arrangement lacked the signatures of both the Japanese intending parents, it took six months to complete the surrogacy contract after the embryo was implanted in the surrogate mother.[48]

iii. *No procedural mechanism:*

Surrogacy agreements are generally recorded as forged documents on stamp paper with a nominal worth of Rs. 50 and a scribble of one or two excerpts, including stipulations on the surrogate mother's handover of surrogate child custody to the intending couple. There is no established procedure for negotiating a surrogacy arrangement, and there is no indication of authoritative compliance with the ART Bill or Regulations law. Moreover, there is no significant differentiation or stage for leaving and entering into a surrogacy contract; however, it's been ascertained that surrogacy agreements are registered after the verification of surrogate pregnancy or by the end of the first trimester of surrogate pregnancy and around the middle of the second trimester or the fourth month of pregnancy by the infertility clinic; thus, the woman is already pregnant, and it has no alternative but to be obligated to sign the surrogacy agreement throughout this timeframe. The reproductive health of the surrogate mother is jeopardised with no legal responsibility on the couple or the clinic, which is grossly unfair.

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[44] Rahi Gaikwad, 'They Need the Baby, she Needs the Money', *The Hindu*, September 28, 2014, available at <http://www.thehindu.com/sunday-anchor/they-need-the-baby-she-needs-the money/article6453307.ece> accessed on 15 April 2022.

[45] *ibid*.

[46] Dipen Hiranwar, Study Finds Surrogate Mothers in India Face Discrimination, Health Risks November 2012.

[47] *Baby Manji Yamada* v *Union of India*, (2008) 13 SCC 518.

[48] Swati Vashishtha, Baby Manji Faces another Legal Hurdle, CNN-fBN, Aug 15, 2008.

C. Surrogacy Agreement Legal Validity and Enforceability Questions

Numerous frivolous legal challenges strike a surrogacy agreement's core legitimate justification, such as its legitimacy, integrity, and enforcement. First, commercial surrogacy arrangements, by their very essence, allow for financial compensation using a woman's reproductive services, childbearing, and the handover of custodial and guardianship rights over the infant. Thus, they encounter heavy condemnation for violating public policy. Second, numerous components of the surrogacy agreement do not constitute or adhere to the essential statutory standards outlined in Indian contract law. There are also ancillary factors to consider, which present further worries. These are mentioned underneath and intermittently addressed.

i. Commercial Surrogacy Agreements and inconsistency with the essentials of a Valid Legal Contract

The constitutional legitimacy of a surrogacy contract has been called into doubt due to its inability to comply with the fundamentals of a legally binding contract as defined by the Indian Contract Act.[49] There is no unrestricted, informed, voluntary permission upon the part of the surrogate; instead, there is coercion, notably monetary compulsion, and the woman surrogate agrees to be a surrogate mother only for monetary remuneration. Such women are illiterate and come from an underprivileged environment; therefore, they cannot interpret the settlement terms. Attributable to the surrogate mother's absence of explicit approval, the parties lack *consensus ad idem*, that is, meeting the parties' minds on the understanding and performance of the agreement.[50] It is among the most significant prerequisites for a surrogacy contract's judicial legitimacy and effectiveness.

Secondly, the participants in the surrogacy arrangement are not in equal standing in respect of the duties and responsibilities conferred on individuals. Surrogate mothers are primarily from marginalised, disenfranchised areas of society who are uneducated, poor, and often struggle to make ends meet. Furthermore, the surrogate receives zero legal counselling. The intending couple continues to receive professional advice, including relevant clarifications from legal professionals whom health centers would readily offer as part of the surrogacy agreement process, which the couple pays for. Thus, the surrogate mother is positioned in a precarious situation while the intended couple is in a solid financial situation. As a result, the surrogacy agreements are doubtful owing to non-compliance with the contractual Law's prerequisites.

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[49] The Indian Contract Act, 1872 (Act No. 9 of 1872), s. 10.
[50] The Indian Contract Act, 1872 (Act No. 9 of 1872), s.2(h).

ii. Commercial Surrogacy Agreements and inconsistency with the tenets of Distributive Justice

The biological mother is responsible for severe medical issues, while the intended parents experience no hazards. Specified clauses in the surrogacy agreement explicitly state that the surrogate will be jeopardised to the edge of death. The intending couple's desires and objectives are imposed on the surrogate as a contractually legal and binding responsibility, and the surrogate persuades fulfilment under the potential danger of a lawsuit. Under the contract, the surrogate mother must take all judicial, clinical, and health risks, even though it endangers her personal life. On the other hand, the intending couple is the right-bearing party, immune to all these health consequences and unfettered by all lawful obligations. It violates the distributive justice theory, necessitating a fair and equitable distribution of benefits, hardships, and advantages and drawbacks among the contracting parties[51]. However, according to the surrogacy agreement's requirements earlier in this section, it certainly appears that the agreement invalidates the distributive justice principle. Surrogacy agreements are in theoretical and empirical work opposed to distributive justice principles.

Considering the legal concerns surrounding surrogacy commercialisation and monetary contracts, perhaps the most basic recommendation is to reframe the commercial terminology and substitute this with compensated surrogacy arrangement as soon as possible with legislation and lawmakers. Compensated surrogacy is recognised in a wide range of international areas of the law, including the United Kingdom (UK), Australia (New South Wales), Canada (Canada), and a handful of other countries. It guarantees compensation and restoration of the surrogate mother's health care for enduring pregnancy, childbirth, and any associated illness. Under these provisions, only "reasonable expenditures" payments are authorised in these countries. Many UK cases, such as Re the Matter of IT (A Minor)88 and Re P (Surrogacy: Residence)89, had allowed and supported merely the above-mentioned proportionate contribution. As a result, compensated surrogacy agreements may be structured primarily to allow for legally recognised expenditures or reimbursement in compliance with the same.

V. SUGGESTIONS

1) Implement a central registry: Create a centralized database to keep records of all surrogacy agreements, including information about intended parents, surrogate mothers, and clinics. This will aid in monitoring surrogacy activities, detecting cases of exploitation or abuse, and ensuring compliance with the law. Additionally, this will facilitate

[51] US Legal, Distributive Justice Law & Legal Definitionavailable at <http://definitions.uslegal.com/d/distibutive-iustice/>.

tracking surrogacy-related medical procedures, including fertility treatments.

2) Ensure informed consent: Proper counselling and medical care should be given to surrogate mothers before entering into a surrogacy agreement. It is important that all parties involved, particularly the surrogate mother, provide informed consent. Surrogate mothers should be given a clear understanding of their rights and responsibilities and the potential risks and benefits of surrogacy.

3) Monitor clinics: The legislation should establish licensing and regulation requirements for clinics providing surrogacy services and regular inspection protocols. Regulatory bodies should ensure that clinics do not engage in unethical or illegal activities, such as using substandard medical equipment or exploiting surrogate mothers. Additionally, regulatory bodies should enforce strict penalties for non-compliance.

4) Protect the rights of surrogate mothers: The legislation should prioritize the protection of surrogate mothers' rights and interests. This includes ensuring that they are fairly compensated for their services, have healthcare access, and protect their privacy. Additionally, the legislation should require surrogate mothers to have access to legal representation.

5) Provide legal recognition for children born through surrogacy: Children born through surrogacy arrangements should be given legal recognition and protection. This includes establishing legal procedures for determining parentage and ensuring that the child's best interests are always the top priority. Additionally, the legislation should clarify citizenship and nationality for such children.

6) Offer post-pregnancy medical care: Surrogate mothers should receive extensive medical check-ups and treatment for their reproductive systems for at least three months after delivery. Furthermore, all parties involved in surrogacy arrangements should be provided with professional counselling services to ensure their mental and emotional well-being. Finally, there should be strict disclosure requirements for surrogacy relationships to avoid unnecessary investigation, and eligibility criteria for surrogate mothers should be clearly outlined.

Based on the analysis, the researchers recommend implementing the above-mentioned measures to create effective legislation on surrogacy. These suggestions can help protect the rights of all parties involved in surrogacy arrangements, monitor clinics' practices, and provide legal recognition to children born through surrogacy.

VI. CONCLUSION

In recent decades, India has emerged as a global centre for commercial surrogacy. Infertility affects 15% of couples worldwide, and surrogacy

is becoming increasingly acceptable among couples interested in expanding their families.[52] India has been a popular surrogacy destination due to its lenient rules, affordable expenses, and many women ready to become surrogate moms.[53] Thousands of couples commute to India each year in quest of surrogate mothers, and treatment centres have begun to spring up. Surrogacy's absence of restrictions and surrogate mothers' lack of protection has raised many ethical concerns.[54]

In November 2015, the Supreme Court of India delivered a verdict prohibiting a foreigner from using commercial surrogacy.[55] According to the court, the injunction was imposed to prevent women in India from exploitation. It has, nevertheless, been widely planned. A prohibition will not resolve the issue since it will likely result in new concerns, such as the black market, greater victimisation, and psychological and sociological repercussions on surrogates if only altruistic surrogacy is adopted. Commercial surrogacy preserves infertile women's reproductive rights, but criminalising it breaches their human rights. A crucial tendency is to regulate surrogacy to achieve mutually advantageous outcomes. Due to a shortage of effective regulation, a global black market for surrogacy activities will continue to exist, posing significant hazards to women and exposing them to human trafficking, extortion, and coercion. Surrogacy contracts must adapt to protect the interests of surrogate mothers, considering the unavoidable reality that surrogacy choices are made in the context of specific individual circumstances that may develop over time. Surrogacy contracts must incorporate provisions for medical coverage and the surrogate mother's emergency needs. The development and execution of more onerous restrictions are both essential and imperative.

In conclusion, to make the existing legislation on surrogacy effective, it is crucial to implement a central registry to maintain records of all surrogacy arrangements and ensure informed consent by providing counselling and medical care to surrogate mothers. It is also important to monitor and regulate clinics providing surrogacy services, prioritize the protection of the rights of surrogate mothers, provide legal recognition for children born through surrogacy, and enact extra-territorial enforceable restrictions. Additionally, extensive medical treatment and check-ups should be provided for surrogate mothers after delivery, and surrogacy contracts should incorporate provisions for medical coverage and emergency needs. Only through these measures can we achieve mutually beneficial outcomes and protect the rights and interests of all parties involved in surrogacy arrangements.

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52 Mother or Nothing: The Agony of Infertility, World Health Org. (last visited April. 14, 2022).
53 *Union of India* v *Jan Balaz* (2015) SC (India).
54 *ibid*.
55 *Union of India* v *Jan Balaz* (2015) SC (India).

AN AGE WHERE EYES CAN'T BE TRUSTED: IMAGE MANIPULATION THROUGH DEEPFAKES

—Gowri Dev & Akshay Pramodh***

Abstract—Digital transformation in recent years has normalised the distortion of reality on the internet. It took an exponential leap with the advent of 'deepfake' technology. Machine learning has now enabled the manipulation of content to produce hyper-realistic false content resistant to detection. Like any other invention, while deepfakes have their apparent advantages, the threats that are exacerbated by them overshadow them. This article attempts to understand the current legal framework for deepfakes. We aim to provide an analysis of whether the current legal system in India is equipped to deal with the novel issue of deepfakes. A broad array of legal provisions is analysed, relating it to the regulation of deepfakes. This paper seeks to find the accessible remedies available against the misuse of deepfake, especially in the sphere of non-consensual pornography.

The first part deals with the technological origins of deepfakes. The second part deals with the threats posed by deepfakes, particularly focusing on non-consensual pornography analysed through the aspect of sexual privacy. The last part constitutes the current legal remedies available against deepfakes.

Keywords: Deepfakes, privacy, digital misinformation, technological remedies.

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I. INTRODUCTION

Science fiction that bloomed in the creative minds of filmmakers[1] popularised the concept of artificial intelligence in the early 20th century. Today, everything ranging from medicine to social media involves the application of artificial intelligence. Machine learning, a subset of artificial intelligence has enabled humankind to manipulate technology to mimic human intelligence revolutionising the way technology works. For decades, audio-visual manipulation has been dominating the film industry domain. Machine learning and automated technologies have replaced the more mundane and painful aspects of manipulating technology. With these tremendous technological advancements, what had been earlier used as a method of entertainment has now transformed into something dangerous to the social fabric.

Now, increasingly sophisticated technology has led to the development of good tools that create, manipulate, and transform photos and videos potentially erasing the boundaries between fake and real. The latest addition to the array of image manipulation tools is deepfake technology. Deepfake applies machine-learning algorithms to insert faces and voices into video and audio recordings successfully creating realistic impersonations.[2] The term deepfake which denotes both the technology that facilitates the content creation and the phony content it creates is a portmanteau of deep learning and fake.[3] In the simplest terms, deepfake is sophisticated photoshopping. The basic form of deepfake is face swapping or the image manipulation technique that utilises a machine learning algorithm to swap the faces of an individual based on large datasets containing photos and videos. These algorithms create output based on the multitude of data made available and in the case of deepfakes, the data set involves recordings, photos, and videos. Deepfake thus creates falsified content by manipulating or synthesizing faces, voices, and even emotions. It imitates a real person but with actions that they didn't commit.

Manipulated imagery is nothing new to the world. With the advent of photography in the early 1800s, harmless manipulation of images using light effects or manual techniques was most common. Before photoshop, images were retouched using paint, ink, or like techniques. Photoshop enabled the substantial manipulation of images. Artificial intelligence and machine learning have now enabled near-perfect manipulative techniques that have made the

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1 Anyoha R., 'The History of Artificial Intelligence' (*Science in the News,* April 23, 2020) <https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/> accessed 12 August 2022.

2 Cole S., 'Deepfakes were Created as a Way to Own Women's Bodies—We Can't Forget That,' (*VICE*, June 18,2020) <https://www.vice.com/en/article/nekqmd/deepfake-porn-origins-sexism-reddit-v25n2> accessed 12 August 2022

3 Wigmore I., "What is deepfake AI? A Definition from WhatIs.com." *WhatIs* <https://www.techtarget.com/whatis/definition/deepfake> accessed 17 August 2022.

detection of hoax content more difficult. Discuss in brief about the things to be covered in the paper further. Objectives of the paper are not clear.

