

Copyright Protection of Artificial Intelligence Works: *An Indian Perspective*

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Abstract

High-speed internet, peer-to-peer networks, excellent technological wherewithal, energizing and speedier communication facilitation, and rapid reproduction without loss of quality with minimum cost, have significantly impacted the future of copyright protection all over the globe. Though the traditional notion of copyright remains the same i.e., protection from piracy, however, the mode of operation has and is undergoing a systematic change in the wake of technology. The ubiquity of the internet coupled with various technical obstacles has made it extremely difficult for copyright holders to locate and implicate the infringer/s, which in many cases may be in different parts of the world. With the advent of artificial intelligence, the creation of copyrighted subject matter by machines with very little or no human intervention is potentially raising questions as to the authorship of such works. Against this backdrop, this article presents an analysis of the phenomenal impact of digital technologies on the copyright regime, its advantages and disadvantages, the protection of rights of copyright holders the liabilities of intermediaries, etc. Further, this article shall also explore the digital copyright laws available in India to combat the myriad challenges posed by the ever-advancing digital technology and to find out their sufficiency.

Keywords: *artificial intelligence, digital dissemination, Generative AI, idea-expression dichotomy, Digital Rights Management (DRM)*

1. Introduction

The increasing sophistication and proliferation of artificial intelligence has given rise to a provoking question in copyright jurisprudence: Who is the copyright owner of a work created by autonomous artificial intelligence? In other words, when a machine learns, thinks, and acts without human input and it creates a work, what person should own the copyright, if any?¹

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¹ Victor M. Palace, What if Artificial Intelligence Wrote it? Artificial Intelligence and Copyright Law, 71 Fla.L. Rev 217(2019) available at:

<http://www.HeinOnline/>

In this digital age, where everything is available in one place, to everyone, always, the vulnerability of copyrighted works has increased manifold. With high-speed internet, peer-to-peer networks, excellent technologies facilitating rapid reproduction without loss of quality, fast and easy dissemination, and high-density storage devices, copyright violation is becoming an effortless task.² Though the traditional notion of copyright remains the same i.e., protection from piracy, however, the mode of operation has and is undergoing a systematic change in the wake of technological development. The performance of rights in a typical analogous copyright set-up is extremely different from the performance of such rights in a digital platform.³ Martin Kretschmer, for example, hypothesized a radical subversion of copyright law within a generation. He argues that the current legislation (American, European, and International) is counterproductive and ineffective, because it hinders the diffusion of culture and information, whereas it should enhance it – and indeed repeatedly claims this in its declaration of intents. The author puts forward his vision:⁴

Within a generation [...] copyright laws will change, to be unrecognizable. There will be a short burst of exclusivity, encouraging fast exploitation, followed by a remuneration right for the lifetime of the creator. Criminal law will retreat to the traditional domain of unauthorized or deceptive commercial exploitation. As we reflect, digital copyright at the turn of the millennium will have marked the end of an era.

2. Artificial Intelligence and Copyright Parameters

Copyright protection owes its development to the printing technology some centuries back and in a way had to grapple with technology right from the word go. The interplay of copyright law and technological intervention has remained the burning topic requiring serious debate and discussion.⁵ Digital technology has largely moulded and folded copyright protection in many ways than one.⁶ The basic concept of authorship of a copyrighted work in the technological spree is under threat and possibly may be invisible in the presence of artificial intelligence manoeuvring⁷.

² Mathur, Alankrita, A reflection on digital Copyright Law in India, NISCAIR-CSIR-INDIA, 2020.

³ Hombal, S. G., & Prasad, K. N. (2012). Digital copyright protection: Issues in the digital library environment.

DESIDOC Journal of Library & Information Technology, 32(3).

⁴ See M Kretschmer, 'Digital Copyright: The End of an Era', 25(8) EIPR 333–41, 341.

⁵ Litman, J. (2020). Revising copyright law for the information age. On *The Internet and Telecommunications Policy* (pp. 271-296). Routledge.

⁶ Selvadurai, N., & Matulionyte, R. (2020). Reconsidering creativity: copyright protection for works generated using artificial intelligence. *Journal of Intellectual Property Law & Practice*, 15 (7), 536-543.

⁷ Sun, H. (2021). Redesigning copyright protection in the era of artificial intelligence. *Iowa L. Rev.*, 107, 1213.

Complex Artificial Intelligence (“AI”)-systems can generate original works as if they were human, yet with little or no human intervention.⁸ The doctrine of originality of a copyrighted work seems to be a thing of the past because of the ever-increasing footprints of techno-legal indulgence. The rapid advances in artificial intelligence are calling into question some of the fundamental assumptions upon which intellectual property law rests. Currently, the European framework of copyright law does not take non-human innovation into account. Meanwhile, advances in artificial intelligence are quickly making machine generation of creative works a reality. Institutions of the European Union have recently explicitly addressed the need to clarify the legal implications of advancements in artificial intelligence.⁹ In this regard, two vital questions remain as to whether works co-created or independently created by artificial intelligence systems are eligible for copyright protection under current EU copyright law. And to whom, if anyone, should the rights to works entirely generated by artificial intelligence systems be allocated?¹⁰

For a long time, mankind assumed that only humans could create literary and artistic works. With developments in the field of AI giving birth to a new kind of algorithmic creator in the realm of cultural creativity, this assumption no longer seems valid.¹¹ Today robots are capable of mimicking works of art, such as literature, music, and paintings. The technology enabling their creative functions is becoming more and more advanced¹². Instead of relying on human instructions, contemporary AI systems have become increasingly independent by mimicking human traits, such as reason, creativity, and learning.⁷ AI authors are thus capable of cultural creation, on their own, allowing for broad-scale production of cultural objects whose eye and ear often fail to distinguish from human creation.¹³

⁸ Kasap, A. (2018). Copyright and Creative Artificial Intelligence (AI) Systems: A Twenty-First Century Approach to Authorship of AI-Generated Works in the United States. *Wake Forest J. Bus. & Intell. Prop. L.*, 19, 335.

⁹ Bøhler, H. M. (2017). *EU copyright protection of works created by artificial intelligence systems* (master’s thesis, The University of Bergen).

¹⁰ Yanisky-Ravid, S., & Velez-Hernandez, L. A. (2017). Copyrightability of Artworks Produced by Creative Robots, Driven by Artificial Intelligence Systems, and the Concept of Originality: The Formality-Objective Model. *Minnesota Journal of Law, Science & Technology*,

¹¹ See for example: S. Yanisky & S. Moorhead, “Generating Rembrandt: Artificial Intelligence, Copyright and Accountability in the 3A Era”, *Michigan State Law Review* (2017), 659 (662); A. Bridy, *The Evolution of Authorship: Work Made by Code*, *Columbia Law Journal & Arts* 39 (2016), 395 (397); W.T. Ralston, “Copyright in Computer-Composed Music: HAL Meets Handel”, *J. Copyright Society U.S.A.* 52 (2005), 281 (283).

¹² D. Gervais, “The Machine as Author”, *Iowa Law Review* 105 (2020), forthcoming, Vanderbilt Research Paper No. 19-35, 2-4; J.C. Ginsburg & L.A. Budiardjo, “Authors and Machines”, *Berkeley Technology Law Journal* 34 (2019), 343 (395-396);

¹³ J.-M. Deltorn, “Disentangling deep learning and copyright”, 2018, 172 (173-174); R. Pearlman, “Recognizing Artificial Intelligence as Authors and Investors under U.S. Intellectual Property Law”, *Richmond Journal of Law and Technology* 24 (2018), 1 (4); Yanisky & Moorhead, *supra* note 10, 670.

3. Human Creativity Requirement

The human authorship requirement raises questions regarding robot creations. Especially when robots start operating more independently, making their choices less predictable and foreseeable to either their users or programmers, human involvement in the process of creation becomes more difficult to identify.¹⁴ If, for that reason, robot creations are deemed ineligible for copyright protection, they automatically enter the public domain where everybody can use, enjoy, and exploit them freely. One of the many areas wherein AI has raised tough questions is ownership and enforcement of intellectual property (IP) rights. For example, while generative AI tools such as ChatGPT and Midjourney allow people with minimal creative skills to produce reasonably beautiful outputs with the help of a couple of text prompts, their use has raised several copyright-related questions. These include whether the use of copyrighted materials, including texts and images, as training data, infringes the rights of millions of authors and artists on the Internet. A related query revolves around copyright ownership over output generated by AI, autonomously or with inputs from humans.¹⁵ There needs to be a cautious approach to extending existing IP protections to work generated by Artificial Intelligence.¹⁶ In *Us, Fundamentally*, the term ‘author,’ used in both the Constitution and the Copyright Act, excludes nonhumans”. The office also clarified that copyright applicants had a duty to disclose the inclusion of AI-generated content in any application, followed by detailed guidelines on doing so in registration forms.¹⁷ According to the US SC in the nation to address the issue, only human beings—and not robots, computers, or other machines—can be “authors” of copyrightable works. In *Thaler v. Perlmutter*, the federal district court for the District of Columbia ruled in favour of the U.S. Copyright Office, which had denied the copyright application of the owner of an artificial system who claimed that the system had created the artwork in question “without any human involvement.”¹⁸

4. Doctrine of Originality

The two requirements that play a role in determining what constitutes a copyrightable work as per the recognized law, are “originality” and the act of

¹⁴ See for example: S.J. Russell & P. Norvig, *Artificial Intelligence: A Modern Approach*, Upper Saddle River: Pearson Education 2010, 9 (arguing that a robot’s ability to learn may extend the reach of its designer into unknown environments); Yanisky & Moorhead, *supra* note 10, 670 (arguing that AI systems are creative and unpredictable).

¹⁵ Arul George Scaria, *AI and the issue of human-centricity in copyright law*, November 2, 2023, the Hindu available at: <http://www.thehindu.in/>

¹⁶ *Ibid*

¹⁷ *Thaler v. Perlmutter*, No. 1-22-cv-01564, 2023 WL 5333236, (D.D.C. Aug. 18, 2023)

¹⁸ Reinharl, *Only Humans Can Be Authors of Copyrightable Works*, available at: <http://www.reinharl.com/>.

fixation “in any tangible medium.”¹⁹ About works generated by or with the help of a computer, the act of fixation does not pose problems. Robots can write on paper, paint on canvas, and create audio files of music. More interesting issues arise from the originality requirement. As the US Copyright Act does not define “originality” more precisely, the conceptual contours of this requirement must be deduced from the Supreme Court’s case law.²⁰ In India, for a work to be protected under the copyright law, it is imperative to ensure that such is an original work and is not copied from any other work of any other person. Such a right is granted to original works since one has the right of protection over the work completed through one’s efforts. It is important to note that regarding *R.G. Anand v. Delux Films & Others*²¹ there can be no copyright in an idea or subject matter but only in the arrangement and expression of such an idea. It is not even necessary that the work involves a novel expression of a thought. All that is required for originality of expression is that the expression should not be copied from another work. Thus, the work should be composed by the author independently.²² The determining factors for ascertaining the originality of a copyrightable work can be, the sweat of the brow test²³, modicum of creativity test²⁴, skill and judgment test²⁵.

The basic requirements are to retain a robust public domain facilitating further creativity in the copyright context, the major requirements are originality in the expression of the copyright content and the mandatory exclusion of ideas,

¹⁹ Section 102 of the US Copyright Act provides that copyright is present: “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

²⁰ See for example: US Supreme Court 27 March 1991 (*Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*), 499 U.S. 340 and US Supreme Court 17 March 1884 (*Burrow-Giles Litographic v. Sarony*), 111 U.S. 53.

²¹ *R.G. Anand v. Delux Films & Others*, AIR 1978 SC 1613

²² Understanding The Concept of Originality Under Copyright Law in India By Robbin Singh, Law Mantra Think Beyond Others (International Monthly Journal, I.S.S.N 2321 6417) Journal.lawmantra.co.in/

²³ This test was originally propounded in

University London Press v. University Tutorial Press

[1916 2 Ch 60] based on the principle Coined by the privy council in the case of

Macmillan & Company Ltd. v. Cooper [1924 BOMLR,292]

, which conferred copyrights on work because time, energy, skill, and labour were expended (i.e., originality of skill and labour).

²⁴ The U.S. Courts developed this approach through the case of *Feist Publications Inc. v. Rural Telephone Service Co.* It acknowledges that not every effort or industry, or expending of skill, results in copyrightable work, but only those activities which create works that are somewhat different, involve some intellectual effort, and involve a certain degree of creativity. [*Burlington Home Shopping v. Rajnish Chibber*, 61 (1995) DLT 6]

²⁵ To ascertain this, the author should have applied his ‘skill and judgment’ in creating the work and such work should have the minimal element of creativity thereby leading the work to be original.

facts, themes, and plots from copyright coverage. The very minimal originality requirement is to exclude further propitiation of already available information/creations. Ideas, facts, themes, plots, etc., on the other hand, aim at the exclusion of building blocks from protection. The Indian jurisprudence which could be deduced from the judicial pronouncements can be a safer area to reckon with.²⁶

5. Idea Expression Dichotomy

The idea-expression dichotomy was originally formulated to ensure that the manifestation of an idea is protected rather than the idea itself. Created to stimulate creativity while at the same time ensuring that such creativity is protected.²⁷ An idea is always in an abstract form, which cannot be demonstrated in physical form unless given an expression discernible through the naked eye. But in the case of software technology, it is relatively difficult to ascertain where the idea and expression become distinguishable. Thus, through the doctrine of merger courts determine the copyrightable digital copyright²⁸. Copyright protection in modern times has become most vulnerable and susceptible to copyright infringement courtesy of the internet and ICT technology which has made its duplication quite easy and almost free of cost.²⁹

The idea-expression doctrine has become quite cognisant with the Indian milieu and courts have largely adopted and implemented it as a reality though it has yet to get properly theorised.³⁰ Demonstration of yoga sequences/practices under law cannot be protected as the idea-expression merges to an indistinguishable level, so no copyright protection can be granted.³¹

The protection of copyright work in the digital world is the greatest challenge faced by the copyright law. The copyright and its infringements have no territorial boundaries. The International Conventions including the WIPO Copyright Treaty, 1996 and the WIPO Performances and Phonograms Treaty, 1996 oblige countries to provide adequate legal protection and remedies against the circumvention and impose obligations concerning Digital Rights Management. India amended its Copyright law in 2012 to align with these

²⁶ Agitha, T. G. (2017). Idea-Expression Dichotomy and Originality Requirements for Copyright Protection: An Analysis of the Jurisprudential Underpinnings of the Judicial Pronouncements in India. *Copyright Law in the Digital World: Challenges and Opportunities*, 1-44.

²⁷ Sankar, K. P. (2008). The idea-expression dichotomy: Indianizing an international debate. *J. Int'l Com. L. & Tech.*, 3, 129.

²⁸ Chandrachud, A. (2005). The Idea-Expression Fallacy: Effacing the Traditional and Doctrinaire Limits. *Law Rev. Gov't LC*, 4, 1.

²⁹ Kaul, B. T. (2004). COPYRIGHT PROTECTION: SOME HASSLES AND HURDLES on JSTOR. *Journal of the Indian Law Institute*, 236. <https://doi.org/43951906>

³⁰ Ghosh, R. (2020). Expression Dispute under Copyright Law: A Synthesis Study. *Indian JL & Just.*, 11, 240.

³¹ Pai, Y. (2016). Create, Copy, Disrupt: India's Intellectual Property Dilemmas.

developments.³²

International treaties for Copyright set general requirements for the protection of subject matter, it is explicit that any work entitled to copyright has to be original, but this is still problematic as to what accounts for original or not. Harmonization in the copyright requirement has solved some of the problems in the European Union member states, where at least, there is a minimum standard of originality is set. The idea-expression principle parameter is still difficult to apply and there is a need for further harmonization both within the international and national frameworks.³³ However, the fact remains that copyright protection is an incentive for writers to invest and users to pay so that creativity and ingenuity are rewarded and further boosted to venture for more.³⁴ The duality of this combination is quite rewarding for the people at large who get access to the best-copyrighted material to end up as the common treasure in terms of the public domain.

In the case of Artificial Intelligence, the creator and the creation often merge with the result it becomes debatable as to who owns what. Thus, the formulation evolved over the years by experts and courts to delineate the boundaries of idea-expression dichotomy to become either irrelevant or obtuse. Current copyright laws fail to address the question of copyright ownership for works made by an autonomous artificial intelligence.³⁵

6. Artificial Intelligence and The Element of Creativity

With the advent of artificial intelligence (AI), the field of creativity faces new opportunities and challenges. This scenario of human-machine collaboration on creative tasks, according to some experts, proposes to lay down “fundamental laws of generative AI” to reinforce the responsible and ethical use of AI in the creative field. According to their manifesto, four scenarios can emerge to address this phenomenon: Co-Cre-AI-tion, Organic, Plagiarism 3.0, and shutdown, each illustrates different possible futures based on the collaboration between humans and machines. In addition, it incorporates an AI-generated manifesto that also highlights important themes, ranging from accessibility and ethics to cultural sensitivity³⁶.

³² Dayananda Murthy, C. P. (2017). Copyright and the Digital Media: Perspective and Challenges in the New Legal Regime in India. *Copyright Law in the Digital World: Challenges and Opportunities*, 221-253.

³³ Dauda, I. I. (2021). An Examination of the Copyright Originality Threshold. *Available at SSRN 4589345*.

³⁴ Ghosh, R. (2020). Expression Dispute under Copyright Law: A Synthesis Study. *Indian JL & Just.*, 11, 240.

³⁵ Palace, V. M. (2019). What if artificial intelligence wrote this: artificial intelligence and copyright law? *Fla. L. Rev.*, 71, 217.

³⁶ The fundamental laws proposed aim to prevent AIs from generating harmful content and competing directly with humans. Creating labels and laws are also highlighted to ensure the responsible use of AIs.

The positive future of creativity and AI lies in a harmonious collaboration that can benefit everyone, potentially leading to a new level of creative productivity respecting ethical considerations and human values during the creative process³⁷. Regarding AI as a tool to create work, we must be aware that even though AI seems to be equivalent to the human mind, AI is still far from being “intelligent”. Much depends on the definition of “intelligence” recognized by the human agency. If “intelligence” is understood as finding new ways not already known, AI may be called “intelligent” as it can detect new relationships in big data heaps, which was not possible earlier. Furthermore, AI can learn from previous errors and mistakes and improve the patterns of its program. Thus, some argue that the author no longer has sufficient control over how the work is being created and under which conditions. However, AI in its present form cannot determine the preferences or goals to be achieved; it is still up to the human being implementing and using AI to define the areas and goals for it. In other words, AI may improve ways to achieve a goal but cannot change it. Hence, suggestions to qualify AI (or robots) as a new form of the legal person (a so-called “ePerson”) disregard these facts. Moreover, such suggestions do not answer the crucial questions of how AI could be held liable or could raise money to handle claims against it (or robots). Ultimately, the real question regarding all legal areas concerns to a greater extent the issue of whether the actions of AI can be attributed to the human being using it.³⁸

Artificial intelligence (AI) is a well-established discipline of computer science focused on making computers perform tasks that would normally require human intelligence³⁹. Due to the convergence of massive data availability, computational resources, and novel deep-learning-based architectures, the machine learning (ML) sub-field of AI has experienced breakthroughs over the past decade⁴⁰.

Such great progress has been made that AI technology is now a major driver of global business and investment. AI is being deployed in varied practical scenarios, from machine translation to medical diagnosis, detecting fraudulent credit card use, transcribing speech, summarizing sporting events and financial reports, targeted advertising on social media, and autonomous vehicles. The combination of AI and robotics is also widely transforming manufacturing⁴¹.

³⁷ Florent Vinchon, Todd Lubart, Sabrina Bartolotta, Valentin Gironnay, Marion Botella, Samira Bourgeois-Bougrine, Jean-Marie Burkhardt, Nathalie Bonnarde, *Artificial Intelligence & Creativity: A Manifesto for Collaboration*, 15 June 2023, available at: <https://doi.org/10.1002/jocb.597>

³⁸ Spindler, G. Copyright Law, and Artificial Intelligence. *IIC* 50, 1049–1051 (2019). Available at: <https://doi.org/10.1007/s40319-019-00879-w> retrieved on 20-11-2023.

³⁹ Russell and Norvig 1995, available at: <http://www.mdpi.com/2076-0752/8/3/>

⁴⁰ Goodfellow et al. 2018, available at: <http://www.mdpi.com/2076-0752/>

⁴¹ Economics 2019, available at: <http://www.mdpi.com/2076-0752/8/3/>

Real-world applications of AI have generated controversy as well, such as tracking people using biometric indicators (e.g., face, speech, gait), prediction of criminal recidivism, judicial sentencing recommendations, drone warfare, predicting protected characteristics (e.g., sexuality, pregnancy), and creating and distributing propaganda (e.g., deep fakes).⁴²

7. Generative Artificial Intelligence and Copyright

The balance between copyright and free speech is being challenged by generative AI (GAI), a powerful and enigmatic tool that mimics human responses to prompts entered by an internet search box. The purpose of copyright law, according to the U.S. Constitution, is “to promote the Progress of Science and useful Arts, by securing to Authors and Inventors the exclusive Right to their exclusive writings.”⁴³ The problem is that GAI’s ability to incentivize progress and innovation threatens the entertainment industry’s dependence on copyright to protect creative works.⁴⁴

Copyright law strikes a balance between those who create content and the public’s interest in having wide access to that content. It does this by granting authors a limited monopoly over the dissemination of original works by giving them the exclusive right to reproduce, distribute, and create derivative works based on copyrighted material. However, the concept of exclusive rights doesn’t apply to artificially intelligent robots and computers scraping ideas and facts from public websites.⁴⁵

Because copyright does not protect ideas, facts, procedures, concepts, principles, or discoveries described or embodied in works, copying alone doesn’t constitute copyright infringement. To prove copyright infringement, one must prove that the defendant had access to the copyrighted work and that the defendant’s work is substantially like protected aspects of the first work.⁴⁶ For AI output to infringe upon a book, it must have taken a substantial amount of copyrightable expression from the author’s work. When it comes to text, GAI is an artful

⁴² Sturm, B. L., Iglesias, M., Ben-Tal, O., Miron, M., & Gómez, E. (2019, September). Artificial intelligence and music: open questions of copyright law and engineering praxis. In *Arts* (Vol. 8, No. 3, p. 115). MDPI.