II. ORIGIN AND TECHNOLOGICAL FOUNDATION OF DEEPFAKE

While the first-ever mentions of deepfake technology can be traced back to academic works in the early 20th century, the mainstreaming of deepfake can be credited to Reddit. It started in the subreddit r/CelebFakes, a Reddit community devoted to the photo-manipulation of celebrities. Photomanipulation and video splicing, some of them including spliced-up pornographic videos manipulated with celebrity photos, have been a common occurrence on the platform. However, in 2017, a series of videos featuring virtually manipulated recreation of Game of Thrones star Maisie Williams was posted by a user named deepfakes sparking the debate over the quality of the algorithm used. Although Reddit made sure to take them down, it had already spread to different other platforms propagating the 'deepfaking' technique across the internet. The user, eventually started a subreddit, r/deepfakes to release the algorithmic script they were using to create the impeccable simulations of real people, enabling the formulation of more sophisticated algorithms, better at accuracy than the original one.

The greater sophistication of deepfakes facilitated the increase in the degree of realism and the ease of making realistic-looking fake videos. It has now complicated the process of detecting falsified videos. The time and expertise required to fabricate videos have significantly decreased in recent years with the increased accessibility to "large-volume training data and high-throughput computing power, but more to the growth of machine learning and computer vision techniques that eliminate the need for manual editing steps".[4]

Deepfake uses the input video of a specific individual (commonly called the "target") and creates an output video replacing the target's face with someone else's. It is created by neural networks, a method of machine learning which is trained to "map the facial expressions of the source" creating the fabricated video. Generative Adversarial Networks or GAN is the newest technology composed of two neural networks working together.[5] The first neural network acts as the picture forger; it creates synthetic pieces of data from the data sets (mostly images, videos, and recordings) by analysing the statistical patterns[6]. Simultaneously, the second network, the "critic", finds the shortcom-

[4] Li Y. and Lyu S., *Exposing DeepFake Videos by Detecting Face Warping Artifacts* (Cornell University, 2019) 1.

[5] *ibid*.

[6] Knight W., 'The US Military is Funding an Effort to Catch DeepFakes and other AI Trickery: But DARPA's Technologists Admit that it Might be a Losing Battle' (MIT Technology Review, April 2,2020) <https://www.technologyreview.com/2018/05/23/142770/

ings in the data created by the forger.[7] This sequential, back-and-forth feedback mechanism enables the first network to produce deepfakes. The same method is employed to create convincing audio fakes. Deepfake technology is cheap and easily accessible; one does not require any cutting-edge knowledge or tools rather than basic knowledge of algorithms and machine learning does the job. Machine learning is now commercially available making it easier to learn and use it. Samsung has already developed commercially available software that requires a single source image to create a highly realistic deepfake.[8] This software thus comes in handy for anyone who has basic technology knowledge to grasp the technique of deepfake. With such developments in the technology sector, the necessity of knowledge in machine learning to create deepfakes is fast dwindling. Added to this, the ability to distribute deepfakes through social media and the trend of blind sharing misinformation facilitates the spread of scandalous deepfakes through online platforms.

III. LOOMING THREATS OF DEEPFAKES

The rapid diffusion of deepfake technology poses a significant threat to society. The information revolution which democratised access to communication has considerably reduced the amount of gate-keeping in all platforms. Although online platforms have enormous power to moderate content with their in-house policies, it falls flat in most cases if the content does not amount to obvious illegality. The spread of deepfakes online can be attributed to several factors including Information cascade. An information cascade occurs when people pass the information along with assuming its reliability from the number of shares it has. The tendency of people to rely on what others say, even if it contradicts their beliefs or knowledge leads them to exacerbate the information cascade. The paper requires proper footnoting. Social media can be equated to that of a beehive; everyone and everything on it is connected. When such intricate connections are in place, the possibility of people influencing each other is more direct. Mindless imitation occurs, and it cannot always be regarded as irrational; in most cases, such imitation is based on the rational analysis of limited information which does more harm than lack of information.

The widespread circulation of deepfakes can be attributed to our natural tendency to accept and propagate negative information. A meticulous study conducted by MIT on false information concluded that "false information

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the-us-military-is-funding-an-effort-to-catch-deepfakes-and-other-ai-trickery/> accessed 24 August 2022.

7 *ibid*.

8 Solsman J., 'Samsung Deepfake AI Could Fabricate a Video of You from a Single Profile Pic: Even the Mona Lisa can be Faked' (*CNET*, 24-5-2019) <https://www.cnet.com/tech/computing/samsung-ai-deepfake-can-fabricate-a-video-of-you-from-a-single-photo-mona-lisa-cheapfake-dumbfake/> accessed 7 August 2022.

outperforms true information".[9] This study published in the *Science* magazine points out that false information often includes novel and negative information. "These two features grab our attention as human beings and that causes us to want to share that information with others—we're attentive to novel threats and especially attentive to negative threats."[10] The appeal of false information is also reflected in how it is perceived and remembered. Researches show that false or negative information stays with people more than positive information. This susceptibility of people towards negative information provides a ripe ground for deep fakes. The threat of deep fakes lies here, in their capability of being accepted and circulated, distorting reality.

A. Non-Consensual Pornography

The term "pornography" can be best defined as the reporting or portrayal of sexual actions to produce sexual excitement through books, films, or other media. Pornographic websites, pornographic material created using computers, and the surfeit use of the internet to download and transmit pornographic films, texts, photographs, and photos, among other things, fall under this category. To put simply, privately watching porn in India, does not fall within the ambit of an offence under Indian Penal laws but, there are certain limitations to the liberty of watching porn that the Indian judiciary has laid down time and again.

Non-consensual pornography is the distribution of sexually explicit images of individuals without their consent. It involves the distribution of non-consensual intimate pictures and content which have been previously obtained within the context of a private relationship. Deepfake, an upgrade of traditional tools like photoshop, only requires access to a person's photos and videos, which may be found in the social media accounts posted publicly. Such images can be easily manipulated to create sexual deepfakes altering reality. The term non-consensual pornography is often used interchangeably with revenge porn, but non-consensual pornography may be motivated by several factors including revenge porn.

Revenge porn is the non-consensual distribution of sexually graphic images & videos on an online platform, also known as Image-Based Sexual Abuse (IBSA). It's an unethical act to share or publish explicit pictures or videos of anyone without his/her consent to harass the person and no one is safe from this type of offense irrespective of their gender. The scorn of rejection can become extremely offensive to a girl which can even destroy her career, dignity, and social esteem. Perpetrators use revenge pornography to satisfy their vengeance without considering the consequence.

[9] Meyer R., 'The Grim Conclusions of the Largest-Ever Study of Fake News' (*The Atlantic*, June 3, 2021) <https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/> accessed 22 August 2022.

[10] *ibid*.

Perpetrators are toiling with the life and reputation of victims, targeting their sexual integrity by misusing technology and consequently harassing them. Revenge porn not only blows out the victim emotionally but also disintegrates their career and social standing. The victim of such crimes is not just one person but the whole family which must bear the brunt of it. A crime like revenge porn is no less than a rape and is very difficult for the victim to fight in this situation where the perpetrator breaks someone's trust and blackmails them for their benefit thus besmirching the reputation of their entire family in society. In *State of W.B.* v *Animesh Box*,[11] court treated the victim of revenge porn as a rape survivor and provided the victim with appropriate compensation. In today's era of technological advancement, even our personal electronic device is not safe anymore.

B. The aspect of Sexual Privacy

Sexual privacy stands at the apex of privacy values for it dictates sexual agency, intimacy, and equality. Sexual privacy concerns the personal choices in intimate life including whether or not to expose one's body to another. Sexual privacy allows a person to manage and set boundaries around their body. It dictates how one experiment with their sexual choices, sexuality, and gender identity.[12] Sexual privacy plays a crucial role in self-disclosure and creates a vulnerability that manifests itself through trust. Sexual privacy secures personal autonomy which defines a person. Sexual privacy can be seen as a subset of the right to privacy which protects the dignity of an individual. The first instance of sexual privacy can be seen in American jurisprudence. It recognised the right to sexual privacy in *Griswold* v *State of Connecticut*[13] wherein the court highlighted the importance of privacy in the context of birth control pills. The concept of human dignity, popularised by the adoption of the Universal Declaration of Human Rights, finds its origin in the Roman Law concept of *diginitas hominins* which meant 'status'. Human dignity as explained by Canick "denotes worthiness, the outer aspect of a person's social role which evokes respect, and embodies the charisma and the esteem presiding in office, rank or personality".[14] Dignity is not absolute; it is an ever-evolving concept that is multi-faceted. Constitutional, as well as judicial interpretations over time, have subjected the concept of dignity to redefinitions incorporating the perceived social changes.

The conceptual expansion of the right to life has led to the recognition of human dignity in the Indian context. Right to life means more than mere

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[11] C.R.M. No. 11806 of 2017, GR/1587/2017.

[12] Citron D., 'Sexual Privacy' (2019) 127 (7) The Yale Law Journal <https://www.yalelawjournal.org/article/sexual-privacy> accessed 28 August 2022.

[13] 1965 SCC OnLine US SC 124: 14 L Ed 2d 510: 381 US 479 (1965).

[14] McCrudden C., *Human Dignity and Judicial Interpretation of Human Rights* (19th edn., European Journal of International Law, 2008), 655-724.

animal existence. The Supreme Court in *Francis Coralie* v *UT of Delhi* held that the right to life includes the right to live with human dignity and all that goes along with it including the bare necessities of life such as adequate nutrition, clothing, etc.[15] Subsequently, judicial interpretations have widened the definition of life with dignity to include a plethora of rights.

Justice D Y Chandrachud in the historic judgment of *K.S. Puttaswamy* v *Union of India*[16] held that privacy is a constitutionally protected right that arises in varying contexts of rights guaranteed in Part III of the Constitution, primarily from the right to life and personal liberty enshrined in Article 21. "Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level, privacy sub-serves those eternal values upon which the guarantees of life, liberty, and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests, which lie at the foundation of ordered liberty."[17] The court embarked on an extensive journey to recognise the plurality and diversity of the concept of privacy. The core of privacy is the preservation of personal intimacies including the personal choices that are intrinsically linked with bodily autonomy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.[18] Bodily autonomy can be seen as another subset of privacy which is the power of an individual to make choices over their body without fear or coercion. Thus, privacy encompasses sexual privacy.

Privacy invariably contains the right to bodily integrity, self-determination, and sexual autonomy. It involves the right to engage in sexual intercourse as has been laid down by the Supreme Court in *Joseph Shine* v *Union of India*[19]. The court while holding Section 497 IPC, which criminalised adultery, unconstitutional, opined that an overtly moralistic attitude undermines the values of personal liberty. The right to sexual privacy was also cemented by the court's decision in *Navtej Singh Johar* v *Union of India*[20] with the decriminalisation of homosexuality, reiterating the right to sexual and bodily autonomy.

While the law has been gradually incorporating the enlarged dimensions of privacy, on the other side, contemporary invasions of privacy are also on the rise. Non-consensual pornography invades the sexual privacy of a person by violating their right of self-determination of who can view their private photos. Similarly, deepfake porn or false pornography breaches an individual's sexual identity and intimacy. Deepfake porn dominates intimate identity and sexuality by exhibiting it to others without the consent of the person involved. It forces a sexual identity on a person by reducing them from personality to genitalia.

15 (1981) 1 SCC 608: AIR 1981 SC 746: (1981)2 SCR 516.
16 (2017) 10 SCC 1.
17 *ibid*.
18 *Puttaswamy supra* note 16.
19 (2019) 3 SCC 39: 2018 SCC Online SC 1676.
20 (2018) 10 SCC 1.

The danger of deepfakes lies in the fact that it enables the insertion of people's voices and pictures into realistic pornography. This enables revenge porn to a greater extent. Deepfake sex videos also allow the targeted attack on specific individuals. The recent circulation of deepfake videos of Rana Ayyub, an Indian journalist stands testament to it. In response to her comments on corrupt Hindu nationalist politics, a two-minute deepfake video of her appeared on several social media platforms accompanied by threats of gang rape.[21]

Deepfake videos have the ability to eclipse the victim's personhood by eliminating self-determination that protects one from being reduced to mere objects. The psychological damage that such videos cause to the victims may be profound in addition to the collateral consequences that would follow.

IV. CURRENT LEGAL SCENARIO

Deepfakes, creating a new dimension to technology-facilitated offences are challenging the legal systems worldwide. The conventionality of legal systems contributes to their rigidity and countries are trying to keep up with rapid technological innovations. The United States attempted in combating deepfakes through the Deepfakes Accountability (Bill) Act 2019, which unfortunately didn't pass through the Parliament. The bill proposed punishment for not watermarking deepfake content disclosing that its altered or fake and injunctive remedies for the victims. The deepfake video of the BJP Delhi President during the 2020 assembly polls marked the first ever known instance of deepfake in India. Since then, there have been certain incidents reported involving deepfakes. The most recent one was the deepfake facilitated advertisement by Zomato creating a personalised advertisement based on the user's GPS status. While the obvious advantages of deepfakes certainly cannot be overlooked, regulatory measures are necessary for preventing misuse of it. Anything that isn't regulated slowly erodes its usefulness to chaos. Presently, India does not have any legislation exclusively dealing with deepfakes. Indian laws are not yet equipped enough with adequate provisions for recognising or regulating deepfakes. The most suitable recourse in Indian law regarding deepfakes is the Information Technology Act, of 2000. While the effectiveness of the IT Act in dealing with deepfakes is arguable, it is the best recourse against deepfake cyber-crimes in the absence of specific legislation.

The transmission of photographs of "a private part of any person without his or her agreement" is covered under Section 66E of the IT Act. For the same, the penalty is either three years in prison or a fine of not more than two lakh rupees, or both. In the landmark judgment in *K. S. Puttaswamy* v *Union*

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[21] Ayyub R., 'Opinion In India, Journalists Face Slut-Shaming and Rape Threats' (*The New York Times* 22 May 2018) <https://www.nytimes.com/2018/05/22/opinion/india-journalists-slut-shaming-rape.html> accessed September 14 2022.

of India[22], the right to privacy was ruled to be guaranteed as a basic right and safeguarded under the Right to Life in Part III of the Indian Constitution. Sharing any material that violates a person's privacy is consequently a violation of Article 21 of the Indian Constitution. Informational privacy was another facet of privacy that recognises the right of an individual over the dissemination of data personal to them with digital privacy forming a part of it.

The publication or transmission of obscene material is covered by Section 67 (described as "any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons"). The first conviction carries a sentence of up to three years in jail and a fine of up to five lakh rupees, with successive convictions carrying a sentence of up to five years in prison and a fine of up to 10 lakh rupees.

Further, Section 69A of the Act empowers the Central Government to direct intermediaries to block access to any content in the interest of sovereignty and integrity, security of the state, and friendly relations with states. The legislative language provides for a wider interpretation of the section which can be extended to any deepfake content aimed at disturbing the sovereignty and integrity of the state.

Complimenting the IT Act, several provisions under the IPC can be resorted to in defining deepfake offences. Defamation is another offence that can be extended in its application to deepfakes. A deepfake created to defame an individual publicly will fall within Section 500 of the Indian Penal Code. Criminal defamation includes visible representations used to defame an individual affecting their reputation.

Additionally, if the deepfakes are directed at promoting hatred or enmity or inciting disaffection against the Government, it can be for the offence of sedition under Section 124A IPC. Deepfakes, being forged content of an original creation can constitute the offence of forgery. Section 468 prescribes a punishment of seven years for the act of forgery intended at harming the reputation of the victim.

Sections 292 and 293 of the Indian Penal Code, 1860 make it illegal to sell, distribute, exhibit, or circulate obscene objects. The provisions relating to obscenity can be invoked in cases of deepfake porn. Similarly, using deepfake videos for extorting a victim through threats to their reputation or property can be covered in the wider ambit of Section 503 of IPC dealing with criminal intimidation.

Similar to privacy infringement, deepfakes also pose the legal challenge of copyright infringement. The World Intellectual Property Organization

[22] *Puttaswamy* supra note 16.

("WIPO") published the "Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence"[23] on December 2019. The draft holds problems with deepfake content in terms of intellectual property rights. There are two questions addressed specifically to the deepfake issue on the Draft:

"(i) Since deep fakes are created based on data that may be the subject of copyright, to whom should the copyright in a deep fake belong?

(ii) Should there be a system of equitable remuneration for persons whose likenesses and "performances" are used in a deep fake?"

WIPO believes that deepfakes may cause more severe problems such as violation of human rights, than copyright infringements. Therefore, the main concern here is whether copyright should even be accorded to deep fake imagery, rather than to whom copyright in a deep fake should belong. As a response, WIPO states that if the deepfake contents are completely contradictory to the victim's life, the deepfake content should not be rewarded with copyright protection. For the previous questions, WIPO also mentions that if deepfakes are subject to copyright, they should belong to the inventor of deepfakes. As for the reason that there is no intervention of the source person whose image, sound, or other feature is used during the creation of deepfakes but just their consent.

In the Indian context, a deepfake may be justified or defended by taking the shield of fair use as elucidated under section 52 of the Indian Copyright Act which grants the author limited use of copyright material without the first author's acquiescence. The US concept of fair use of copyrighted work mostly relates to transformative work involving one's skill and labour. Unlike the fair use concept, Indian copyright law is inclined more to the concept of 'fair dealing', not explicitly defined but exhaustively lists many instances that constitute fair dealing in Section 52 of the Copyright Act, 1957.[24] Since deepfakes do not find a mention in the exceptions as stated, hence, it's simpler to hold the developer liable. In addition to this, copyrighted work is protected from distortion, mutilation, and modification under Section 57 (1) (b).[25] The rigidity of the fair dealing concept can be appropriately utilized to tackle deepfakes.

V. EXPLORING THE SOLUTIONS

The blessing in disguise of better access to information on the internet has opened up a new set of threats to the privacy of an individual. The enormity of personal data available on the internet allows for its misuse or even abuse overshadowing the original intent with which it was posted. Deepfakes,

[23] Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence (2019) WIPO/IP/AI/2/GE/20/1.

[24] Copyright Act, 1957, s. 52.

[25] *ibid*, s. 57.

the new technological wave, can skew the pictures or videos or in the greater sense, the content or information that has been posted on the internet for illegitimate purposes ranging from non-consensual pornography to dissemination of misinformation affecting the fabric of security of the nation. The legal remedies available at present are insufficient to regulate deepfakes. Individual remedies under the present legal regime are quite often cumbersome and unyielding, given the fact that current laws do not explicitly deal with deepfakes as the subject matter.

The European Union's GDPR-General Data Protection Rules[26] serve as a starting point in regulating deepfakes. Since GDPR provides protection and remedies for processing data its applicability can be extended to deepfakes that involve the manipulation of data. The right to be forgotten as envisaged in the GDPR can be defined as the right of the data subject to remove personal data from search engines that they no longer desire to be shown.

In light of Article 5 of the EU General Data Protection Regulation, if deepfake content is irrelevant, inaccurate, or falsity, it should be erased without delay. Moreover, even if the deepfake content is true or accurate, a data subject —a victim of a deepfake— may exercise the right to be forgotten, granted to European residents in Article 17 as the "right to erasure". In accordance with Article 17, the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the data controller shall have the obligation to erase personal data without undue delay. The obligation to respect the data of an individual is on social media platforms or search engines under the GDPR. The Google Spain case[27] is an illustration of how search engines are liable for the violation of the right to be forgotten. A deepfake, which is invariable false or forged information, if published on a platform, the data subject to it can get it removed by exercising their right under Article 17 of the GDPR.

In the Indian context, the right to be forgotten has been recognised as a fundamental right as part of the right to privacy under Article 21. The right to privacy has been expanded to personal data in addition to the physical and spatial protection of privacy. This expansion of the concept of privacy to include informational privacy was recognised in the landmark judgment *K.S. Puttaswamy* v *Union of India*. Following this, in *Vasunathan* v *High Court of Karnataka,*[28] the court while holding that right to be forgotten has to be implemented in sensitive cases observed that "the modesty and reputation of the people involved, especially if it includes women, should not be made available to everyone indiscriminately."[29]

[26] General Data Protection Regulation (2016) OJ L 199/1.

[27] *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C: 2014:317, paras 70 and 92.

[28] 2017 SCC Online Kar 424.

[29] *ibid*.

The legislative response to the threat of deepfakes has been gradual and is yet to effectuate. Law to be effective, it needs to encapsulate the nuances of the subject it is dealing with. The current legal framework, including the IPC, Copyright Act, etc, falls short of comprehensively addressing the menace that deepfake. Enacting a balanced regulatory response to deepfakes is crucial in the legislative framework on it. A balanced regulatory response would require concurrence with the needs of the stakeholders and the negative and positive implications that deepfake has on them. The primary stakeholders of deepfake applications include the maker, viewer, disseminator, and primarily the victim. Rather than an absolute prohibition, the law must authorise the use of deepfakes for lawful purposes while prohibiting it otherwise. This standard set for the victims has to be balanced with that of the maker of a deepfake, in granting them authority over their content. The most important guiding principle would be ensuring access to effective remedies to protect these prerogatives.

VI. CONCLUSION

> "*The web as I envisaged it, we have not seen it yet. The future still holds so much bigger than the past*"
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> - Tim Berners Lee, creator of the World Wide Web.

With a rapid increase in the scope, scale, and sophistication of digitisation, the line between fake and real is blurred. Digital misinformation in the form of fake news or morphed pictures has become the new normal on the internet. Deepfakes can seem like a menace to society considering its grey area in the law books. It is pertinent to note that deep fake technologies were not used to benefit people initially, it was first used to visualize and recreate images of how certain celebrities would look in compromising positions and later tech companies exploited the technology for medical and educational purposes by creating learning tools, technology was later used by some historians to recreate people in history and even used in gaming and arts.

When used in the right sense, there are extensive uses for the technology, but at this rate, we require stricter regulations, and people who abuse the extent of the technology ought to be held accountable. Stringent regulations must be put into place with a view to protecting people's online persona. Even if the users are to be technically held accountable for manipulating and stripping away the autonomy of individuals by using their resemblances, developers should be held responsible too for using their knowledge to develop something that actively harms them.

In light of the above-mentioned assertions, "it has become appallingly obvious that our technology has exceeded our humanity" as quoted by Albert Einstein.

BLOCK THIS, BLOCK THAT! A METICULOUS APPROACH TO DYNAMIC INJUNCTIONS IN INDIA & EU

—*Siddharth Saxena**

Abstract—In digital space, files can be shared in no time. If a website is blocked or taken down by injunction through the court's order, within minutes a mirror website appears that hosts the same data hosted on the parent website. These are also known as rogue websites. The copyright infringement thereupon continues through the rogue website although the parent website has been taken down by injunction. Copyright Act, 1957, provides for remedies in case of infringement for the plaintiff which apply to electronic and digital medium in the same manner as they apply to conventional medium. Dynamic injunction refers to the remedy wherein the plaintiff prays for the injunction restraining the parent website to be extended to different domain names or websites that host the information that caused copyright infringement in the first place. Dynamic injunction was first granted in India in 2017 by Hon'ble Delhi High Court in UTV Communications v 1337x.to where the Court laid down the criteria for identifying rogue websites for the purpose of extending the main injunction. However, Bombay HC has taken a different view and advocated the appointment of ombudsman for such grievances. Since the infringing media can be hosted on intermediary, therefore, the balancing of interest between online speech and the statutory obligation of preventing copyright infringement has to be made. Dynamic Injunctions have been granted in the European Union recently. However, Dynamic Injunctions in the EU differ vastly from their counterparts in India. This article aims to find out the efficacy as well as implications of Dynamic Injunctions in

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combating copyright infringement in Digital space. Moreover, this article shall seek to set forth the contrasting features of a dynamic injunction granted in India in comparison with dynamic injunctions in the European Union (Hereinafter referred to as 'EU'). The author shall also analyse the discourse around intermediary liability and copyright infringement.

Keywords: Rogue Websites, Dynamic Injunctions, Intermediary Liability, Copyright Infringement, Ombudsman.

I. INTRODUCTION

Ever since the dawn of the internet age, numerous avenues have opened. The internet has facilitated the transfer of data and communication between entities. As much as the internet facilitated the transfer of data between people, it also facilitated the sharing of data which was not authorized or unauthorized. In simpler words, the data shared was shared without the authorization of the entity who owned the data. This sharing was done by mode of either hacking, copying or duplication.

It can be aptly put that illegal sharing of data or sharing of data without authorization is one of the many illegal acts that have emerged with the advent of the internet. One of such illegal acts is digital or online piracy.

The unlawful act of replicating, reproducing, or disseminating a work without the consent of the copyright owners is known as digital piracy, and it is a contravention of intellectual property law. Digital piracy has been growing exponentially due to the advancement in tech, especially concerning personal computing where complex works could be done portably.[1]

Digital piracy can be briefly categorized into three sub-categories – music, video, and software piracy.[2] Whilst unlawfully duplicating or disseminating duplicates of digital works in physical form, falls within the definition of digital piracy, online digital piracy has expanded the reach of the issue.

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1 Jason R. Ingram, 'Digital Piracy', *The Encyclopaedia of Criminology and Criminal Justice* (John Wiley & Sons, Ltd. 2014). <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118517383.wbeccj116> accessed 15 February 2022.

2 *ibid*.

The unauthorized replication or reproduction or dissemination of copyrighted work would amount to copyright infringement in the digital space. Although effective remedies such as injunctions do exist in the enactments to combat such infringement, yet the ever-evolutive aspect of technology makes itself out of reach in certain peculiar instances.

The conventional remedies such as temporary or perpetual injunctions are mentioned under the Code of Civil Procedure, 1908 and Specific Relief Act, 1963[3]. However, when it comes to digital space, files can be shared in almost no time. In simpler words, even if an injunction is granted as a relief by the court to prohibit a particular website from hosting the copyright-infringing content, a new website hosting the identical copyright-infringing content could be hosted within the blink of an eye. This is facilitated by the technology growing in folds over a period of time. Therefore, the law fails to catch up and the rights of the parties could not be effectively protected.

The websites that host identical copyright-infringing content after the main website is taken down by Courts' order are known as rogue websites. The copyright infringement, therefore, continues from the rogue website although the parent website has been taken down by injunction.

Copyright Act, 1957, provides for remedies in case of infringement for the plaintiff. The remedies can be civil, criminal and border enforcement. The provisions of the Act apply to the electronic and digital mediums in the same manner as they apply to conventional mediums.

The concept of dynamic injunctions is relatively new. Dynamic injunction refers to the remedy where the plaintiff prays for the main injunction restraining the main website to extend to different domain names or websites that host the information that caused copyright infringement in the first place. A dynamic injunction was first granted in India in 2017 by the Hon'ble High Court of Delhi in *UTV Software Communications Ltd.* v *1337x.To*[4] where the Court laid down the criteria for identifying rogue websites for the purpose of extending the main injunction.

Since the infringing media can be hosted on an intermediary, therefore, the balancing of interest between online speech and the statutory obligation of preventing copyright infringement has to be made. Dynamic Injunctions have been granted in European Union recently. However, Dynamic Injunctions in the EU differ vastly from their counterparts in India under various aspects such as jurisdiction.

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[3] Manmeet Kaur Sareen and Kanika Kalra, 'Dynamic Injunctions – Internet 'Injunctions 2'' (2019) II ILI Law Review 32.

[4] 2019 SCC OnLine Del 8002.

II. COPYRIGHT INFRINGEMENT IN DIGITAL SPACE

Several parts of our daily lives have been touched by digitization. Over time, as technology has progressed, copyright laws have also evolved dramatically. Today's headline-grabbing changes are often related to digital technology and online communication networks, such as the Internet and computers. Like many advancements, these emerging technologies are equally hopeful and potentially damaging to diverse parties involved in the usage and exploitation of works of authorship - ranging from music and literary works to web pages, series and movies.[5]

Copyright is a form of intellectual property that secures original works of authorship as early as the author sets the work in a tangible state of representation. Copyright promotes artistic creativity and free circulation of ideas[6]. The digital era inevitably brought with it a large consumer base and easy access to resources, however in disguise which became a blatant reality soon after, was the copyright infringement in the internet regime.