⁴³ Art 1, section 2 US Constitution

⁴⁴ Llyde J Jasen, *Generative AI vs. Copyright*, September 2023, an attorney examines what artificial intelligence will mean for the publishing industry,

⁴⁵ In 2023, in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, the U.S. Supreme Court held that the claim to fairness is severely undermined “where an original work and copying use share the same or highly similar purposes, or where wide dissemination of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it.” AI-generated works can devalue human-created content, but is that the kind of economic harm contemplated in the Supreme Court’s decision?

⁴⁶ Troutman Pepper, *The Intersection of Generative AI and Copyright Law*, 2023 available at: <https://www.lexology.com/library/detail.aspx?g=e44fe476-6a76-4bcd-93a3-2d360b6819e3>

plagiarist. It knows how to dance around copyright. The predictive model emulates, it doesn't copy.⁴⁷

Artificial intelligence (AI) has taken centre stage as an important new technology resource. Generative AI tools and systems can increasingly perform organizations' tasks or decision-making with increased efficiency. However, these tools or systems present new risks and issues for consideration. As generative AI becomes more popular, it will be important to consider the ramifications of using this technology and the importance of implementing best practices and other guidelines.⁴⁸

8. Copyright Protection In The Digital Era-A Myth

More recently, the term darknet has been used to differentiate private, anonymous distributed networks from their public predecessors⁴⁹. In his groundbreaking legal work regarding darknets, Fred von Lohmann incorporated the element of privacy, defining the Darknet as "[t]he collection of networks and other technologies that enable people to illegally share copyrighted digital files with little or no fear of detection."⁵⁰ In his 2005 book, *Darknet: Hollywood's War Against the Digital Generation*, Darknet expert J.D. Lasica emphasized that darknets can be used for illegitimate activities.⁵¹ Lasica defined darknets as "networks of people who rely on closed-off social spaces—safe havens in both virtual and real worlds where there is little or no fear of detection—to share copyrighted digital material with others or to escape the restrictions on

⁴⁷ Insofar as text generated in response to a prompt is not substantially similar—a legal term of art—to the data it is scraping, it is not an infringement. In other words, don't overestimate the value of litigation.

⁴⁸ Heather West & Armand J. Zatola, 2023, *Generative AI: IP and data considerations*, Venable LLP,

⁴⁹ The Darknet has its roots in underground physical networks organized around groups of friends that shared music on cassette tapes and computer disks. See *id.* That distribution network termed the "Sneaker Net," consisted of handing off physical media between group members. Webopedia.com, Sneakernet, <http://www.webopedia.com/TERM/S/sneakernet.html> (last visited May 20, 2010). As technology evolved, so did the methods users sought to share media.

⁵⁰ Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 637 n.15 (2004) (citing *The Word Spy*, <http://www.wordspy.com/words/darknet.asp> (last visited May 20, 2010)). Fred von Lohmann is a senior staff attorney at the Electronic Frontier Foundation (EFF), a non-profit organization that aims to protect the public interest in digital rights matters. Elec. Frontier Found., <http://www.eff.org/about/staff> (last visited May 20, 2010).

⁵¹ J.D. Lasica, *Darknet: Hollywood's War Against The Digital Generation* 264 (John Wiley & Sons, Inc. 2005).

digital media imposed by entertainment companies.”⁵² Widespread use of darknets will frustrate efforts to detect and track illegal file sharing, making enforcement of copyrights on the Internet difficult or impossible.⁵³

A computer program developed for machine learning purposes has a built-in algorithm that allows it to learn from data input, and to evolve and make future decisions that may be either directed or independent. When applied to art, music, and literary works, machine learning algorithms are learning from input provided by programmers. They learn from these data to generate a new piece of work, making independent decisions throughout the process to determine what the new work looks like. An important feature of this type of artificial intelligence is that while programmers can set parameters, the work is generated by the computer program itself – referred to as a neural network – in a process akin to the thought processes of humans⁵⁴. Traditionally, the ownership of copyright in computer-generated works was not in question because the program was merely a tool that supported the creative process, very much like a pen and paper. Creative works qualify for copyright protection if they are original, with most definitions of originality requiring a human author⁵⁵. But with the latest types of artificial intelligence, the computer program is no longer a tool; it makes many of the decisions involved in the creative process without human intervention.⁵⁶ The authorship of AI on the analogy of computer-generated works that need to be given to the programmer is evident in a few countries, such as Hong Kong (SAR), India, Ireland, New Zealand, and the UK. In the UK it is best encapsulated in her copyright law⁵⁷:

In the case of a literary, dramatic, musical, or artistic work that is computer-generated, the author shall be taken to be the person by whom the arrangements

⁵² Lasica relates the phenomena as [T]he millions of users trading files in the shady regions of Usenet and Internet Relay Chat; students who send songs and TV shows to each other using instant messaging services from AOL, Yahoo, and Microsoft; city streets and college campuses where people copy, burn, and share physical media like CDs; and the new breed of encrypted dark networks like Freenet.

⁵³ Wood, J. A. (2009). The Darknet: A digital copyright revolution. *Rich. JL & Tech.*, 16, 1.

⁵⁴ Andres Guadamuz, WIPO MAGAZINE, Artificial Intelligence, And Copyright 2017

⁵⁵ Conferring copyright in works generated by artificial intelligence has never been specifically prohibited. However, there are indications that the laws of many countries are not amenable to non-human copyright. In the United States, for example, the Copyright Office has declared that it will “register an original work of authorship, provided that the work was created by a human being.” This stance flows from case law (e.g. *Feist Publications v Rural Telephone Service Company, Inc.* 499 U.S. 340 (1991)) which specifies that copyright law only protects “the fruits of intellectual labour” that “are founded in the creative powers of the mind.”

⁵⁶ In Europe the Court of Justice of the European Union (CJEU) has also declared on various occasions, particularly in its landmark *Infopaq* decision (C-5/08 *Infopaq International A/S v Danske Dagbaldes Forening*), that copyright only applies to original works, and that originality must reflect the “author’s own intellectual creation.”

⁵⁷ section 9(3) of the Copyright, Designs, and Patents Act (CDPA),

necessary for the creation of the work are undertaken.

Copyright is no doubt under challenge given the ubiquity of artificial intelligence but it will survive because of its ingenuity, creativity, exclusivity, transmission, and pro-tech manoeuvrability. Multiple corporate and class action lawsuits claim that AI training practices are violating copyright law, specifically, copyright holders claim training AI models on copyrighted material is not a 'fair use' of their material and should be prohibited.⁵⁸

9. Conclusion

Artificial Intelligence has made a profound impact on every aspect of human activity and has almost ceased to be the servant of human agency. Its overriding impact in shaping the things to grapple with is often beyond the ordinary imagination. The copyright law, no doubt, is a creation of human ingenuity and technological intervention, but the human factor remains the central focal point that cannot be ignored. AI is challenging the very basis of human creativity, innovation, and manipulation seen as *sine qua non* for copyrightable works. The copyright jurisprudence need to grapple with the changing situation by recognizing certain newer parameters to pave the way for real-term protection against the artificial world. However, strong might be the technology the human element cannot be overwritten. Perhaps the remedy lies in the synthesis of human creativity and technological intervention how much superior it may be. There can never be a substitute for the human element in shaping the future course of action.

⁵⁸ Primer: Training AI Models with copyrighted work-AAF, available at: <https://www.americanactionforum.org/>

Data in the Clouds:

A Legal Odyssey through Cloud Computing in India

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Abstract

This research paper delves into the intricate relationship between cloud computing and information technology (IT) law in the context of India. The advent of cloud computing has revolutionized the way data is stored, processed, and accessed, presenting numerous opportunities and challenges. As India strives to position itself as a digital powerhouse, understanding and addressing the legal implications of cloud computing becomes imperative. The study explores the current regulatory landscape governing cloud computing in India, analyzing key provisions within the existing IT laws and regulations. It aims to provide a comprehensive overview of how Indian legal frameworks align with the dynamic nature of cloud services, considering issues such as data security, privacy, and cross-border data transfers. Furthermore, the paper examines recent legal developments and challenges faced by businesses and individuals adopting cloud technologies in India. It explores case studies, precedents, and emerging best practices to offer insights into the evolving nature of legal considerations in the rapidly changing field of cloud computing.

Keywords: *Cloud Computing, Information Technology, Data, Cloud Services*

Introduction

The buzz is everywhere about cloud computing. Although this topic has recently attracted significant momentum and attention in both academia and industry

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however no common definition exists yet.¹ Nevertheless, it's generally accepted that cloud computing refers to a new IT paradigm for users. The **National Institute of Standards and Technology (NIST)**² defines cloud computing as:

*Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction*³

Cloud Security Alliance (CSA)⁴ defines cloud computing as:

*Cloud computing is an evolving term that describes the development of many existing technologies and approaches to computing into something different. Cloud separates application and information resources from underlying infrastructure, and the mechanisms used to deliver them. Cloud enhances collaboration, agility, scaling, and availability, and provides the potential for cost reduction through optimized and efficient computing*⁵

Cloud computing is the latest technology that brings different types of services under one structure. Cloud computing provides services over the internet and the clients pay according to their usage. Suppose you want to travel from India to London you do not need to own or purchase a plane. Instead of this you book a ticket and pay for the airline according to your destination. The rest of the things will be managed by the airline staff. Likewise, the same working model is adopted by cloud computing. In cloud computing you pay for what you use the rest of the things will be managed and maintained by cloud providers. In layman's terms, cloud computing means storing and accessing data and programmes over the internet instead of your computer's hard drive (hardware).⁶

¹ H. Erdogmus, "Cloud Computing: Does Nirvana Hide behind the Nebula?" IEEE Software, vol. 26, no. 2, 2009, p. 4–6 available at <http://www.dblp.unitrier.de/db/journals/software26.html#Erdogmus09a>

² The National Institute of Standards and Technology (NIST) is an agency of the United States Department of Commerce whose mission is to promote American innovation and industrial competitiveness. NIST's activities are organized into physical science laboratory programmes that include nano-scale science and technology, engineering, information technology, neutron research, material measurement, and physical measurement. From 1901 to 1988, the agency was named the National Bureau of Standards

³ Domenico Talia, "Cloud Computing and Software Agents: Towards Cloud Intelligent Services" available at http://http://ceur-ws.org/Vol-741/INV02_Talia.pdf

⁴ Cloud Security Alliance (CSA) is a non-profit organisation with the mission to promote the use of best practices for providing security assurance within cloud computing and to provide education on the uses of cloud computing to help secure all other forms of computing.