It is a known truth to all that Intellectual Property, especially literary and artistic works are seen as sources of inspiration for growth and development and in consonance to that very thought, the idea of achieving a balance of the Copyright bargain between protection for the artists and the rights of the consumer was formulated.[7] The Copyright law envisaged the usage, distribution and principles of fair use setting in the frame of this very bargain. However, in the digital era, access to intellectual property has become easy in the hands of people[8]. The level of technology has progressed to the extent that netizens can replicate nearly anything for free with the click of a button. Consumer access has reached to an extent that it is directly harming the protection bestowed upon the creators under the copyright regime. Copyright protection on the web has risen to the top of the priority list.

Copyright infringement in the online world takes place in various forms and ways.[9] Downloading and uploading of the creative works via means of technology, derivative works created from the amalgamation of the unauthorized copyrighted works on the internet, Hotlinking images from the original websites, Peer to Peer (P2P) sharing of audio visual works on the net, software piracy, infringement via multimedia and infringement through social media by replicating, reposting the original works of the creator without prior permission or

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5 Prathiba M Singh, 'Evolution of Copyright Law - The Indian Journey' (2020) 16 Indian Journal of Law and Technology 38.

6 *ibid*.

7 Pradip N. Thomas, 'Copyright and Emerging Knowledge Economy in India' (2001) 36 Economic and Political Weekly 2147.

8 *ibid*.

9 Krishnendra Joshi, 'Copyright Issues in Digital Era' (*iPleaders*, 12 May 2019) <https://blog.ipleaders.in/copyright-digital-era/> accessed 16 February 2022.

license from the creator are few forms of Online copyright infringement prevalently found.

From observation and analysis, it can be deduced that Copyright infringement in the digital era is occurring due to falling out in three specific areas[10]. Firstly, the Incapability of the law has been a hurdle to the implementation of effective measures to tackle the issue of online infringement. Secondly, the idea of 'permitted acts' of the intellectual property leads to unauthorized publication and usage on online platforms. Thirdly, narrow interpretation of Copyright works and a lack of judicial pronouncement covering online protection.

The world is in dire need of the implementation of effective and strong measures to tackle the issue of weak copyright protection in the digital regime. A strong copyright law framework holds many merits for the growth and development in the fields of creative works[11]. Strong copyright protection is not only compatible with future digital models: it is an essential pre-condition for their success. Effective law, guidelines and regulations can eventually pave the way for a formidable, strong and stable approach to copyright protection, especially with the evolving technologies.

III. DYNAMIC INJUNCTIONS AS REMEDY AGAINST COPYRIGHT INFRINGEMENT

Various types of remedies can be sought against copyright infringement. They can be classified under three major categories –

1) Civil Remedies[12] such as injunctions, damages etc.
2) Criminal Remedies[13] such as penalties, fines etc.
3) Administrative Remedies such as banning of importation.
4) Although, these three remedies can be availed as per the requirement of the plaintiff, civil and criminal remedies are generally sought. These two are often considered to be practically viable.

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[10] Jennifer L. Kostyu, 'Copyright Infringement on Internet: Determining the Liability of Internet Service Providers' (1998) 48 Catholic University Law Review 1237.

[11] LexOrbis-Manisha Singh and Aprajita Nigam, 'Combating Copyright Online Piracy in India: Government's Initiatives and Judicial Enforcement' (*Lexology*, 4 March2020) <https://www.lexology.com/library/detail.aspx?g=795b374a-88d6-4399-bdbd-e5e1f593ccf7> accessed 13 February 2022.

[12] Copyright Act, 1957, Ss. 54-62.

[13] Copyright Act, 1957, Ss. 63-70.

A. Civil Remedies

Civil remedies can be sought by the plaintiff by way of filing a suit or any other civil proceedings in the District Court or High Court as per the jurisdiction. Civil remedies are governed by Copyright Act, 1957 and their procedure is laid down under the Code of Civil Procedure, 1908 & Specific Relief Act, 1963. Civil remedies can be –

1) Interlocutory Orders
2) Anton Piller Orders[14]
3) Mareva Injunctions
4) Delivery of copyright-infringing content.
5) Damages for conversion.
6) Pecuniary Remedies

Generally, injunctions are the most viable civil remedy in cases of copyright infringement. The underlying idea behind injunctions being sought as the most viable remedy is the ability of injunction to be granted in combination with any other remedy.

An injunction can be defined as a judicial process operating *in personam* which requires a person to whom it is directed to do or refrain from doing a particular thing. In other words, an injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing. As per the need of the time, Courts have granted various other types of injunctions as per the facts and circumstances of the case.

B. Anton Piller Orders

A type of search warrant that is granted with the aim of preserving the evidence.[15] The plaintiff prays for the urgent search and examination of the place of the copyright violator without any prior notice. This is done for the reason that if prior notice is given, there can't be any collection of evidence. Therefore, to uncover and collect evidence that Anton Piller orders are issued.[16]

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[14] Priyanka Devgan, 'A Comparative Case Law Analysis of John Doe and Anton Piller Orders' (Social Science Research Network 2012) SSRN Scholarly Paper ID2224153 <https://papers.ssrn.com/abstract=2224153> accessed 16 February 2022.

[15] *ibid*.

[16] Areness Law-Arushi Gupta, 'Anton Piller Order: Whip Hand of IP Owners' (*Lexology*, 1 November2021) <https://www.lexology.com/library/detail.aspx?g=ed9756c7-b30d-4e08-a551-56136309276e> accessed 16 February 2022.

First issued in 1976 in the case of *Anton Filler Kg* v *Mfg. Process*[17], there haven't been many Indian cases that talk about the principles behind the grant of such relief. In this kind of order, a Court Commissioner is appointed under Order 26 of the Code of Civil Procedure, 1908 to accompany the aggrieved party and search the premise and preserve the evidence. The principles that govern temporary injunctions under Order 39 of the Code of Civil Procedure, 1908 govern Anton Piller Order which are – Balance of convenience, prima facie case and irreparable injury.

C. John Doe or Ashok Kumar Orders[18]

John Doe Orders or as they are called in India, Ashok Kumar orders is one of the biggest tools to combat copyright infringement in the digital space[19]. Ex-parte injunctions against unknown or nameless violators are known as John Doe orders or Ashok Kumar orders. In cases involving copyright and trademark infringement, and internet piracy, these orders are frequently granted. This order is generally passed against the defendants which are unknown at the time of the order or potential infringers. This order is a kind of ex parte injunction against the potential defendants in order to stop the copyright infringement from happening at the very instance.

John Doe or Ashok Kumar Order was first passed by Delhi High Court in *Taj Telivison* v *Rajan Mandal*[20] in 2002. This order was way ahead of its time and was criticized heavily. However, over time, the courts have heavily relied on the precedent for passing similar orders due to the increase in internet usage as well as the increase in copyright infringement in cyberspace.

John Doe Orders or Ashok Kumar Orders are the results of Courts invoking the power given to them under the provisions of the Code of Civil Procedure, 1908[21]. Since injunctions can be awarded in combination with other remedies, they are viable in most cases. The courts have used the powers relating to temporary injunctions[22] and inherent powers of the court[23] to pass such orders in the interests of justice or to prevent the abuse of the process of law.

However, a normal John Doe order fails to combat copyright infringement when the websites when taken down by virtue of the court's order could

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17 1976 Ch 55: (1976) 2 WLR 162: (1976) 1 All ER 779.

18 Devgan supra note 14.

19 Aadya Chawla, 'John Doe Orders: Prevention of Copyright Infringement of Cinematograph Films'(2017) II ILI Law Review 8.

20 2003 FSR 22.

21 Gaurav Sarin, 'Ashok Kumar Order: The Indian Version of John Doe Orders – Sarin Partners' <https://sarinpartners.com/ashok-kumar-order-the-indian-version-of-john-doe-orders/> accessed 16 February 2022.

22 Code of Civil Procedure, 1908, Order XXXVIII.

23 Code of Civil Procedure, 1908, S. 151.

spearhead into many multiple mirror or alternate access links to access the infringing content. A typical John Doe order would fail when there are mirror websites. To block copyright-infringing content or to be taken down, the plaintiff has to go through the procedure as laid down under Order I Rule 10 of the Code of Civil Procedure, 1908. The plaintiff had to file an application supported by an affidavit for the mirror website to be added as a defendant for the injunction to be functional against that website.

To combat this menace, Hon'ble High Court of Delhi, in *UTV Communications* v *1337x.to*[24] used the concept of dynamic injunction[25] as a remedy to tackle digital piracy. The Hon'ble Court has held that plaintiffs shall have the liberty to go through the procedure of Order I Rule 10 of the Code of Civil Procedure, 1908 to add any websites of similar nature as the parent website which host or mirrors the copyright-infringing content. These websites are known as rogue websites. The plaintiff shall file the application whenever the rogue websites are discovered for the interim order passed by the Court to be applicable to them. The Court, in *para 7.3*, has emphasized the purpose of such remedy as to dynamically monitor such illegality and to pass such interim orders as necessary to restrain the rogue websites from infringing the content which is the copyright of the plaintiffs.

A major difference that lies between a typical Ashok Kumar Order and a dynamic injunction is that in cases of Ashok Kumar order, the order can be enforceable only against the mirror websites which existed at the instance of the order by the Court. Unlike Ashok Kumar Order, Dynamic Injunction can be enforceable against the rogue websites that may surface after a period of time after the passing of the order.[26] Therefore, if a dynamic injunction is granted by the Court and a rogue website surface later on[27], the dynamic injunction can be enforced against the rogue website to block the copyright-infringing content. Therefore, the court is relieved of its responsibility to constantly monitor and pass interim orders on every mirror website that surfaces later on after the issuance of the order.

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[24] Supranote 4.

[25] Akansha Agarwal, 'India's First Dynamic Injunction Issued to Block Access to 'Rogue Websites'' (*The IPKat*) <https://ipkitten.blogspot.com/2019/07/indias-first-dynamic-injunction-issued.html> accessed 27 January 2022.

[26] Pranay Bali and Nayantara Malhotra, 'To Block or not to Block? Analysing the Efficacy of Website Blocking Orders and Dynamic Injunctions in Combating Digital Piracy' (2020) 11 Indian Journal of Intellectual Property Law 179.

[27] Selvam and Selvam, 'The Case of Dynamic Injunction' Selvam & Selvam' <https://selvams.com/blog/the-case-of-dynamic-injunction-2-2/> accessed 13 February2022.

IV. COMPARATIVE ANALYSIS OF DYNAMIC INJUNCTIONS IN EU & INDIA

Dynamic Injunctions in the EU unlike India have statutory backing. They can be granted against intermediary that falls under Article 8(3) of InfoSoc Directive as well as provision under IPRED. In the EU there are three types[28] of injunctions that can be granted –Blocking Injunctions, Dynamic Blocking Injunctions and Live Blocking Injunctions.

Blocking injunctions in the EU can be defined as directions to internet intermediaries to undertake measures to block access from any particular location.[29] These injunctions are also called internet site-blocking injunctions. There are various means to implement blocking injunctions by way of DNS filtering, blocking or IP address filtering to name a few.

Dynamic Blocking Injunctions are similar as to Dynamic Injunctions in India. These injunctions are based on the similar principle of extending the granted injunction to the cases of infringement of identical infringing content. These injunctions are granted with a view to cater enhanced protection against copyright infringement.[30] These injunctions bypass the need to go through the judicial proceedings to get the relief of a similar injunction for the website that hosts infringing content which is materially the same for which the main website was taken down. The injunction granted is based on certain parameters that if a similar or mirror website hosts the identical infringing content.

Live Blocking Injunctions are considered to be a subset of Dynamic Blocking Injunctions. Unlike other injunctions, these specifically relate to the specific subject matter of live broadcasts such as a sports match, speech etc.[31] These live blocking injunctions can be used to block the live broadcast of any copyrightable subject matter. The right holders can identify the hosting service which is infringing the copyrightable content of the right holder and then apply for the blocking of the same to the internet service provider. The internet service provider than shall block the server for the time being. Unlike other injunctions, live blocking injunctions can be time-specific which effectively means that once the broadcast of the copyrighted subject matter is over, the hosting service can be unblocked. Therefore, it is not perpetual but event specific.

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[28] European Union Intellectual Property Office. and Centre for International Intellectual Property Studies (CEIPI), *Study on Dynamic Blocking Injunctions in the European Union.* (Publications Office 2021) <https://data.europa.eu/doi/10.2814/301088> accessed 29 January 2022.

[29] *ibid*.

[30] Giancarlo Frosio and Oleksandr Bulayenko, 'Website Blocking Injunctions in Flux: Static, Dynamic, and Live' (Social Science Research Network 2021) SSRN Scholarly Paper ID 3848063 <https://papers.ssrn.com/abstract=3848063> accessed 29 January 2022.

[31] European Union Intellectual Property Office. and Centre for International Intellectual Property Studies (CEIPI) *supra* note 462.

The blocking injunctions in the EU have to abide by the proper balancing of the rights of the stakeholders.[32] Therefore, different rights of the stakeholders are considered and injunctions are granted which are proportionate to the rights of the stakeholders. Hence, they should satisfy the doctrine of fair balance[33] similar to dynamic injunctions in India. The injunctions granted should be with the aim of protecting the interest of the stakeholders as well as not to impose any condition or order which could infringe the existing rights of the other people.

One of the major differences that can be drawn from Dynamic Injunction in the EU and India is the aspect of territorial jurisdiction. The Member States in the EU have the discretion regarding the applicability of the injunctions[34]. Hence, the scope varies in the Member States. This variation could be in relation to subject matter or intermediaries. There are variations in the cases of websites as well.