⁵ The Cloud Security Alliance (CSA) is the world's leading organization dedicated to defining and raising awareness of best practices to help ensure a secure cloud computing environment. See <http://www.cloudsecurityalliance.org/>.

⁶ The PCMag Encyclopaedia defines it succinctly as "hardware and software services from a provider on the internet."

Customers like the public have also instantly embraced cloud computing in the form of services like Gmail, Facebook, YouTube, Yahoo, Hotmail, etc. Some major examples of cloud computing everyone is probably using are:

- i. **Google Drive:** This is a pure example of a cloud computing service. In this, all the storage is found online so it can work with the cloud productivity apps like Google Docs, Sheets, and Slides. Google Drive is available on more than desktop computers and can also be used on tablets like the iPad or smartphones, having separate apps for Docs and Sheets.
- ii. **Apple iCloud:** Apple's cloud service is mainly used for online storage, backup, and synchronization of user's mail, contacts, calendar, and more. All the data is available on the user's iOS, iPadOS, macOS, or Windows devices⁷. iCloud is also the place where iPhone users can go to utilize the '*Find My iPhone*' feature when the handset goes missing to retrieve personal data.
- iii. **Dropbox:** This service has been a simple, reliable file-sync and storage service for years which is now enhanced with lots of collaborative features. Cloud computing systems can be multi-layer to basic three-layer models.⁸ The basic three-layer model of cloud computing consists of a client, a Cloud Service Provider, and a Cloud Host Company. *Client:* A Client is an entity that uses the service from the provider to solve their business computing problems. It can be considered as an end user. The Consumer accesses the provider's service, either through the API or Internet Connection. A cloud consumer is charged based on usage according to the Pay-per-use model. The required infrastructure capabilities may vary. *Cloud Service Provider:* A Provider is usually a third party that makes services available for a customer. A cloud service provider works as a bridge between the end user and the cloud Host Company. It maintains the required infrastructure and capabilities to deliver a particular service to the customer. The capabilities vary based on the type of cloud service the provider delivers. *Cloud Host Company:* It is an intermediary that works on behalf of the Cloud consumers to deal with the provider. It helps the consumer to architect the right system on a cloud provider and assists in all activities of a provider and consumer.⁹ In terms of the services provided by cloud computing, one may begin to appreciate what this new approach is

⁷ Windows users have to install the iCloud control panel to access iCloud.

⁸ H. Erdogmus, "Cloud Computing: Does Nirvana Hide behind the Nebula?" IEEE Software, vol. 26, no. 2, 2009, p. 4–6 available at <http://www.dblp.unitrier.de/db/journals/software26.html#Erdogmus09a>

⁹ Simple Learn, "Cloud Entities: Cloud Computing Certification Training" February 2015. Available at: <http://www.blog.simplilearn.com/it-service-management/cloud-entities>.

all about. Let us go over the three basic sorts of services that the cloud can provide.¹⁰

- iv. **Infrastructure as a Service (IaaS):** Infrastructure as a Service (IaaS): This mode of delivery comprises the remote delivery (over the Internet) of a complete computer infrastructure (e.g., virtual machines, servers, storage devices, and so on).
- v. **Platform as a Service (PaaS):** To appreciate this cloud computing layer, consider the conventional computer model, in which each program managed locally requires hardware, an operating system, a database, middleware, web servers, and other software. It is also important to remember the team of network, database, and system administration experts who are required to keep everything working smoothly. These services are now delivered remotely by cloud providers under this layer using cloud computing; etc.).
- vi. **Software as a Service (SaaS):** Applications are offered as a service via the Internet through this layer. Instead of installing and maintaining software, it is simply accessed via the Internet, eliminating the need for complicated software and device maintenance. This sort of cloud service provides entire application capabilities ranging from productivity (e.g., office-type) apps to Customer Relationship Management (CRM)¹¹ or enterprise-resource management.

Many of the products that are offered by the above-discussed three types of cloud services will require some degree of programming (by the user or indeed the cloud provider) to access the functionality of such services. Cloud providers will have to create their APIs¹² so that software developers can use them to create client applications to access that functionality. To understand how those services can be utilized and the processes involved in their utilization (in a very simplified manner), a hypothetical example can be given. Take, for example, a typical university with an IT infrastructure that caters for the needs of students, software developers (e.g., Web developers), teaching staff and management, researcher scholars the demand for IT services in this environment is directed to the IT services department whose job is to:

- Provide with software to students and staff (e.g., email accounts, operating systems, productivity applications, anti-virus, malware detectors and cleaners,

¹⁰ Mehdi Khorsow-Pour, *Use and Design for Improved Learning Techniques* P-3 (IGI Global America, 2014 Edition)

¹¹ CRM software (customer relationship management software) is a tool that's designed to help your organization offer your customers a unique and seamless experience, as well as build better relationships by providing a complete picture of all customer interactions, keeping track of your sales, organizing, and prioritizing your opportunities, and facilitating collaboration between various teams.

¹²API stands for application programming interface, a concept that applies everywhere from command-line tools to enterprise Java code to Ruby on Rails web apps. An API is a way to programmatically interact with a separate software component or resource.

etc.) and hardware (e.g., PCs, Servers, etc.).

- Provide the required special software and hardware to researchers and postgraduate students for running experiments that are likely to involve a great deal of processing and computation.
- Provide the development tools to web developers needed for writing and hosting web applications.

Cloud computing provides many advantages to organizations and is also very economical because organizations pay according to their usage and the rest of the things are considered by the provider itself. However, some of the recent reports conclude that cloud computing is not a viable solution for Indian organizations. Research and studies¹³ conclude that cloud computing in India is very risky and India is not yet ready for a cloud computing platform.

Scope of Cloud Computing in India

Cloud computing offers immense potential and benefits for all types of organizations. For a virgin territory in terms of technological advancements like India, the importance of technology like cloud computing is manifold. In India, the adoption of the concept of cloud computing is gaining momentum and the market is growing exponentially. This is because of the factors like government's support in embracing emerging technologies and best practices derived from different cloud deployment scenarios and application areas. This has resulted in many organizations in India planning to move to the cloud on priority. Research studies indicate that CIOs in India are planning to move their business operations to the cloud on a priority basis.

The Indian cloud computing market is rapidly establishing. All types of businesses whether small or medium sized are actively migrating to cloud-based applications and are followed by and large enterprises also. The Reserve Bank of India (RBI) recently granted more than 20 new banking licences to banks that are very actively leveraging cloud-based infrastructure and applications. According to a report published by Gartner¹⁴ the end-user spending on public cloud in India is expected to rise by 27% in 2023. Except for data centre systems and devices, all other categories of IT spending in India will increase in 2023. In India, policy infrastructure is emerging as a significant contributor to public cloud growth. For example, the recently launched public cloud government programmes *Meghraj* and *Cloud Vision* for India 2022 will be beneficial to small and medium-sized firms or those in the early stages of cloud adoption. The Covid epidemic ushered in new ways of doing business in all industries and organizations. Remote working became the new normal, increasing cloud use. The epidemic accelerated the growth of cloud services. According to International Data Corporation (IDC), the Indian public cloud

¹³Perry4Law's research. Available at <http://www.perry4law.in/><accessed 2nd Dec 2022>

¹⁴Gartner, Inc, officially known as Gartner, is a global research and advisory firm providing information, advice, and tools for leaders in IT, finance, HR, customer service and support, communications, legal and compliance, marketing, sales, and supply chain functions. Its headquarters are in Stamford, Connecticut, United States.

services market will reach \$13.5 billion by 2026, up from \$4.6 billion in 2021, rising at a compound annual growth rate (CAGR) of 24% over the next five years. “Moving to the cloud and investing in public cloud services have become imperative to the success of digital business initiatives,” says Sid Nag (research vice president at Gartner). It is no more a question of ‘why,’ but of ‘when’ organizations can migrate to the cloud. We have reached the cloud 2.0 age, in which organizations are pursuing cloud-first or cloud-only strategies.”¹⁵ This demonstrates that India is an important growth market for all types of cloud computing providers. According to NASSCOM, India’s public cloud market was worth Rs 17,000 crore in FY2019-2020 and is predicted to expand at a 30% CAGR to reach Rs 63,000 crores by FY2025.¹⁶

The above-mentioned statistical data is quite likely to change soon, but first, let us have a look at cloud adoption across a few sectors in India.

Cloud Services in government: The Government of India welcomes cloud computing technology to expand its e-governance efforts implemented across the country to decrease corruption and guarantee government schemes reach individuals living in rural areas. To name one effort, the Ministry of Communications and IT’s Department of Electronics and Information Technology is quite excited about incorporating cloud computing in governance. It has already created plans for the development of IT-enabled services, applications, and policies to reap the full benefits of various government projects in which cloud computing will be actively deployed.¹⁷

Cloud adoption in manufacturing: The Indian manufacturing industry has come a long way, and the usage of information technology in the industrial sector can be traced back two decades. Since 2010, CIOs in the Indian industrial sector has begun to adopt cloud models, as evidenced by numerous research studies and industry circles. CRM (customer relationship management) and supply chain systems, which allow improved connectivity to external stakeholders and customers, are two of the most notable cloud-based manufacturing application areas. For example, analytics will assist the organization in better forecasting product ranges and providing insight for future investments in various business areas. Business intelligence (BI) assists in understanding client expectations and providing input for demand shaping. Other areas where the cloud improves industrial efficiency include data

¹⁵<http://www.gartner.com/en/newsroom/press-releases/2019-11-05/><visited 5th December 2022>

¹⁶The National Association of Software and Service Companies is a trade association of Indian Information Technology and Business Process Outsourcing companies. Established in 1988, NASSCOM is a non-profit organisation. Report available at <https://www.business-standard.com/article/companies/india-public-cloud-market-to-reach-rs-63-000-crore-by-fy25-nasscom-120091800847/><visited 5th Dec 2022>

¹⁷<http://www.ctrls.in/blog/cloud-adoption-in-india/><visited 5th Dec 2022>

warehousing, information security, green IT,¹⁸

Cloud adoption in the Indian IT industry: Cloud computing is revolutionizing the Indian IT business. With an increasing number of ISPs and IT companies in India, the cloud IaaS model is enabling SMEs (Small and medium-sized organizations) to gain access to cutting-edge technology while lowering their in-house infrastructure expenditures. Similarly, the PaaS approach offers significant benefits to software organizations. This concept provides developers with many development platforms while saving the organization money on capital costs. Adopting the SaaS model benefits both large and small businesses. For example, by installing solutions such as SAP Business or Office 365, Indian businesses can significantly reduce the costs of managing IT applications.