Unlike India, Member States in the EU have the discretion to impose costs or penalties between the stakeholders and violator or infringer. The variation in the costs is based on the fact that different Member States have different rights and intermediary provisions when compared to each other.

Unlike India, where the courts have not yet passed an injunction which is extra-territorial in nature, Member States in the EU can pass such injunctions which may have extra-territorial application as per their own discretion with regard to rights and international norms. Indian Courts direct Meity and Intermediaries to block the website in the territory of India and have not yet exercised extra-territorial jurisdiction.[35]

Unlike India, Member States in the EU have disputes or issues with regard to different directions or reliefs granted in a case in different jurisdictions regarding their applicability and enforcement which is not the case in India. Dynamic Injunctions in India can be considered far more robust as compared to dynamic blocking injunctions in the EU as can be inferred from the above-mentioned discussion.

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[32] *ibid*.

[33] Berdien BE van der Donk, 'How Dynamic is a Dynamic Injunction? An Analysis of the Characteristics and the Permissible Scope of Dynamic Injunctions under European Law after CJEU C-18/18 (Glawischnig-Piesczek)' (2020) 15 Journal of Intellectual Property Law & Practice 602.

[34] *ibid*.

[35] Essenese Obhan and Tarika Pillai, 'Dynamic Injunctions to Tackle Digital Piracy in India" - Intellectual Property - India <https://www.mondaq.com/india/copyright/1017874/dynamic-injunctions-to-tackle-digital-piracy-in-india> accessed 26 January 2022.

V. DISCOURSE AROUND INTERMEDIARY LIABILITY AND COPYRIGHT INFRINGEMENT

Different countries have adopted different approaches to tackle copyright infringement in digital space. Copyright Act, 1957 lays down that when any person does anything which could potentially relate to exclusive rights given to the copyright holder without his authorization is said to commit copyright infringement.

Internet Intermediaries are exempted[36] from liability in India by virtue of the Information Technology Act, 2000.[37] It incorporates the safe harbour provision of the EU after *Shreya Singhal* v *Union of India*.[38] The Act however doesn't create the exemption in the favour of the copyright infringer. The Act states that the provisions do not aim to restrict the exercise of the exclusive rights under the Copyright Act, 1957.

Hence, if the provisions were harmoniously construed it would mean that ISPs or intermediaries could be held liable for copyright infringement. For the sake imposing the liability on the intermediaries, they are classified into two different categories –

1) Active Intermediary – These intermediaries play an active role in the hosting of content on their services and have actual knowledge of the content.
2) Passive Intermediary – These intermediaries do not play an active role in what type of content is hosted. The user has the discretion regarding the content.

The blanket exemption is given to passive intermediaries. If Section 52(1)(c) of the Copyright Act, 1957 which lays down the provision regarding the transient or incidental storage of the content with or without the authorization of the copyright holder with the intention to provide electronic links to facilitate access and Rule 75 of the Copyright Rules, 2013 are construed together, the basis so formed leads to the notice and takedown approach undertaken by the Courts.

The ISP can therefore block the access or take down the infringing content for 21 days till the complainant obtains a judicial remedy for the same from

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[36] Gautam Bhatia and Vasudev Devdasan, 'Online Speech and Intermediary Liability: The Delhi High Court's MySpace Judgment' (*Indian Constitutional Law and Philosophy*, 16 January 2017) <https://indconlawphil.wordpress.com/tag/copyright-2/> accessed 29 January 2022.

[37] Pratik P. Dixit, 'Dynamic Injunctions against Internet Intermediaries: An Overview of Emerging Trends in India and Singapore' (2020) 23 The Journal of World Intellectual Property 65.

[38] (2013) 12 SCC 73.

the Courts. The exemption from the liability doesn't extend when the intermediary has failed to comply with the notice and takedown.

The discourse around the intermediary liability & copyright infringement can be inferred from the issue of the extent of the remedies granted by the courts[39]. These remedies so granted have varied.

Bombay HC in *Balaji Motion Picture Ltd.* v *BSNL*[40] has taken a way of caution and held that taking down the whole website would be excessive in nature. The Court has held that the plaintiff should be specific in this regard as such relief would infringe the rights of the other stakeholders. Therefore, the plaintiff should seek the taking down of a specific URL and not the website as a whole. However, it is pertinent to note that, it is relatively easy to change the URL and host content. Hence, the infringement still exists.

VI. LIMITATIONS OF DYNAMIC INJUNCTIONS

Dynamic Injunctions is one of the most efficient measures to combat digital piracy.[41] It applies to the grey area where the rogue websites surface after the issuance of the order. The plaintiffs could implead the rogue website as a defendant under Order I Rule 10 of the Code of Civil Procedure, 1908. The court would then apply its judicial mind if the defendant, the rogue website, fits into the description of the requirements of a rogue website. If it does, the court shall adjudicate the matter thereupon and pass the interim order. However, this approach is flawed as this defeats the whole underlying idea of a dynamic injunction and makes it function like a typical John Doe Order. Therefore, this approach is flawed.

However, the decision in *Disney* v *KimCartoon.to*[42] wherein the Court has referred the matter of rogue websites to its Joint Registrar to adjudicate upon the conditions whether the pertaining rogue website falls under the conditions of rogue websites as laid down under the UTV case. If the Joint Registrar finds them to be rogue websites, it shall direct the ISPs to block those websites or take them down.

Previously, the Joint Registrar had the responsibility to identify whether the website was a rogue website or not i.e., whether the websites are mirror websites of the main website against whom the injunction has been granted. However, the order under *Disney* v *KimCartoon.to*[43] has given them the

[39] Pritika Rai Advani, 'Intermediary Liability in India' (2013) 48 Economic and Political Weekly 120.

[40] 2016 SCC OnLine Bom 6607.

[41] Shefali Chitakara, 'Role of Dynamic Injunctions' (*iPleaders*, 28 January2021) <https://blog.ipleaders.in/role-of-dynamic-injunctions/> accessed 13 February 2022.

[42] *Disney Enterprises, Inc. and Ors.* v *Kimcartoon.to and Ors.*, MANU/DE/1457/2020.

[43] *ibid*.

responsibility to adjudicate upon the identification and pass orders. Joint Registrar is purely an administrative body and therefore, such functions are out of the ambit. These kinds of situations ideally require the application of the judicial mind.

Moreover, dynamic injunctions in India usually follow the trend of blocking the website rather than blocking the specific URL of the website. This was highlighted in the decision of *Eros International Media Ltd*.v. *BSNL*[44] by the Hon'ble High Court of Bombay, where in Justice Patel had highlighted that due to various technological advancements, hybrid injunctions such as a combination of Anton Piller and Mareva Injunctions in so far combating the copyright infringement in digital space.

Moreover, the principle of proportionality as highlighted in *MySpace Inc.* v *Super Cassettes Industries Ltd*.[45] The balance between the right to have IP and the right to freedom of expression should be struck. If the balance is not struck while passing such orders, it violates the freedom of expression of the defendant. In addition to taking down the copyright-infringing content, the courts have generally adjudicated and passed the order of taking down the entire website instead of specific URLs which host the content.

The Court further held while refusing to grant Ashok Kumar Order that unless a high standard of care is exercised by the plaintiffs, sweeping orders such as plea for dynamic injunction or Ashok Kumar order cannot be granted.[46]

The judgment further elaborates the need for balancing. No right created by the law is absolute. Every right is subject to reasonable restrictions. In granting a dynamic injunction or Ashok Kumar order, the court has to exercise a certain standard of care so that public rights such as Freedom of Expression are not infringed by the order of the court.

The prayer of the copyright holder to block the website as a whole should not be granted but the prayer should be strictly specific to the URL which hosts the infringing content. In the exercise of protecting the rights of the copyright holder, the innocent third parties or ISPs would face losses if their hosting is taken off the internet over the night. Therefore, the need for balancing between the grant of such relief and the public rights has to be struck.

Although Delhi High Court has laid down certain parameters for the rogue websites to be identified, the dynamic injunction without any sort of parameters for the extent of its enforceability can be equated with the analogy of using rockets to kill an ant. Therefore, a balance should be made while

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[44] 2016 SCC OnLine Bom 10315.
[45] 2016 SCC OnLine Del 6382: (2017) 69 PTC1. (Del)
[46] *ibid*.

granting such an injunction since it is a nuclear weapon[47] to combat copyright infringement in digital space.

VII. CONCLUSION

Several parts of our daily lives have been touched by digitization. Over time, as technology has progressed, copyright laws have also evolved dramatically. Like many advancements, these emerging technologies are equally hopeful and potentially damaging to diverse parties involved in the usage and exploitation of works of authorship - ranging from music and literary works to web pages, series and movies.

The unlawful act of replicating, reproducing, or disseminating a work without the consent of the copyright owners is known as digital piracy, and it is a contravention of intellectual property law. Digital piracy has been growing exponentially due to the advancement in tech, especially in relation to personal computing where complex works could be done portably.

Copyright Act, 1957, provides for remedies in case of infringement for the plaintiff. The remedies can be civil, criminal and border enforcement. The provisions of the Act apply to the electronic and digital mediums in the same manner as they apply to conventional mediums. The concept of dynamic injunctions is relatively new. Dynamic injunction refers to the remedy where the plaintiff prays for the main injunction restraining the main website to extend to different domain names or websites that host the information that caused copyright infringement in the first place.

However, there are several underlying issues that relate to the enforcement of such dynamic injunctions such as procedural issues. Dynamic Injunction can be regarded as a nuclear weapon to combat digital piracy. Similar to a nuclear weapon[48], the after-effects such as infringement of the rights of the defendants in cases of excessive blocking. Therefore, there is a need to have a robust framework to create uniformity for the courts to grant such effective remedy. Unless a framework is in place, the discretion of courts could make this boon, a bane.

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[47] Mark A. Lemley and R. Anthony Reese, 'Reducing Digital Copyright Infringement without Restricting Innovation' (2003) 56 Stanford Law Review 1345.

[48] *ibid*.

SENTENCING POLICY: AN INVIGORATION THAT INDIAN CRIMINAL JURISPRUDENCE IS IN NEED

—*Prakhar Dubey**

Abstract—The rate of crime is increasing alarmingly and to cater to the need we require a just criminal justice system on which reliance can be placed upon. Presently, the Indian Criminal Justice System believes in the idea of sentencing and punishment but there have been many debates to decide what can be termed as just punishment as it heavily depends upon the judicial discretion of judges. This paper begins with an explanation of what is a sentencing policy with next in order is the explanation of the use of power in awarding punishment which totally depends upon the judicial reasoning and discretion that can lead to some person being faced with an irreparable injury. The author of this paper wants to basically talk about the context of India where we don't have a codified sentencing policy and why there is an urgent requirement for our legislature to draft such a policy concerning the same. India's reformative approach towards punishment has been discussed by the author in the later part of the paper followed by an argument that Model Prison Reform 2016 of the UK can be referred to for drafting Indian sentencing policy. The author has highlighted the doctrine of vagueness which is there in USA jurisprudence and Coroners Justice Act 2009 which is derived from English Jurisprudence from which reference can be taken for India. This paper also discusses the need for a sentencing council.

At last, the author has made an attempt to answer the question "does having a sentencing policy bring

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uniformity in punishment or not" and "what would be the results of lack of consistency in punishment as this may result in higher offences in future".

Keywords: *Sentencing, Punishment, Judiciary, Reformative, Criminal Justice.*

"*Imprisonment is a way of pretending to solve the problem of crime. It does nothing for the victims of crime, but perpetuates the idea of retribution, thus maintaining the endless cycle of violence in our culture.*"[1]

—Howard Zinn

I. INTRODUCTION

Punishment and sentencing are the benchmarks on which a criminal justice system is evaluated. It should encourage retribution, prevention, deterrence, and reformation[2] and should be proportionate to the crime committed. The just and proportionate punishment is regarded as the principle of 'Just deserts'. But deciding just and proportionate punishment is a herculean task for a judge in India as there is no codified policy prepared by legislature neither there are any set guidelines framed by the supreme court and the remaining attention is on retaining or abolishing the death penalty.

Presently, the Indian Penal code is the comprehensive penal law describing offences and prescribing their maximum and minimum punishment and resultantly the judiciary enjoys wide discretion in awarding punishment. This discretion has resulted in variations in punishment across the courts thus violating the right of fair conviction of the convicts.

The sentencing policy came to the glare of public through the case of *State of Punjab* v *Prem Sagar,*[3] wherein the Hon'ble Supreme Court acknowledged the absence and need of sentencing policy in India, and yet again in *Soman* v *State of Kerala,*[4] the Supreme Court went to say that the punishment is the

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1 Howard Zinn, *You Can't be Neutral on a Moving Train: A Personal History of our Times* (Beacon Press, 1994).

2 *Jacob George* v *State of Kerala*, (1994) 3 SCC 430.

3 *State of Punjab* v *Prem Sagar*, (2008) 7 SCC 550.

4 *Soman* v *State of Kerala*, (2013) 11 SCC 382.

weakest part of the criminal justice system in India as there are no legislative or judicially laid guidelines to assist in sentencing and punishment. A beam of light came in October of 2010 through the statement of Law minister M Veerappa Moily where he assured that the central government is working on a uniform sentencing policy.[5] Despite the cognizance by judiciary and lawmakers on sentencing policy even after a decade, it is still limited to discussions.

From the initial phase human species have been maintaining the law and order. If anyone breaks the law, they have to face repercussions in the form of punishment. Initially the punishment was seen to be applied in the strictest form but with developing society and social change the focus has shifted the idea of punishment is seen taking the shape of a reformative approach. The major aim behind bringing the reformative approach was to rehabilitate the offender. To establish the presence of the same, model prison Manual 2016 was released by the government. But still after a lot of efforts, the Indian Criminal Justice System seems to be very complex which raises many questions over the commitment of India towards human right initiative. A large part of criminal justice resolves around punishing someone for any act and for which there should exist the sentencing policy but still there is no sentencing policy as of now.

The very purpose of criminal law will become futile if it does not serve the purpose of human rights. It is important to ponder on the aspect for creating mandatory sentencing policy guidelines in order to stand on the line of a fair justice delivery system. There are instances where the judiciary have stated that the absence of the sentencing guidelines is resulting in uncertainty in the sentence which is awarded and the person who suffers the most is ultimately the victim. The author in this paper has tried to cover different facets revolving around the need of Sentencing Policy in India, the immediate need to adapt in our criminal justice system and what are the strong reason behind adapting this policy, this paper highlights the analogy between Coroners and Justice Act, 2009, from which lesson can transpired into Indian legal framework.

Drawing the inference from the Malimath Committee recommendation where they have raised concern on having statutory guidelines in the form of sentencing policy, Indian Penal Code (IPC) has, mentioned the part of maximum and minimum punishment for any offence but still it is the judge's discretion at last who decides the punishment leading to uncertainty in sentencing. The nature of judge is different like some can be kind but some can be very strict in adapting their approach while awarding punishment.[6] Even in

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[5] 'Govt for a Uniform Sentencing Policy by Court', *Zee News* (July 27,2021, <https://zeenews.india.com/news/nation/govt-for-a-uniform-sentencing-policy-by-courts_660232.html>.

[6] Garg Pooja, 'Shifting Trends in Burden of Proof and Standard of Proof: An Analysis of the Malimath Committee Report' Student Bar Review, Vol. 17, 2005, pp. 38–58. JSTOR, <http://www.jstor.org/stable/44290308> accessed 23 Nov 2022.

Madhav Menon Committee which came in 2008 have also highlight the need for having sentencing policy in India as it would lead to uniformity in sentencing and for which reference can be drawn from countries where they already have sentencing policy like US and UK.[7]

The instances where the judiciary have highlighted the need for sentencing policy like in *Soman* v *State of Kerala*[8] the court held that the theory of punishment is based on different factors like deterrence, proportionality, and rehabilitation all these factors need to be calculated in order to decide sentencing. The fact and circumstance become crucial factors in this case.

As per the court's proceeding which can be divided into 2 stages where firstly the court has to decide the liability and then finally award the punishment and as per which the court has to see the information about the accused carefully. Entire justice delivery system is a time- taking process that is why there is over-burden over the judiciary and cases takes more time than they should take ideally. The second stage of the proceeding, where the court has to finally decide the quantum of punishment, is often compromised by judges.

Taking the reference from the que *Modi Ram* v *State of M.P.*[9], in this case, the accused's wife married the victim and because of which accused cut off the nose and male organ of the victim. When the matter reached the trial court, they awarded the punishment of 1-year rigorous imprisonment as result of accused's action. When the matter went in appeal to the High Court, the court held sentencing for the accused to 8 years of rigorous imprisonment and the casual approach cannot be taken like trail court, Then the matter was finally heard by the Supreme Court where they reduced the sentence to 3 years of rigorous imprisonment. The apex court in this case has looked into the facts and circumstances of the problem to decide the nature of punishment as the act of the accused was done out of provocation. This instance clearly reflects the ambiguity in deciding the punishment and thus it is high time we formulate sentencing policy in India.

II. DOUBT REGARDING INFLUENTIAL FACTOR EXISTING WHILE AWARDING SENTENCE

Judges do get influenced by different factors and there can be "n" number of reasons for it. In the Malimath Committee report 2003 which based its recommendation on different factors for establishing a statutory committee for formulating sentencing policy which will be headed by the former judge of

[7] Hiremath Vijay, 'Draft Policy on Prison Reforms' Economic and Political Weekly, Vol. 43, No. 26/27, 2008, pp. 29–32. JSTOR, <http://www.jstor.org/stable/40278901> accessed 23 November 2022.

[8] *Soman* v *State of Kerala*, (2013) 11 SCC 382.

[9] *Modi Ram* v *State of M.P.*, (1972) 2 SCC 630.

Supreme Court or former Chief Justice of High Court where the other member comes from legal profession, police, social scientists and women representative. The idea to gather members from different fields is to gather collective idea on sentencing policy which is getting influenced and leading to different verdict by different courts. The Malimath Committee has also suggested for separate codification which can be specially made for formulating sentencing policy.

III. ON THE TOUCHSTONE OF CONSTITUTION

The sentencing policy is equally important from the constitutional perspective as it is important for the criminal justice system. Though the Indian Constitution has little to say about criminal justice. One significant provision is Article 20 of the Indian Constitution enshrines the principle of double jeopardy, self-incrimination, and protection against ex post facto law. Additionally, the right to fair and speedy trial became an unalienable right under Article 21 since the judgment of *Hussainara Khatoon* v *State of Bihar*[10]. Lastly, Article 14 in its succinct terms guarantees the right to equality before the law and equal protection of laws. The absence of sentencing policy encroaches upon the right to speedy and fair trial and the right to equality before the law.

A. Violation of Right to Equality before Law

The underlying principle of 'Equality before law' means that the equals must be treated equally while unequals must be treated differently. This applies to sentencing as well that the punishment in cases of similar facts and circumstances should be uniform and without variations and inconsistencies. Because of the absence of sentencing policy, the higher judiciary has either enhanced or reduced the punishment granted by the lower judiciary in a catena of cases which implies that with the change in the forum the application of the law has also changed which violates the right to equality before the law.

In *K.S. Muhammed* v *CCE,*[11] the supreme court substituted the sentence imposed by Kerala High Court of two months with a fine of 1 lakh to only fine 3.5 Lakhs. In another case of *State of M.P.* v *Kedar Yadav,*[12] the apex court reversed the decision of the Madhya Pradesh High Court and enhanced the punishment of one year and three months to three years. In *Santosh* v *State of Kerala,*[13] the court reduced the sentence from three years to already undergone, observing that one of the accused was given benefit of doubt and earlier the accused was never involved in any criminal activity. In *Bishnupada Sarkar* v *State of W.B.*[14]*,* the Hon'ble Supreme Court observed that a distinction has

[10] *Hussainara Khatoon* (4) v *State of Bihar*, (1980) 1 SCC 98.
[11] *K.S. Muhammed* v *CCE*, (2020) 13 SCC 159.(hereinafter "*Muhammed*").
[12] *State of M.P.* v *Kedar Yadav*, (2009) 17 SCC 280.
[13] *Santosh* v *State of Kerala*, (2019) 11 SCC 762.
[14] *Bishnupada Sarkar* v *State of W.B.*, (2012) 11 SCC 597.(hereinafter "*Sarkar"*).

to be made in the sentence awarded to accused of old age and other accused of young age and thus awarded the reduced punishment to convict which was sixty- five years old. In *Mohd. Maqbool Tantray* v *State of J&K*[15], the conviction of the accused was reached in particular based on the confessional statement and was awarded the rigorous imprisonment of five years but the Supreme Court observed that confessions are encouraged thus the quantum of punishment can be reduced.

In the aforenoted cases, the issue was only regarding the quantum of punishment, and to get the relief the cases had to appeal to the Supreme Court through a protracted trial which would not have been the situation if there was a codified sentencing policy. The cases though, set out as to what other factors can be considered while deciding the just punishment but the lacunae is that they are not formed into guidelines or a policy thus they have no usage in the trial courts.

B. Violation of Right to Speedy Trial

The aforenoted cases also demonstrate as to how the absence of sentencing policy encroaches upon the right to speedy trial. Justice RC Lahoti stated in *P. Ramachandra Rao* v *State of Karnataka*[16] that:

> *"Speedy trial would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision, and retrial — in short everything commencing with an accusation and expiring with the final verdict."*

The case of *K.S. Muhammed* v *CCE*[17] took thirty years, *Bishnupada Sarkar* v *State of W.B.*[18] took eleven years to reach a final verdict. Bizarrely in *Tantray case*[19] the accused was awarded imprisonment of five years but because of a long trial, the accused had gone imprisonment of more than eleven years with trial almost continuing for twenty years which tempted the supreme court to symbolically reduce the sentence to already undergone.

IV. DOCTRINE OF VAGUENESS AND SENTENCING POLICY

The roots of the doctrine of vagueness can be found in American Constitutionalism. This doctrine obligates the state to explicitly and definitely

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[15] *Mohd. Maqbool Tantray* v *State of J&K*, (2010) 12 SCC 421.
[16] *P. Ramachandra Rao* v *State of Karnataka*, (2002) 4 SCC 578.
[17] *K.S. Muhammed* v *CCE*, (2020) 13 SCC 159.
[18] *Bishnupada Sarkar* v *State of W.B.*, (2012) SCC 597.
[19] *ibid*.

state as to what conduct is prohibited and punishable in criminal laws.[20] The United States Supreme Court described various elements of vagueness in *Richard Grayned* v *City of Rockford* [21] as follows:

> *"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application*."

After the landmark judgment of *Maneka Gandhi* v *Union of India*[22], due process was introduced into Indian constitutional jurisprudence. Consequently, a procedure established by law has to be fair, just, and reasonable, not fanciful, oppressive, or arbitrary. The doctrine of vagueness is a corollary to due process of law. The Supreme Court of India discussed this doctrine in *Shreya Singhal* v *Union of India*[23] wherein Section 66A of Information Technology act, 200 was struck down on account of being vague. The doctrine of vagueness squarely applies to the sentencing policy. The dicta of the *Grayned v City of Rockford*[24], case provides two types of vagueness namely 'substantive vagueness' and 'procedural vagueness'. This squarely applies to sentencing policy. A codified sentencing policy by laying down standard procedure eradicates the procedural vagueness behind sentencing.

V. PROSTRATION OF PRIMARY PURPOSE

As per the Lombroso's theory which mentions that nobody in this world is born criminal and it is because of the society one becomes criminal and on this criteria punishment as a concept has evolved.[25] Punishment as a concept

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[20] *Vagueness Doctrine*, Cornell Law School (July272021 9.53 p.m. IST) <https://www.law.cornell.edu/wex/vaguenessdoctrine>.

[21] *Richard Grayned* v *City of Rockford*, 1972 SCC OnLine US SC 157: 33 L Ed 2d 222: 408 US 104 (1972).

[22] *Maneka Gandhi* v *Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.

[23] *Shreya Singhal* v *Union of India*, (2015) 5 SCC 1.

[24] 408 U.S. 104 (1972).

[25] Elisabeth Brookes, 'Cesare Lombroso: Theory of Crime, Criminal Man, and Atavism,' <https://criminologyweb.com/cesare-lombroso-theory-of-crime-criminal-man-and-atavism/>.

caters violence and it is justified by deterrence-effects on the society. The one of the best ways is to rehabilitate the offender. Thus, judges need to be more vigilant enough in deciding the nature of punishment as the excessive nature of punishment may defeat the purpose of law which is actually to rehabilitate the offender. On the other hand, there should not be a very liberal approach, we need to create a balanced mechanism. This can be implemented by accounting two factors. First is the immediacy of punishment and second is the consistency in the nature of awarding punishment. A need for structured guidelines should be better suited idea than having dependency on the court to seek remedy.

In *State of Punjab* v *Prem Sagar,*[26] where the Hon'ble Court has acknowledged that the apex court has seen there are large number of cases which shows anomalies in sentencing policy. Approximately 90% of the trial court cases are overturned when the matter is adjudged by the superior courts. This fact is enough to show that all this is the result of the absence of a uniform sentencing policy.

The existing sentencing policy is resulting in more cases as there are no guidelines as the parties involved in the case are not getting proper justification and they end up taking the matter in appeal to the Supreme Court and this delays the court proceeding where one has to wait for years to get their chance for hearing. This delay is causing in violation of Article 21 where an individual has right to speedy trial, this wait brings physical torture, bodily injury to person who is accused and is also mentally challenging.[27]

VI. A SHIFT TOWARDS REFORMATIVE APPROACH

A sentencing policy is not restricted to bringing uniformity in punishment and shifts the sentencing to reformative sentencing. At present, Section 53 of the IPC provides the kinds of punishment that could be given and they are death penalty, imprisonment, forfeiture of property, and fine. These punishments are deterring and preventive in nature but completely ignores the reformative approach. Expressing their idea on the reformative approach, Justice Krishna Iyer observed in *Narotam Singh* v *State of Punjab,*[28] that the reformative approach should be the object of criminal law in order to promote rehabilitation. Thus, new forms of Punishments are required that reflect reformative values. An initiative was taken in 1972 to introduce three new forms of punishment namely community service, compensation to victims, and public censure but the proposal was rejected.[29]

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[26] *State of Punjab* v *Prem Sagar*, (2008) 7 SCC 550: 2008 SCC OnLine SC 872.
[27] *Kartar Singh* v *State of Punjab*, AIR 1961 SC 1787: (1962) 2 SCR 395.
[28] *Narotam Singh* v *State of Punjab*, (1979) 4 SCC 505: AIR 1978 SC 1542.
[29] Law Commission of India, Report on The Indian Penal Code, Report No. 156, 29 (30-8-1997).

In 1997, the report by the law commission submitted that community service may not be practicable and will not amount to punishment.[30] But in 2003, Justice VS Malimath Committee highlighted the need for new forms of sentencing and suggested incorporating community service as an alternative to punishment considering certain restrictions like the age of the accused should be less than 18, punishment in the offence should be less than 3 years etc.[31] Again in 2007, NR Madhava Menon Committee backed the suggestion made by the Justice VS Malimath Committee and emphasised that new forms of punishment will be helpful in avoiding short-term imprisonment thereby resolving the problem of overcrowding of jails.[32]

Instantly, community service as a punishment is not alien to the Indian legal system. Juvenile Justice Act, 2015 recognises the community service order, for children found to be in conflict of law.[33] Further, courts have started utilising community service. In *Prahladbhai Jagabhai Patel* v *State of Gujarat,*[34] the supreme court gave community service as one of the conditions for bail. In *State v Sanjeev Nanda,*[35] the supreme court took a step ahead and held that serving the society may not be a punishment in a real sense but in community service, the convicts pay back to the community what they owe. It awarded the community service for two years and on default to undergo simple imprisonment for two years. In *Francis* v *State of Maharashtra,*[36] the Bombay High Court observed that the dispute between the parties was personal thus instead of punishment, the community service was granted. In another case of Bombay High Court where the accused were students, community service was awarded.[37] These cases reflect that even if there is no legislative provision for community service the courts have already accepted the community service. However, they are only granted considering the peculiar facts and circumstances of the case and thus they are not used in the trial courts, reason being the absence of statutory provisions.