In addition to the areas described above, cloud service models are slowly but steadily being employed in other industrial domains such as advertising, health care, finance, banking, and so on. The consistent speed can be linked to numerous constraints such as a lack of knowledge of cloud technology, network challenges, customer awareness of ROI in cloud adoption, and other legal impediments. According to the studies and statistics presented above, cloud adoption is rapidly catching up in India, but it is not without obstacles, issues, problems, and roadblocks.

Legal Issues in Cloud Computing

Because of the explosive growth of innovations in the Information Technology industry, the country's legal framework is lagging and desperately looking for ways to cope up with such never-seen-before IT advancements. Being one of such recent IT advancements cloud computing has raised numerous impediments and legal issues including privacy and data security, contracting issues, insolvency issues, issues relating to the location of the data, and business considerations.¹⁹

The above mentioned issues are the primary ones faced by almost all nations across the globe. However, India is facing several additional complicated issues owing to a lack of awareness and lack of resources. With the 'Digital India' initiative making rounds everywhere, it is apparent that more and more individuals and organizations will be using online services and infrastructure via the Cloud shortly. Therefore, it is necessary to analyze our position thereon and discuss whether our legal system is ready for such a revolutionary change.

¹⁸Green IT aims to minimize the negative impact of IT operations on the environment by designing, manufacturing, operating, and disposing of computers and computer-related products in an environment-friendly manner. The motives behind green IT practices include reducing the use of hazardous materials, maximizing energy efficiency during the product's lifetime, and promoting the biodegradability of unused and outdated products.

¹⁹<https://www.anshumansahoo.com/2018/01/legal-issues-surrounding-cloud-computing.html><visited 10th Dec 2022

Several legal issues frequently arise in cloud computing however, attempting a broad generalization there are four common issues:²⁰

1. Privacy of data and data security
2. Issues relating to contractual relations between the cloud service provider and the customer.
3. Complex jurisdictional issues, or issues relating to the location of the data and the set of laws applicable.
4. Commercial as well as business considerations

Privacy and data security issues:

Seemingly the primary privacy/data security concern relating to the cloud is of 'data breach'. Data breach may be defined as the loss of unencrypted electronically stored personal information²¹. A data breach can cause huge losses to both the provider as well as the customer in several ways. For example, identity theft and debit/credit card fraud to the customer or financial harm, loss of customers, loss of reputation, and potential lawsuits to the provider. Due to technological advancement, economic development, and socio-cultural transformation, the data privacy and security environment in India is evolving at a phenomenal pace there is a significant demand for such a legal framework that can protect the privacy of the data of individuals and not make it prone to any form of cybercrimes. The proponents of data privacy and protection have condemned the model of cloud computation since it gives the host company an undemanding control to monitor information at will. This can be of great concern as a compromised server can cause significant harm and extremely sensitive information can be easily stolen like credit card details and social security numbers, addresses, and personal messages. The increased usage of services like Google Docs and Gmail has pressed these concerns on a massive scale. Though IT Act does not deal with the issue of privacy directly however very few provisions have a bearing on the right to privacy. The IT Act deals with unauthorized access, breach of privacy & confidentiality, and hacking. For example, section 72 of the IT Act directly deals with the 'confidentiality' and 'privacy' of individuals and section 43A of the IT Act²² is the right step taken to protect the privacy rights. However, these provisions seem to be inadequate due to their narrow scope and application in addressing the substantial issues of violation of privacy and data protection. The varied advantages of cloud computing seem to entice cyber criminals paving the way for a hoard of cybercrimes like hacking, spamming, etc. The concentration of a large amount of data in one place by cloud services tends to become a vulnerable target for such criminal acts.

²⁰ Ibid.

²¹ Rajkumar Buyya, James Broberg, et.al. (eds), *Cloud Computing: Principles and Paradigms* (John Wiley & Sons, Inc. Publication)

²² Inserted by Information Technology (Amendment) Act, 2008, Sec. 22.

Contracting Issues:

Cloud computing, in all its forms (IaaS, PaaS, and SaaS), is a service, and as such is controlled by a Service agreement rather than a Licensing agreement. However, the primary difficulty with Cloud agreements is the “contract of adhesion.” Because of the limited expansion of Cloud Services in India, the ‘click-wrap agreement’ model is most of the time used, resulting in the contract being one of the contracts of adhesion with no or little space for negotiation on the part of the user/customer. The current law simply cannot compel cloud providers to negotiate with every customer. Legal provisions, on the other hand, can be crafted to ensure that the liability and risk responsibility clauses follow a conventional pattern, compensating the user for the lack of negotiation during contract creation.

Jurisdictional Issues:

The authority of a court to judge activities performed in a specific territory is referred to as jurisdiction. Jurisdiction in cases of legal concerns about Cloud services becomes complicated and crucial due to Cloud features such as ‘Virtualization’ and ‘Multi-tenancy’. The cloud allows for a high degree of flexibility in data location, ensuring optimal efficiency in data utilization and accessibility. However, it is also feasible that the same data will be kept in many locations at the same time. If the numerous sites are subject to separate jurisdictions and legal systems, there is a chance of conflicting legal provisions affecting data in the two different locations. This gives rise to most of the legal difficulties in cloud computing.²³

Commercial and Business Considerations:

Other commercial and corporate reasons, such as the desire to avoid risk, maintain data integrity, data accessibility, and service level agreements, have also had a big impact on the present and future of cloud computing in India. It also raises several foreseeable and unanticipated difficulties that must be handled through dedicated laws. Raising awareness, enabling widespread access to information, and mobilizing resources are all complementary measures that can never fail in the Indian environment to improve the effectiveness of an existing legal regime.

Cloud Computing and Information Technology Law

Management and privacy of data play a key role in the adaptation of a new technology. Storage as a service (STaaS) provides the facility that data can be stored at a cloud site and can be accessed around the globe so the client has to decide about what type of data he/she will store in the cloud and what not to store at the cloud. But what if the data breach happens and what is the legal recourse that an organisation can adopt?

²³<https://www.anshumansahoo.com/2018/01/legal-issues-surrounding-cloud-computing.html><visited 10th Dec 2022

Now Indian Information Technology Law has come into existence. At present there is no well-established cloud computing policy and legal framework in India that is responsible for the limited utilization of cloud computing and that effectively regulates and scrutinizes other legal issues relating to cloud computing like private data sharing, data storage at different sites, and protection of sensitive personal data. In India, the existing weak privacy policies are the main reason for undergrowth of the cloud computing. Though the right to privacy is an important human right the Supreme Court of India interpreted Article 21 of the Constitution of India as a “Constitutional source” of the right of privacy in India and now right of privacy is a fundamental right of every citizen of India.²⁴ Nevertheless, the country is not mature in the field of Information Technology (IT). The distributed nature of the cloud computing environment makes it more complex and difficult to ensure legal security. Indian IT (Amendment) Act 2008 has many vulnerabilities or loopholes for data privacy. India is a country where phone tapping and e-surveillance is done without legal permission. Any official from the government can approach the concerned cloud service provider and it would hand over all clients’ sensitive data and information to him without clients’ permission or knowledge. However, in terms of cyber security, few provisions have been incorporated in this regard for example Section 43A (compensation for failure to protect data)²⁵ and Section 72 (penalty for breach of confidentiality and privacy) of the Indian IT Act. These provisions are directly associated with cloud computing. Section 43A of the IT Act read with the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011 provides guidelines for the collection, use, and protection of any sensitive personal data or information of natural persons by a body corporate that possesses, deals with, or handles such data. The Information Technology Act and the Privacy Rules together set out the regulatory framework for the creation, collection, storage, processing, and use of electronic data (including personal and sensitive personal information recorded in electronic form) in India. Cloud computing services that deal with personal or sensitive personal information need to comply with the requirements set out under the Privacy Rules relating to security, encryption, international transfer, and publication of policy statements. Cloud service providers in India may also be required to comply with the Information Technology (Intermediaries Guidelines) Rules 2011 prescribed under the

²⁴ See *Justice K.S. Puttaswamy Vs Union Of India and Ors*, (2017) 10 SCC 1

²⁵ Section 43A of IT Act mandates ‘body corporates’ to implement ‘reasonable security practices’ for protecting the ‘sensitive personal information’ of any individual, failing which they are liable to pay damages to the aggrieved person.

IT Act.²⁶

The government of India has published a Personal Data Protection Bill, 2018 (the Bill) which if notified will overhaul the existing privacy and data protection framework in India.

The Bill was written with the primary goal of filling the void left by the current data protection framework and enhancing individual rights by giving individuals complete control over their data while ensuring a high level of data protection. The Bill is analogous to the EU's General Data Protection Regulation in many ways, including increasing the stringency of requirements and related fines governing data protection from the customer's standpoint. The Bill also establishes rigorous requirements for the processing of personal data both within and outside of India, and it is intended to replace or amend the IT Act and the Privacy Rules in these areas.

CONCLUSION

The main reason why companies choose cloud computing over any other course of storage is because the information is being stored online, having no risk of data being lost or destroyed. However cloud computing has many shortcomings as well which are required to be improved for example there are a number of issues including privacy and security issues associated with the storage of data on the internet. According to the experts in this field cloud computing is safer than many other traditional means of data storage such as hard disks, servers, etc., nevertheless, companies still take the chance of data being stolen by any outsider. The basic reason why companies are not selecting cloud services is the lack of protection or security.

Concerning India, cloud computing is a new notion, and no law exclusively governs it and the law currently lacks clearness. The questions as to the applicable law and jurisdiction remain unanswered. Despite that companies are shifting from traditional methods of storage to cloud computing because of the cost effectiveness. It is suggested here that cloud computing may not be idyllic for all companies because of the various issues and reasons discussed already however it is cost-effective and is suitable for companies globally to use, to store data which can be retrieved at any time from any part of the world. It can be concluded that the implementation of the Information Technology Rules, 2011, and several amendments made to the Information Technology Act 2000, is appreciated however there is a dire need to improve deterrence and to introduce constant amendments to keep pace with the rapidly transforming technological scenario of the country. More forms of cybercrime must be covered, and the quantum of punishment needs to be increased.

²⁶India Law Journal, "Cloud Computing in India: The current Legal regime and the main Issues and Challenges", February 2015. Available at : <http://www.indialawjournal.com/volume7/issue1/article3.html>.<Visted 18th Dec 2022>

Organizations need to develop a swift response mechanism that enables them to understand and embrace the risks and opportunities associated with the cyber world. Adoption of such a universal approach shall ensure a healthy cloud computing environment in the country and shall give a boost to this new and emerging form of technology to facilitate business operations across the country and to reduce all forms of cyber-crimes effectively.