VII. LESSONS FROM ENGLAND AND WALES

The judicial system in England and Wales is akin to the Indian judicial system. In England and Wales, the criminal cases start in the magistrates' court, but the more serious criminal matters are committed to the Crown Court.

[30] *ibid.,* 2.07.

[31] Ministry of Home affairs, Committee on Reforms of Criminal Justice System, 171-174 (30-3-2003).

[32] Ministry of Home affairs, Report of the committee on Draft National Policy on Criminal Justice, 17-19 (July 13,2007).

[33] The Juvenile Justice (Care and Protection of Children) Act, 2015, Section18, Act No. 2 of Parliament, 2016 (India).

[34] *Prahladbhai Jagabhai Patel* v *State of Gujarat*, (2020) 3 SCC 341.

[35] *State* v *Sanjeev Nanda*, (2012) 8 SCC 450.

[36] *Francis* v *Sate of Maharashtra*, 2014 SCC OnLine Bom 2777.

[37] *Ashutosh Vir Dhaval Meher* v *Abdul Rahim Juned Ahmed Ansari*, 2019 SCC OnLine Bom 6069,¶ 9 (India).

Appeals from the Crown Court will go to the High Court, and potentially to the Court of Appeal or even the Supreme Court.[38] Similarly, in India, criminal cases will start in the court of magistrate and serious matters are committed to sessions court then appeal lies to High Court and lastly to Supreme Court.

Till 2003, the courts in England and Wales were enjoying the same status like India, they were given wide discretion which led to inconsistency in punishment and sentencing. Considering the situation, in 1998 Sentencing Advisory Panel (SAP) was established and after five years Criminal Justice Act, 2003 was passed and a new guidelines council named Sentencing Guidelines Council (SGC) was established. Both SGC and SAP were working concurrently till 2009 but both committees were replaced by the Sentencing Council alongside the enactments of the Coroners and Justice Act, 2009.[39] The reason behind this development was the rising prison population. The same situation is at present faced by India. According to the CHRI analysis of the NCRB prison statistics, the prison population over the last five years has increased by 14.1 percent.[40]

The sentencing policy in England approaches uniformity in a rigid as well as flexible manner. It is rigid in the sense that the courts have to follow the guidelines but at the same time, courts can award punishment as per their discretion if it becomes necessary to meet the ends of justice. The lesson to be learnt from this is that sentencing policy is not meant to kill the discretion of the courts, instead it is to lay down a uniform procedure for sentencing.

Along with the codified sentencing policy, United Kingdom has an independent public body called the Sentencing Council. This council is responsible for developing sentencing guidelines, monitoring their use, analysing the impact of guidelines on sentencing practice, and publishing information about sentencing practice in magistrate courts and the crown court.[41] As a part of its duty, the, Sentencing Council has formed over 130 guidelines since 2010.[42] And in a recent development, it has consolidated the existing sentencing procedure law into a single sentencing act which came into effect from 1 December 2020.[43] The lesson is that the implementation of the sentencing policy requires

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38 'Structure of the Courts & Tribunal System',Courts and Tribunals Judiciary (July 27, 2021).

39 Julian V. Roberts, 'Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues, (76)1 Law and Contemporary Problems 1,25 (2013).

40 Aneesha Bedi, 'Delhi has 75% More Prisoners than Capacity, 69% of all Prisoners in India are Undertrials', The Print (July 27,2021, 10.32 p.m. IST) <https://theprint.in/india/delhi-has-75-more-prisoners-than-capacity-69-of-all-prisoners-in-india-are-undertrials/496211/>.

41 About the Sentencing Council,Sentencing Council (July 27,2021) <https://www.sentencing-council.org.uk/sentencing-and-the-council/about-the-sentencing-council/>.

42 'General Guideline for Offences without Specific Guelines', SENTENCING COUNCIL (July 28, 2021) <https://www.sentencingcouncil.org.uk/news/item/general-guideline-for-offences-without-specific-guidelines/>.

43 'Sentencing Code', Sentencing Council (July 28,2021)<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/sentencing-code/>.

rigorous toil and thus it is suggested that instead of putting the implementation of policy on the existing and already functioning body, a new independent body shall be formulated.

This Act introduced the change in England where a reformative approach was adopted where any sentencing will be very transparent. The important aspect that they introduced in their system is formation of a sentencing council which will works towards generating public confidence. This council comprise 14 members involving people those from non- judicial background. The Malimath Committee had also recommended such a committee which will work similar to the Sentencing Council like which is present in England.[44] A strict model prevents the court from sentencing which is outside the scope unless the situation demands so. The aim is to bring the consistency in our Criminal justice system approach while sentencing is getting diluted. In the light of recent changes, it becomes necessary to formulate the such guidelines which suits the purpose of justice delivery system.

The U.S. has a grid system with a restrictive approach while awarding sentences, but the Coroner Stone Justice Act, the model law for UK Act, never results in obstruction in judiciary. Looking at Section 125(3)(b) of the Coroner Justice Act Court must impose a sentence under the overall offence range and if the court crosses a certain margin, they have to assign certain reasons. The council should be accountable to introduce more well thought procedure for awarding sentences. It cannot be said that the English System is complete but still there is considerable utility in setting up commission as it reduces the burden of appeal in higher courts and this will result in consistent sentencing from the judiciary.

It is not the first time that voice is being raised to create a sentencing council. On considering the jurisdiction like India, the need for such a council becomes even more important in order to create national standards. A successful model which has worked for England can be adopted in India as it would create awareness regarding sentencing among the members of the legal profession. The problem regarding sentencing will continue to subsist if the action is not taken. The sentencing policy framework will ensure that people who are awarded sentencing need to be treated fairly so that even if the parties are unable to take their matter in appeal, they should not be prejudiced while they are facing sentencing. It will open the ends of justice in India to a large extent.

A. Does Sentencing Policy bring uniformity in Punishment?

Is sentencing policy worth it or it is just a much cry little wool? This question is the very soul of the discussion. The ideal result of a sentencing

[44] Edwards Ian, 'Sentencing Councils and Victims' The Modern Law Review, Vol. 75, No. 3, 2012, pp. 324–46. JSTOR, <http://www.jstor.org/stable/41682854.https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf>.

policy should be consistency and uniformity. Research conducted by Jose Pina-Sánchez and Robin Linacre assessed the usage of sentencing guidelines in the crown courts in cases pertaining to assault. The findings were that the variability in sentence lengths attributed to differences between courts is only 1.8 percent of the total and the majority of guidelines factors are treated consistently amongst courts.[45] This research thus proves the hypothesis that sentencing policy enhances consistency. It is pertinent to note that this consistency has been achieved within a decade and is expected to improvise in the long run.

B. Does Sentencing Policy reduce the Prison population?

The need for the sentencing policy was felt because of the rising prison population. In England and Wales, the prison population peaked in 2012 but since then it has been decreasing and came to its lowest in 2020 since 2006. The reasons are: decrease of prisoners serving sentences of four years or less, and decrease in the number of indeterminate sentenced prisoners.[46] However, there are other factors as well like the Covid -19 temporary release scheme, covid-19 impact on court functioning. In England and Wales, 59,000 prisoners were sent to prison in 2018 and the majority had committed a non-violent offence and almost half were sentenced to serve six months or less.[47] This statistic shows that sentencing policy doesn't have a considerable effect on reducing the prison population.

The reason behind this failure is the fewer usage of community sentences. As per the report by crest, there has been a staggering 78 percent decline in the number of community sentences from September 2011 to September 2016. The report noted that in 2016 only 100,000 community orders and 56,000 suspended sentences were given which if compared to 2006 it has seen a decrease in community orders and an exponential increase in suspended sentence orders. The report also answers the fewer usage of community sentences. It observed that 33 percent of offenders serving community orders are caught re-offending within the year of being sentenced.[48] This makes the judges and public lose their confidence in community order and makes them inclined towards granting imprisonment rather than community order.

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[45] Jose Pina-Sánchez and Robin Linacre, 'Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey', 53(6) The British Journal of Criminology 1118-1138 (2013).

[46] Ministry of Justice, 'Story of the Prison Population 1993-2020'(July 26,2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/930166/Story_of_the_Prison_Population_1993-2020.pdf>.

[47] Prison: The facts, Prison Reform Trust, 2-3 (July 27,2021) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Prison%20the%20facts%20Summer%202019.pdf>.

[48] 'A Study into the Use of Community Sentences in England and Wales', CREST, 26 (July 22, 2021) <https://static.wixstatic.com/ugd/b9cf6c_fe16050e0740464a897cfdf0b708435b.pdf>.

VIII. CONCLUSION AND RECOMMENDATIONS

In the last two decades, crime and preparators of crime have seen drastic change. Now, the younger population in large proportion is getting involved in committing less serious as well as heinous crimes. Undoubtedly, the remedy is not to put them behind the bars and expose them to the darkest world of crime, and turn them into habitual offenders. A serious effort is required to keep them away from prisons and at the same time reformatting them into law-abiding and asset citizens. Indian penal code is an eighteenth-century law and requires reconsideration with regard to its object. Though with amendments new offences have been added and the definition of existing offences have been changed. But nothing has been done till to its sentencing structure.

Sentencing concerns society, victims, and convicts. For convicts, it should be just and proportionate, for the victim it should be retributive and for society, it should be a way to reduce the crime rate. However, not a single objective is achieved by the present system. Offenders are turning into habitual offenders; crimes rates are rising steeply. The formation of sentencing policy will invigorate the Indian criminal jurisprudence. In recent times, an endeavour has been made in various common law jurisdictions to achieve uniformity in sentencing. Since 2014 after the address of Hon'ble Chief Justice Sundaresh Menon, Singapore has seen guidelines for offences such as drug trafficking, national service evasion, rape and drunk driving.[49]

Indian courts already recognise that may be provided in sentencing policy however the cognizance of which is only available to higher judiciary. As it is said the more justice dispensation is at the lower judiciary, the more accessible it is. By approaching uniformity and reducing variations, the sentencing policy will ensure that the trial courts are being treated with the same credibility and reliability alike to the higher judiciary.

The English model of sentencing policy has achieved great success. The sentencing policy has succeeded in ensuring consistency and has considerable things to be adopted. For proper implementation, India will require a sentencing council on the lines of the Sentencing Council of the United Kingdom. However, the concept of suspended sentences should not be adopted considering its negative effect on community service. For community services, they should be formed in a way that they are rigorous so that it, in real sense doesn't appear to be less than a punishment. In the United Kingdom, community services include charity work, removal of graffiti, renovating derelict areas, clearing wasteland, decorating public places, and litter picking.[50] But

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[49] 'Sentencing guidelines in Singapore', IRB Law (July 27, 2021, 1.00 p.m. IST) <https://irblaw.com.sg/learning-centre/sentencing-guidelines-in-singapore/>.

[50] What Counts as Community Service in the UK', Bray & Bray (July 29,2021, 2.03 p.m. IST) <https://www.braybray.co.uk/what-counts-as-community-service-in-the-uk/>.

community service can be given considering the nature of an offence. As an example, a person convicted of animal cruelty may be awarded community service at an animal shelter.

In the present time, rate of crime has been increasing alarmingly and the Indian Criminal Justice system has to take urgent steps to formulate the sentencing policy. It cannot be too rigid as the main agenda is to subtract the judicial subjectivity which depends upon the punishment decided by different judges. The idea of having sentencing policy is to work towards a just and equitable society where rights of both convicts and victim rights are preserved in the current context. The reference point can be taken from the Coroners and Justice Act, 2009 to formulate such a structure in India. Law should work according to the needs of the society. A proper mechanism is needed to balance the rights of both the victim and the convict.

To sum up, let the punishment be decided by a standard procedure, not by the perception of judges which changes with courts. Let's reform the penal system from penalising to reforming.

ABC V STATE OF MAHARASHTRA: THE WAY FORWARD FOR REPRODUCTIVE AND DECISIONAL AUTONOMY

—Toshita Joshi & Shishir Kumar Rai***

Abstract—The Medical Termination of Pregnancy Act, 1971 was introduced to ensure safe and legal access to abortion facilities for women. The Act, while being a significant legislation, has several impediments in form of insufficient infrastructure, lack of privacy, and below par awareness. The case comment deals with an appeal against the decision of Medical Board which denied abortion facility to the Petitioner on the ground that the gestation period was beyond 24 weeks despite the fact that the foetus has severe abnormalities. The authors briefly deal with the introduction and the facts of the case and delve into the in-depth analysis of the judgement. The authors emphasize on the reproductive choices of a woman which have been traced as a facet of personal liberty and dignity under Article 21 of the Indian Constitution. Through the case note it is highlighted that the socio-economic, mental and physical state of the woman is to be taken into account before reaching the decision by the Medical Board and the courts. Furthermore, it is observed that the report of the Medical Board is not binding and it is the duty of the court to apply its judicial mind while dealing with such cases. The authors further underscore that there should be purposive and not literal interpretation of beneficial legislations and effort should be to widen the gambit of rights available to the citizens in the light of a transformative constitutionalism.

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Keywords: Purposive Interpretation, Advanced Gestational Period, Reproductive Autonomy, Transformative Constitutionalism, Privacy, Decisional Autonomy.

I. INTRODUCTION

"Justice may have to be blindfolded; it can never be allowed to be blind sided."

The MTP Act, 1971 was introduced by the Parliament as a "health," "humanitarian," and "eugenic" measure.[1] The overall objective of the MTP Act is to provide women with access to safe and legal medical abortions. Therefore, the MTP Act is primarily a beneficial legislation. The MTP Act's introduction declares that it is a law aimed at allowing registered medical practitioners to terminate specific pregnancies and health related issues. The Act outlines specific criteria that must be met to carry out an abortion, such as identifying who can perform the procedure, the situations where it is allowable, and the locations where it can be conducted.[2] Recognizing the detrimental effects of unsafe and unlawful abortions, the MTP Amendment Act 2021[3] was designed to enhance women's access to safe and legal abortion care. This was accomplished by easing certain restrictive aspects of the original MTP Act and increasing the permissible gestational period for abortions from twenty to twenty-four weeks. The objective was to improve the availability and quality of lawful abortion services for women, addressing the significant social problem of risky and illegal abortions. Thus, now the scheme of the Act is such that it permits terminating a pregnancy that is under twenty weeks in duration or, in specific circumstances, under twenty-four weeks for certain groups of women.