UNVEILING LEGAL PATHWAYS: EVALUATING ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS THROUGH A CRITICAL ANALYSIS OF THE NATIONAL GREEN TRIBUNAL'S FUNCTIONING IN INDIA

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Abstract

Access to justice constitutes a crucial component of the rule of law and, by extension, democracy. It is imperative to ensure the realization of individual rights. When rights are violated, individuals need a mechanism to provide relief or rectify wrongdoing. Without access to justice, the concept itself becomes a mere illusion. The state must establish institutions capable of administering justice to guarantee universal access. Several cases before the Supreme Court of India and the 186th report of the Law Commission of India emphasized the necessity of creating a specialized body with the expertise to handle environmental disputes involving diverse issues. Responding to this need, the National Green Tribunal was established through the National Green Tribunal Act 2010. This institution addresses the long-standing requirement for an alternative forum that delivers swift and cost-effective justice. The legislation reflects the philosophy of public interest litigation, offering a favorable direction for victims who may otherwise struggle to approach the judiciary. This article critically examines the National Green Tribunal's performance over its decade of existence, exploring how it has transformed the adjudication of environmental matters. Additionally, it analyzes the yearly details of case institutions, disposal, and pending cases at the principal bench in Delhi and other zonal benches.

Keywords: *Environmental Justice; Adjudication; Governance; Environmental Courts and Tribunals.*

1. Introduction

Ensuring access to justice is crucial for safeguarding the environment, and there is a need for an effective institutional framework to deliver such protection.

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The global rise of specialized environmental courts and tribunals (ECTs) is significantly reshaping the landscape of environmental justice. This transformation is spurred by the emergence of new international and national environmental laws and principles, the acknowledgment of the interconnectedness of human rights and environmental preservation, concerns about climate change, and public dissatisfaction with existing general judicial forums.¹ In India, the National Green Tribunal (NGT) was established in 2010 under Article 21 of the Indian Constitution, which guarantees Indian citizens the right to a healthy environment.² India became the third country, after Australia and New Zealand, to adopt such a system.³ The NGT, conceived as a specialized body, was established with the commitment to deliver not only prompt and effective decentralized environmental justice but also the requisite expertise and knowledge in environmental matters.

2. Global Overview of Environmental Courts and Tribunals (ECTs)

2.1. Continuous Surge of ECTs

The widespread emergence of specialized courts and tribunals dedicated to addressing environmental conflicts is fundamentally reshaping the landscape of environmental justice. Among the noteworthy advancements in twenty-first-century environmental law and institutions, the swift worldwide proliferation of these Environmental Conflict Tribunals (ECTs) stands out prominently.

In the words of Justice Antonio Herman Benjamin, High Court of Brazil, “Environmental conflicts require quick action or response, which is incompatible with the slow pace of the court system that, due to its bureaucracy and technical rituals, eventually becomes an obstacle to effective protection of the environment and economic progress.”⁴

During the 1970s, a scant few of these distinct environmental courts and tribunals (ECTs) were in operation, mainly concentrated in Europe. Fast forward to 2009, when the inaugural worldwide examination of ECTs was conducted, revealing a tally of 350 documented instances. Remarkably, a mere seven years down the line, the count has surged to over 1,200 ECTs spread across at least 44 nations. These specialized courts operate at both national and state/province levels, encompassing local/municipal counterparts integrated into broader national or state/province ECT

¹ Gill, Gitanjali [Gita]. (2019). “The National Green Tribunal: Evolving Adjudicatory Dimensions. *Environmental Policy and Law*”. 49. 153-162. 10.3233/EPL-190151.

² Expressly held in the case of “Rural Litigation and Entitlement Kendra vs. State, AIR 1988 SC 2187” by the Supreme Court of India.

³ Khandare, Jayashree (2015). Role of National Green Tribunal in Protection Environment. *Indian journal of Research* Vol 4 | Issue: 12 | December 2015.

⁴ Antonio Herman Benjamin, *We, the Judges, and the Environment*, 29 Pace Env'tl. L. Rev. 582 (2012).

frameworks.⁵

2.2. Factors Contributing to the Surge in ECTs

The 1970s marked a pivotal era characterized by a burgeoning awareness and apprehension regarding environmental well-being, human health, and the intrinsic beauty of the natural world. This surge in consciousness spurred a heightened advocacy for more impactful governmental initiatives. In response, both international bodies and numerous nations swiftly forged a comprehensive framework encompassing environmental standards, legal statutes, regulations, policies, and dedicated institutions. Simultaneously, environmental non-governmental organizations (NGOs), exemplified by the likes of the Sierra Club, Greenpeace, International Union for the Conservation of Nature, World Wildlife Fund, and others, emerged as influential voices, fervently urging governments to adopt proactive environmental measures. The advent of information technology (IT), notably the internet and social media, played a pivotal role in augmenting public knowledge, concern, and cross-boundary communication about local, national, and global environmental issues. Importantly, IT remains a potent catalyst propelling society's insistence on responsible and efficacious environmental initiatives.⁶

2.3. International Legal Framework in Support of ECTs

During the 1970s, international environmental law (IEL) experienced notable fortification, exerting a growing impact on the environmental legislation and institutions of various nations. The ground-breaking Stockholm Declaration of 1972, though not obligatory, served as a catalyst for shaping contemporary IEL principles. Concurrently, the establishment of the UN Environment Programme (UNEP) in the same year marked a significant milestone, solidifying its status as the preeminent global authority on environmental matters.

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to justice and administrative proceedings, including redress and remedy, shall be provided.”⁷

This was followed by significant international instruments in environmental law, including the 1982 World Charter for Nature, the 1992 Rio Declaration on Environment and Development, the 1998 Aarhus Convention on Access

⁵ As per the report published by UNEP under the head “Environmental Courts and Tribunals: A Guide for Policy Makers” (2016).

⁶ *Ibid.*

⁷ 1992 Rio Declaration Principle 10.

to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, as well as UN Environment's 2010 Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters (Bali Guidelines), among others. These global frameworks in environmental law have established standards for best practices in environmental governance globally, giving rise to the trio of environmental "Access Rights" – comprising individuals' entitlements to information, participation, and justice in environmental affairs – now acknowledged as the "3 Pillars" of the environmental rule of law.⁸ The formulation of international standards by UN Environment and other authorities regarding environmental access rights has significantly shaped the development of national laws in numerous respects.

Central to fostering more inclusive, fair, and efficient environmental decision-making, access rights play a pivotal role. The provision of information empowers and inspires individuals to engage in a meaningful and well-informed manner. Participation in decision-making amplifies a government's responsiveness to public concerns and demands, facilitating consensus-building and enhancing acceptance and compliance with environmental decisions. Access to justice empowers individuals to hold government agencies, companies, and individuals accountable.⁹

The third foundational element concerning access rights, notably the right to justice as outlined in Principle 10 of the Rio Declaration and further developed in the Bali Guidelines, has emerged as a key catalyst for innovative Environmental and Conservation Technologies (ECTs). Ongoing initiatives led by national governments to establish a Regional Agreement on Access to Information, Public Participation, and Access to Justice in Environmental Matters (Aarhus Convention) for Latin America and the Caribbean, along with parallel endeavours in different geographical areas, underscore the evolving landscape.

3. NGT: Historical Background

In India, the higher echelons of the judiciary bear a burdensome load due to a substantial backlog of cases. Recognizing the crucial importance of effectively preventing environmental pollution and expeditiously resolving environmental complaints, it becomes apparent that the current judicial administration framework is not conducive to achieving these goals. Consequently, there arose an urgent demand for an alternative forum that could address environmental cases with promptness. The genesis of India's

⁸ Pring, G. and Pring C. (2009). *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, at 6-9 (hereafter *Greening Justice*), <http://www.law.du.edu/ect-study>; Nanda, V. & Pring, G. (2013). *International Environmental Law and Policy for the 21st Century* (2nd rev. ed.) at 97-158.

⁹ Foti, J., et al. (2008). *Voice and Choice: Opening the Door to Environmental Democracy*,

Environmental Court stems from a recurring plea articulated by Constitutional Courts, emphasizing the necessity for a specialized judicial entity equipped to handle intricate environmental issues. The impetus for establishing Environmental Courts was provided by the Supreme Court of India, whose judgment underscored the challenges faced by judges in adjudicating environmental matters.¹⁰

In the case of *M. C. Mehta v. Union of India*,¹¹ the Supreme Court underscored the imperative of creating an “Environment Court”¹² for the prompt resolution of environmental cases, consistently emphasizing this need. In response, the Indian Parliament enacted the National Environment Tribunal Act, 1995, and the National Environment Appellate Authority Act, 1997. However, both acts failed to gain traction, prompting a growing call for more effective legislation to address environmental cases. Subsequently, the Parliament passed The National Green Tribunal Act, 2010, aiming to handle all environmental issue-related cases.¹³ The Supreme Court, in its verdict, emphasized the necessity of establishing an environmental court that benefits from the insights of environmental scientists and technically qualified individuals within the judicial process. Following a detailed discussion on jurists’ perspectives from various countries¹⁴, the Supreme Court also suggested the establishment of “environmental courts on a regional basis with a professional judge and two experts,”¹⁵ recognizing the need for specialized expertise in adjudicating environmental cases involving scientific data assessment.

In the legal case of the *Indian Council for Enviro-Legal Action v. Union of India*,¹⁶ the Supreme Court emphasized the need for the expeditious resolution of environmental issues by proposing the establishment of specialized environmental courts with both civil and criminal jurisdiction. In the context of *Charanlal Sahu v. Union of India*,¹⁷ the court expressed the view that the current civil law process, which involves prolonged litigation to ascertain damages, undermines the primary purpose of compensating victims. To address this challenge and ensure timely relief to victims of industrial disasters or accidents, the court suggested the creation of tribunals

¹⁰ See Article on “India New Environmental Courts: The National Green Tribunal”, By Ritwick Datta, Environmental Lawyer and coordinator of the Legal initiative for Forest and Environment (LIFE), New Dehli.

¹¹ (1996) 3 SCC 212: AIR 1996 SC 1446.

¹² The Bhopal gas disaster in 1984, also led the Supreme Court to emphasize on the need for constitution of environmental courts.

¹³ The National Environment Appellate Authority had a very limited mandate and serves as an applet body against the decision of the Ministry of Environment and Forest granting clearance to a project.

¹⁴ Prof. Satish C. Shastri, Fourth Edition, Eastern Book Company, Lucknow, Pg 170.

¹⁵ *A. P. Pollution Control Board v. M. V. Nayudu*, 1999 (2) SCC 718.

¹⁶ *Indian Council for Enviro-Legal Action v. Union of India*. 1996(3) SCC 212

¹⁷ 1988 SCC (3) 255.

governed by a distinct procedure for determining compensation. Furthermore, the court recommended that appeals against tribunal decisions be limited to questions of law and be made to the Supreme Court only after the prescribed compensation amount has been deposited.