Despite the implementation of the MTP Act, several obstacles persist, hindering women's ability to access safe and legal abortions, resulting in them turning to risky and illegal abortions. These obstacles include inadequate infrastructure, insufficient awareness, social stigma, and the failure to ensure confidential care. When assessing whether continuing a pregnancy would pose a serious threat to the physical or mental health of the pregnant woman, her current or anticipated circumstances can be considered, as stated in Section 3(3)[4] of the MTP Act.

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1 *X* v *Health & Family Welfare Deptt*., 2022 SCC OnLine SC 1321.
2 *X.* v *Health & Family Welfare Deptt.* supra note 1.
3 The Medical Termination of Pregnancy (Amendment) Act, 2021 (No. 8 of 2021).
4 The Medical Termination of Pregnancy Act, 1971, S. 3(3).

II. FACTS OF THE CASE

The Petitioner underwent a sonography and a foetal anomaly scan at 14 weeks which showed normal results. However, a follow-up scan at 29 weeks revealed multiple anomalies in the foetus, including microcephaly (Microcephaly is a birth defect in which a baby's head is smaller than expected, often leading to smaller and improperly developed brains) and lissencephaly (Lissencephaly, a rare gene-linked brain malformation that causes an abnormally small head and lack of normal folds in the cerebral cortex, and may lead to symptoms such as seizures, psychomotor retardation, and deformities in the hands, fingers). Despite mild uteroplacental insufficiency, a Medical Board denied the request for a medical termination of pregnancy due to the advanced gestation period, although the possibility of intellectual disability was acknowledged. It is this recommendation of the Medical Board which has been challenged before the Hon'ble High Court of Bombay.

The petitioner contends through her counsel that her husband and she would not be able to provide additional care and meet the expenses of an infant born with such conditions owing to their financial problems. According to the learned counsel for the petitioner, if a medical report confirms that there are significant abnormalities in the foetus, the time limits of up to 20 weeks and less than 24 weeks, and beyond 24 weeks, do not apply. She therefore prays that the Hon'ble Court permits termination of the pregnancy. The Hon'ble Court after hearing the submissions acknowledged the right of the petitioner and allowed her to terminate the pregnancy.

III. ANALYSIS OF THE JUDGMENT

The court decided that because there are serious foetal abnormalities and the mother is not willing to continue the pregnancy to the term due to her socio-economic problems, the Medical Board cannot overlook these facts. It held that if there is a severe foetal abnormality, the length of the pregnancy is immaterial in cases of termination.

A. Overlooking of Sec 3 (2b) of the Acts

Firstly, analyzing the pregnancy of a married adult woman, the court reiterates the provisions of Section 3 (2B) which states-

> "*The provision of sub-sections (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.*"[5]."

[5] The Medical Termination of Pregnancy Act, 1971, S. 3(2-B).

The law states that for certain categories of women who are between 20 and 24 weeks pregnant, it is required to obtain the good-faith opinions of two medical practitioners. These opinions must evaluate the potential risk to the woman's life or the likelihood of serious injury to her physical or mental health, as well as the likelihood of the child being born with significant physical or mental abnormalities. Thus, the broad ingredients to be considered by the Medical Board are as follows:

If there is a substantial foetal abnormality; and

If the medical termination is safe on an assessment of the mother's mental and physical health.

Section 3(2B) is designed to cater for circumstances where the uncertainties inherent in pregnancy and parturition may unexpectedly confront a woman with a choice that she did not anticipate, even in planned pregnancies. The court further observed that once the two essentials are satisfied, the Medical Board is not to venture beyond these and render its opinion on whether the termination should be performed or not, and certainly not on account that the abnormal conditions of the new born could be treated - even if for free - solely on the basis of the length of the pregnancy.

The NINDS, which is a component of the US Government's National Institutes of Health, reports that a significant number of individuals with lissencephaly pass away before reaching the age of ten. The Petitioner's foetus has been diagnosed with both microcephaly and lissencephaly, which suggests an unfavorable outcome. It is highly unlikely that the baby will be born without abnormalities or be able to live a normal, healthy life. Unfortunately, the Medical Board has failed to consider this crucial information.

B. Tracing the Right to Reproductive & Decisional Autonomy

The court observes that the right of women to make reproductive choices is a dimension of personal liberty under Article 21.[6] From the right of reproductive autonomy, originate a bundle of rights like the right to access reproductive education or contraceptives, right not to procreate. Emphasizing on the fact that reproduction is both- "*biological and political*"[7], the autonomy to have or not have abortion is a result of complex set of circumstances and only the woman, not the societal factors finding strength through legal impediments, must decide the ultimate outcome.

Decisional autonomy forms an ingredient of the broader right to privacy. It refers to the ability of an individual to make choices with respect to his

[6] *Suchita Srivastava* v *Chandigarh Admn*., (2009) 9 SCC 1.

[7] *X* v *Health & Family Welfare Deptt.* supranote 1.

intimate relations[8]. The Court in Puttaswamy[9] has observed that the personal dimensions of an individual such as family, marriage, procreation, and sexual orientation are essential to their dignity. Privacy being an essential element of the dignity allows an individual to fully realize the rights of life and liberty.[10]

The women have the right to take decision and select the path of their lives. The unwanted pregnancy which the woman is made to carry till birth not only adversely affect her physical health, but may have tragic consequences for her mental well-being by imposing an obligation to which she never had the consent. Furthermore Art. 21[11] recognizes and protects the right of a woman to undergo termination of pregnancy if it poses any danger to her mental or physical health.

Mental health cannot be given a medical interpretation but should be seen in colloquial language. The Act itself recognizes the need to look at the surrounding environment (social, financial and other consequences) of the woman when interpreting injury to her health. By refusing to allow the Petitioner to terminate the pregnancy only on the tenuous ground of delay, the Court would be guilty of compelling the mother to a coerced parenthood, stealing not only her joy of being a mother by choice but her bodily integrity, her reproductive and decisional autonomy and escalate her mental trauma.[12] Further, the Court would be denouncing the foetus to an inferior life.

C. Purposive Interpretation & Transformative Constitutionalism

The fundamental principle in interpreting statutes is to ascertain the legislative intent with which it was introduced. The legislature's intent can be deduced by examining the words used in the statute and determining the purpose or aim of the law, the problem it seeks to solve, and the remedy it intends to provide.

Gajendragadkar, J observed in *Kanailal Sur* v *Paramnidhi Sadhu Khan*[13] that "*when the words of the provision are capable of bearing two or more constructions, they should be construed in light of the object and purpose of the enactment. The purposive construction of the provision must be "illumined by the goal, though guided by the word.*"

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8 *X* v *Health & Family Welfare Deptt.* supranote 1.
9 *K.S. Puttaswamy* v *Union of India*, (2017) 10 SCC 1.
10 *K.S. Puttaswamy* v *Union of India* supranote 10.
11 Constitution of India, 1950, Art. 21.
12 *High Court on its Own Motion* v *State of Maharashtra*, *Sidra Mehboob Shaikh* v *State of Maharashtra*, 2021 SCC OnLine Bom 1839.
13 *Kanailal Sur* v *Paramnidhi Sadhu Khan*, AIR 1957 SC 907.

While interpreting a beneficial legislation, it is important to use a purpose-oriented approach in interpreting its provisions.[14] A liberal interpretation should be given to the Act to advance its objectives. Being a beneficial legislation, MTP Act requires purposive interpretation of the provisions of the MTP Act and the MTP Rules in a way that aligns with the intent of the legislature.[15]

Transformative constitutionalism as seen in Navtej Singh Johar[16], seeks to interpret the Constitution in the light of changes in society promoting the inherent goals of the Constitution. Purposive interpretation in this light aims to interpret the statute in a manner consistent with this transformative objective promoting ideals of social justice and human dignity. Upholding that "*Justice may have to be blindfolded; it can never be allowed to be blindsided*", the court acknowledged the Petitioner's social and economic condition and opined that it was a conscious decision made by her and the Medical Board cannot intervene while the Petitioner exercises her reproductive rights.

IV. DUTY OF REGISTERED MEDICAL PRACTITIONERS AND COURTS

The MTP Act is oriented towards providers, meaning that access to abortion for women is contingent on the approval of a registered medical practitioner (RMP)[17]. As a result, if an RMP refuses to provide services, women are compelled to either approach the courts or seek unsafe abortion alternatives. This underscores the provider's role in determining whether a woman can obtain a legal abortion and places the burden of responsibility on them rather than on the woman's right to access safe and legal abortion care[18]. It is the duty of the RMP to act in the woman's best interest and ensure that they are sensitive towards her concerns, and keeping in mind the physical as well as mental well-being of the patient.

The principle that the courts are not limited to the evidence of an expert, whose opinion is merely advisory in the character, is established beyond doubt.[19] It is for the Court to reach on its own decision after going through the documents, and the protocols.[20] An opinion of the expert or RMP is merely to enable the Court to form an opinion by testing the facts of the case to that anvil. Hence, it is ultimately for the Court to decide whether any such opinion

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[14] *Kerala Fishermen's Welfare Fund Board* v *Fancy Food*, (1995) 4 SCC 341, *Bharat Singh* v *New Delhi Tuberculosis Centre*, (1986) 2 SCC 614: (1986) 2 LLN 4, *K.H. Nazar* v *Mathew K. Jacob*, (2020) 14 SCC 126.

[15] *X* v *Health & Family Welfare Deptt. supra* note 1.

[16] *Navtej Singh Johar* v *Union of India*, (2018) 10 SCC 1.

[17] *X.* v *Health & Family Welfare Deptt. supra* note 1.

[18] Dipika Jain, 'Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach', 12 NUJS Law Review 2 (2019).

[19] *Maharaja Agrasen Hospital* v *Rishabh Sharma*, (2020) 6 SCC 501.

[20] *Maharaja Agrasen Hospital* v *Rishabh Sharma*, *supra* note 19.

by a RPM should be accepted, and if yes, then how much weight should be attached to it.

A. Harmonizing International and Municipal Obligations

India is party to the Convention on the Elimination of All Forms of Discrimination (CEDAW) against Women. It obligates the parties to take steps for eliminating discrimination against women in fields such as health care services related to family planning, pregnancy, confinement, and post-natal period. It also urges the Parties to eradicate all forms of discrimination against women, and allow them the same right to decide freely and responsibly about their reproductive choices. The UN Committee on the Elimination of Discrimination Against Women also urges the Parties to take essential measures to eradicate discrimination against women with regards to access of health-care services in areas of family planning and pregnancy. Article 47[21] of the Indian Constitution directs the state to improve public health.

Thus, through this judgement, the MTP Act is harmonized with India's international obligations and the principles enshrined in the Indian Constitution to holistically ensure that the rights of women are fully realized.

V. CONCLUSION

This judgement resonates with "*Justice must not only be done, but must also be seen to be done.*"[22] The importance of decisional and reproductive autonomy cannot be overstated for these are the fundamental basis which allow the women to make choices about overall well-being. Respect for such autonomy strengthens women's ability to exercise control over their bodies and lives, thereby promoting their dignity and agency. It is necessary One cannot foist blind application of the statute but must pay regard to the physical, mental and socio-economic conditions of the woman. Unlike USA, where it was recently held that abortion is not a constitutional right by overruling *Roe* v *Wade*[23], India has always maintained the stance that reproductive autonomy is an inseparable part of Art. 21 of the Constitution. We celebrate the motherhood of a woman in India thus robbing her of reproductive autonomy cannot be allowed as it would stagnate the existing rights.

The law is the balancing pivot and is the fabric on which in accordance to values of the society a pattern of behaviour is prescribed. Society as a living organism needs the Courts to interpret these patterns so as to bring them in consonance with changing realities of the society, and not remain enrooted in traditional understanding. This judgment furthers the progressive stance of Indian Courts towards reproductive autonomy and it must be welcomed for the same.

[21] Constitution of India, 1950, Art. 47.
[22] *R.* v *Sussex Justices*, (1924) 1 KB 256.
[23] *Roe* v *Wade*, 1973 SCC OnLine US SC 20: 35 L Ed 2d 147: 410 US 113 (1973).

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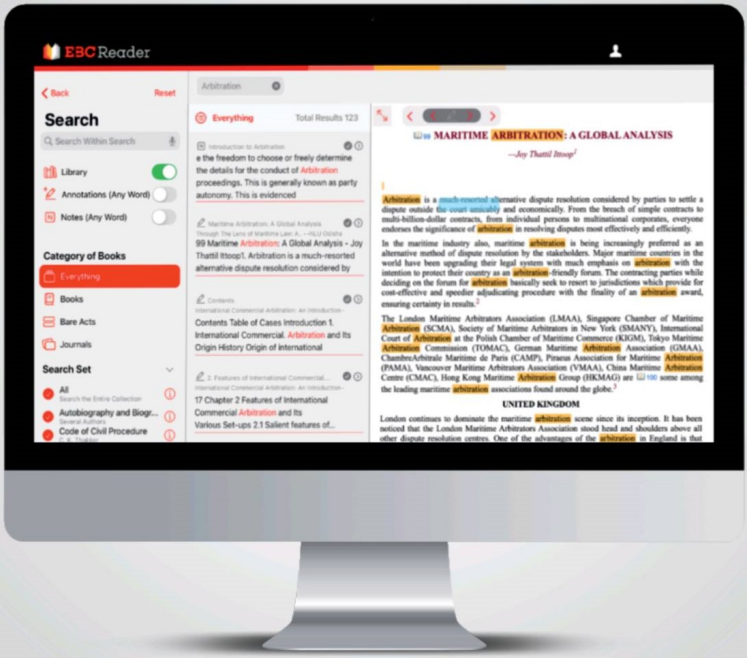

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