The Law Commission, in formulating its 186th law report, drew inspiration from the innovative model of the environmental court established in New Zealand and the Land and Environmental Court of New South Wales. Additionally, it gleaned insights from the Supreme Court's reflections in four pivotal judgments: *M.C. Mehta v. Union of India*, *Indian Council for Environmental – Legal Action v. Union of India*, and *A.P. Pollution Control Board v. Nayudu*. The *Nayudu* case referenced the concept of a “multi-faceted” Environmental Court, incorporating both judicial and technical/scientific expertise, as articulated by Lord Woolf in a recent English context. The Commission also delved into Environmental Court legislation in Australia, New Zealand, and other nations, considering the comprehensive framework outlined in the *Nayudu* case. The report embraced the procedural practices of Environmental Courts in Australia and New Zealand, where they not only serve as appellate bodies for orders under corresponding Water Acts, Air Acts, Noise Acts, and various Environmental Acts but also wield original jurisdiction. These courts are endowed with the full gamut of powers akin to a Civil Court, with some even possessing criminal adjudicatory authority.¹⁸

The legislation represents a dedicated initiative by the Parliament, arising from Article 253 of the Constitution in conjunction with Entry 14 of List I of Schedule VII. This effort is aimed at fulfilling India's commitment to the Stockholm Declaration of 1972, a pivotal event in which India participated, urging states to take initiative-taking measures for the safeguarding and enhancement of the human environment. Additionally, it aligns with the Rio Declaration of 1992, another significant international engagement by India, which calls on states to ensure effective access to both judicial and administrative proceedings, including avenues for redress and remedy. Furthermore, the legislation serves as a strategic response to the imperative set by the apex court, emphasizing that the right to a healthy environment is an integral facet of the right to life as articulated in Article 21 of the Indian Constitution.

4. NGT: Structure, Procedure and Jurisdiction

4.1. Structure

Following the implementation of the legislation, the Principal Bench of the National Green Tribunal has been established in the capital city, New Delhi, accompanied by regional benches strategically located in Pune (Western

¹⁸ Dr. S. C. Tripathi & Mrs. Vibha Arora, Fifth edition, 2013, Central Law publication, Allahabad “Environmental Law”.

Zone Bench), Bhopal (Central Zone Bench), Chennai (South Bench), and Kolkata (Eastern Bench). Each bench possesses a designated geographical jurisdiction spanning multiple states within its respective region. Additionally, a system for circuit benches is in place, allowing flexibility for benches like the Southern Zone bench, centered in Chennai, to convene in alternate locations such as Bengaluru or Hyderabad. At the helm of the National Green Tribunal is a chairperson, a retired Judge of the Supreme Court, with the headquarters situated in Delhi. The tribunal's judicial members consist of retired Judges of High Courts, and every bench is mandated to include at least one Judicial Member and one Expert Member.¹⁹ Expert members are required to hold professional qualifications and boast a minimum of 15 years of expertise in the realms of environment/forest conservation and related fields.²⁰

4.2. Procedure

The National Green Tribunal outlines a straightforward process for applying to seek restitution for environmental harm. Should the concerned party find the decision unsatisfactory, they retain the option to apply to the tribunal, challenging an appeal, order, or any governmental decision. If the application or appeal does not involve a compensation claim, a nominal fee of Rs. 1000/- is required. However, in cases where compensation is being pursued, the fee amounts to one percent of the compensation figure, with a minimum fee of Rs. 1000/-.²¹

4.3. Jurisdiction of the tribunal

The National Green Tribunal possesses the authority to adjudicate all civil matters about environmental issues and inquiries associated with the execution of laws enumerated in Schedule I of the NGT Act, 2010. These encompass various legislations such as the Water (Prevention and Control of Pollution) Act, 1947; the Water (Prevention and Control of Pollution) Cess Act, 1947; the Forest (Conservation) Act, 1980; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1991; the Public Liability Insurance Act, 1991; and the Biological Diversity Act, 2002.²²

This legislation bestows upon the Tribunal the jurisdiction to address all civil cases involving a significant environmental question (including the enforcement of any legal right about the environment) arising from the implementation of the statutes specified in Schedule I.²³

Additionally, it stipulates a six-month timeframe for entertaining applications for dispute adjudication, with a provision for the Tribunal to consider applications filed within an additional period of up to sixty days if reasonable

¹⁹ Section 4, The National Green Tribunal Act, 2010

²⁰ *Ibid.* Section 5.

²¹ *Ibid.* Section 18.

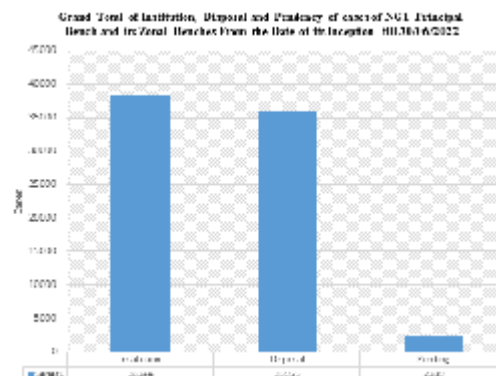
²² *Ibid.* Schedule I.

²³ *Ibid.* Section 14(1).

cause prevented timely submission.²⁴ The term ‘substantial question relating to the environment’ is elucidated in the act, encompassing scenarios where a person directly violates a specific statutory environmental obligation, leading to widespread community impact, substantial environmental or property damage gravity, or broadly measurable public health impairment. Furthermore, the environmental consequences may be tied to a distinct activity or a point source of pollution.²⁵

5. Critical Assessment: Working of NGT

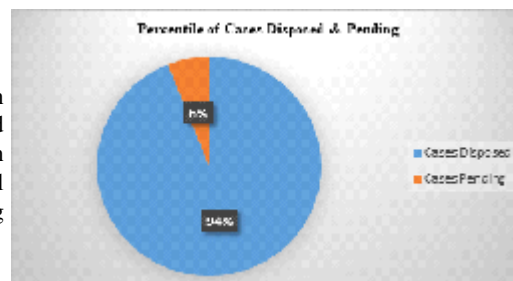
The National Green Tribunal has earned a commendation for its noteworthy contributions to environmental justice and awareness dissemination. An insightful assessment of the Tribunal’s efficacy can be gleaned from its institutional activity, case resolution, and pending matters. As of June 30, 2022, the principal bench and its zonal counterparts have registered a total of 38,244 cases since their inception. Impressively, 35,955 cases have been successfully concluded, showcasing a rapid and commendable disposal rate of approximately 94.01%. Currently, 2,289 cases remain pending, constituting a mere 5.98% of the instituted cases. This expedited resolution stands out when compared to the pace of other justice administration entities. The accompanying graphs and charts visually encapsulate these statistics.



Source: Official Website of National Green Tribunal (July 2022)

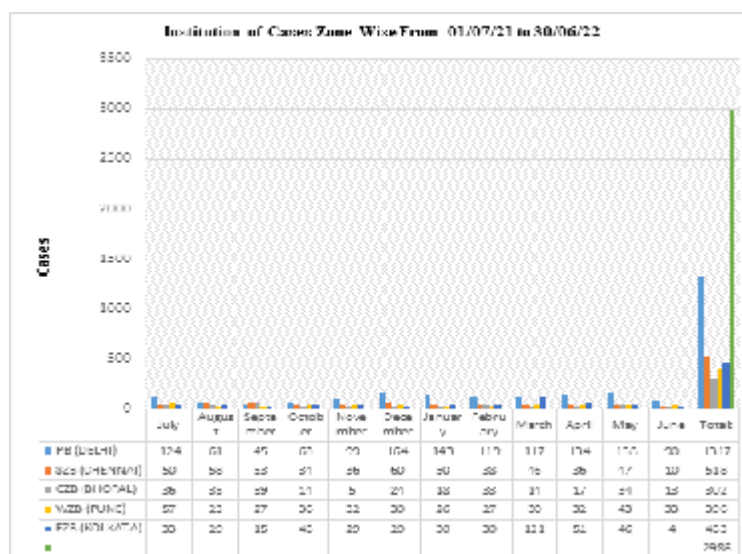
Source: Official Website of National Green Tribunal (July 2022)

The evaluation will predominantly center on scrutinizing the case disposition, pendency, and overall performance of both the Principal Bench and the various Zonal Benches of the National Green Tribunal, categorized by Bench, spanning the period from July 1, 2021, to June 30, 2022.

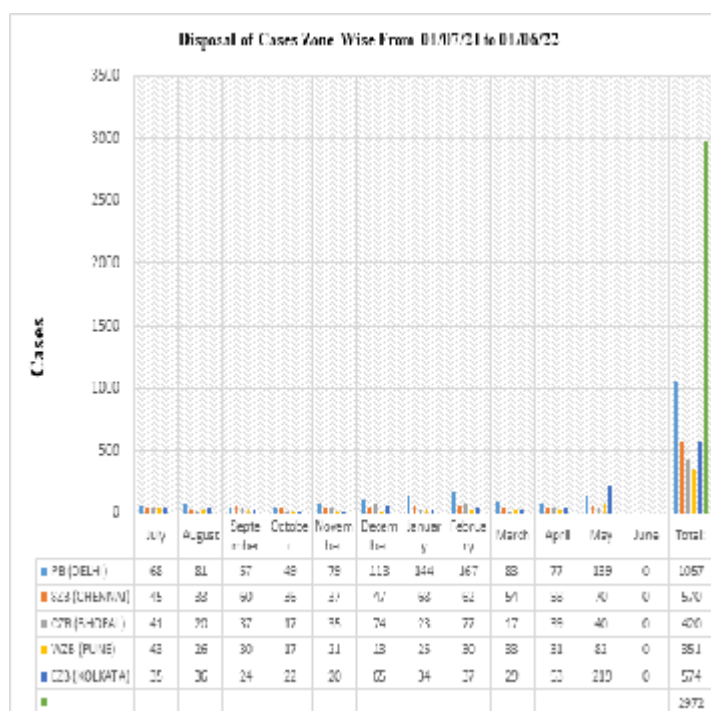


²⁴ *Ibid.* Section 14(3) and Proviso to Section 14.

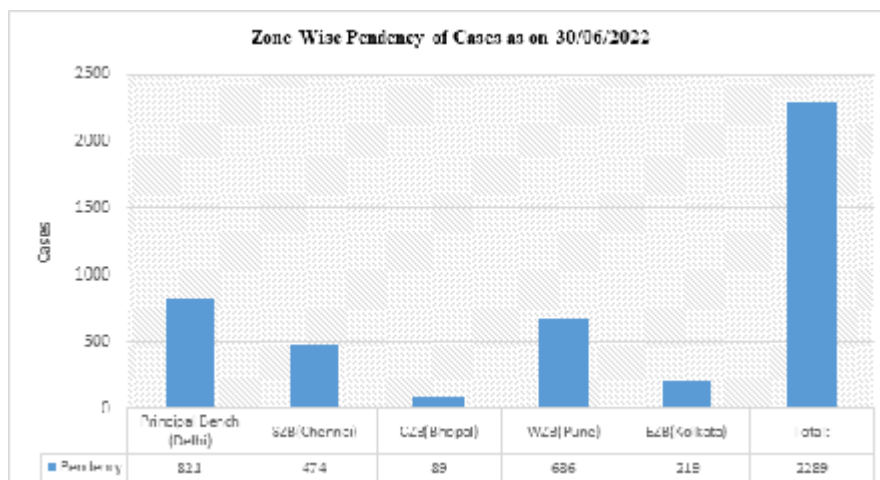
²⁵ *Ibid.* Section 2(m).



Source: Official Website of National Green Tribunal (July 2022)



Source: Official Website of National Green Tribunal (July 2022)



Source: Official Website of National Green Tribunal (July 2022)

1.1. Summary of Findings

- Within the timeframe from 01-07-2021 to 30-06-2022, a total of 2,986 cases were instituted.
- The principal bench in New Delhi saw the highest caseload, with 1,317 cases, while the central zone bench in Bhopal recorded the lowest, with 302 cases during this period.
- A noteworthy 2,972 cases were resolved, a figure nearly mirroring the number of cases brought forth.
- The principal bench in New Delhi led in case resolutions, closing 1,057 cases, whereas the west zone bench in Pune had the fewest closures, with 351 cases during this span.
- As of 30-06-2022, the combined pending cases before principal and zonal benches stand at 2,289.
- The principal bench in New Delhi holds the highest number of pending cases, with 821, while the central zone bench in Bhopal has the lowest, with 89 pending cases.

1.2. Bench wise Assessment

After the incorporation of The National Green Tribunal Act, 2010; one principal bench was established in New Delhi and other zonal benches were created for the convenience of the public at large. All of them became functional on different dates. If we look at the year-wise performance of all these benches including the principal bench, we get to know whether the purpose for which The National Green Tribunal Act, 2010 was incorporated is fulfilled or not. The year-wise data available in this regard is only up to 2017.

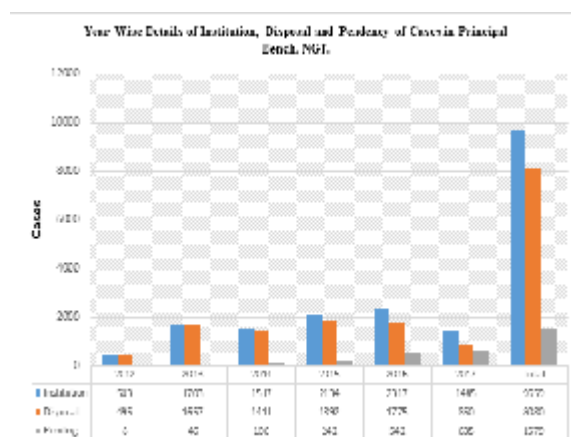
1.2.1. Principal Bench, New Delhi

The Principal bench of NGT became fully operational in July 2011 in New Delhi. The Principal benches of NGT exercise jurisdiction in Uttar Pradesh,

Punjab, Uttarakhand, Himachal Pradesh, Haryana, and National Capital Territory of Delhi, and the Union Territory of Chandigarh.

Summary of Statistical Analysis (2012-2017)

- By the end of 2017 almost 9,659 cases were instituted before this bench;
- In the same period 8,080 cases were disposed by this bench;
- 1,579 cases were still pending before this bench by the end of this period;
- Rate of disposal of cases is 83.65% of the total number of cases instituted in this tenure;
- Rate of pendency of cases is 16.34% of the total number of cases instituted in this phase.



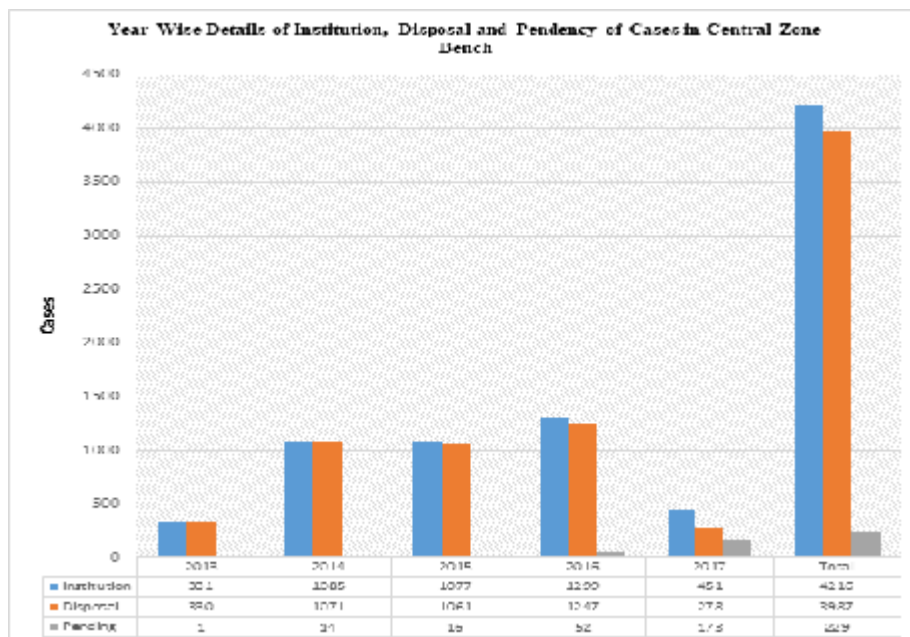
Source: National Green Tribunal International Journal on Environment Vol. 2 (2017)

1.1.1. Central Zone Bench at Bhopal

The Central Zone Bench at Bhopal has become functional w.e.f. 7th April 2013. The jurisdiction of the Central Zone Bench of the National Green Tribunal is Madhya Pradesh and Chhattisgarh.

Summary of Statistical Analysis (2013-2017)

- By the end of 2017 almost 4,216 cases were instituted before this bench.
- In the same period 3,987 cases were disposed by this bench.
- 229 cases were still pending before this bench by the end of this period.
- Rate of disposal of cases is 94.56% of the total number of cases instituted in this tenure.
- Rate of pendency of cases is 5.43% of the total number of cases instituted in this phase.



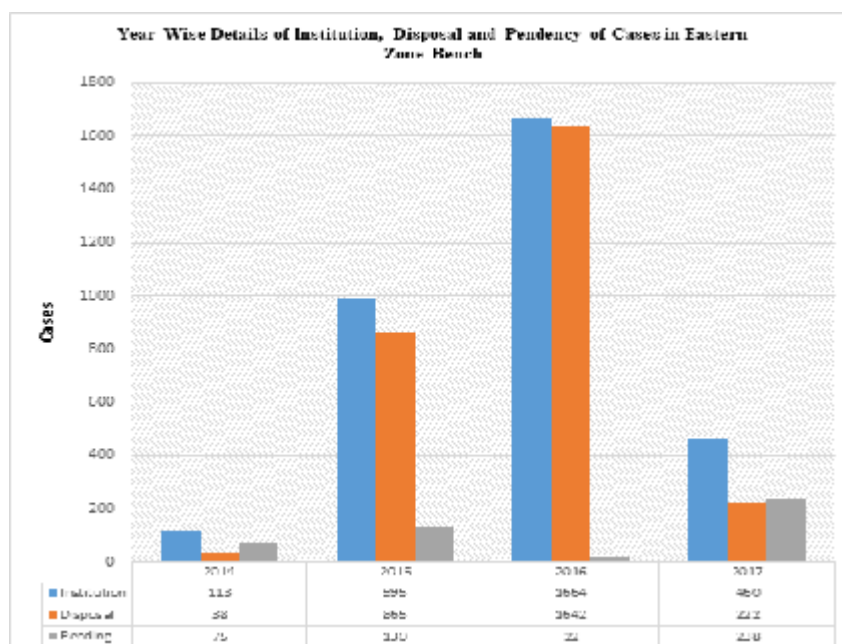
Source: National Green Tribunal International Journal on Environment Vol. 2 (2017)

1.1.1. Eastern Zone Bench at Kolkata

As per the Ministry of Environment and Forest notification dated 17th August 2011, the Eastern Zone Bench at Kolkata has become functional with effect from 24th May 2014. Presently there is only one Bench functioning at Kolkata. The jurisdiction of the National Green Tribunal, Eastern Zone Bench is West Bengal, Orissa, Bihar, Jharkhand, seven sister States of the North-Eastern Region, Sikkim, Andaman, and Nicobar Islands.

Summary of Statistical Analysis (2014-2017)

- By the end of 2017 almost 3,232 cases were instituted before this bench.
- In the same period 2,767 cases were disposed of by this bench.
- 465 cases were still pending before this bench by the end of this period.
- The rate of disposal of cases is 85.61% of the total number of cases instituted in this tenure.
- The rate of pendency of cases is 14.38% of the total number of cases instituted in this phase.



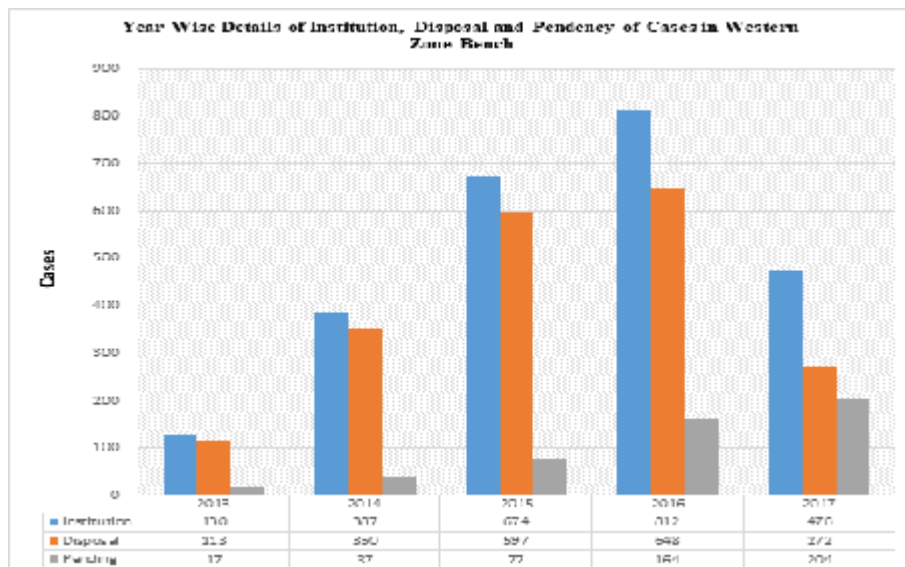
Source: National Green Tribunal International Journal on Environment Vol. 2 (2017)

1.1.1. Western Zone Bench at Pune

The Western Zone Bench at Pune has become functional w.e.f. 25th August 2013. Presently there is only one Bench functioning at Pune. The jurisdiction of the National Green Tribunal, Western Zone Bench is Gujarat, Maharashtra, Dadar and Nagar Haveli, and Goa with Union Territories of Daman and Diu.

Summary of Statistical Analysis (2013-2017)

- By the end of 2017 almost 2,479 cases were instituted before this bench.
- In the same period 1,980 cases were disposed of by this bench.
- 499 cases were still pending before this bench by the end of this period.
- The rate of disposal of cases is 79.87% of the total number of cases instituted in this tenure.
- The rate of pendency of cases is 20.12% of the total number of cases instituted in this phase.



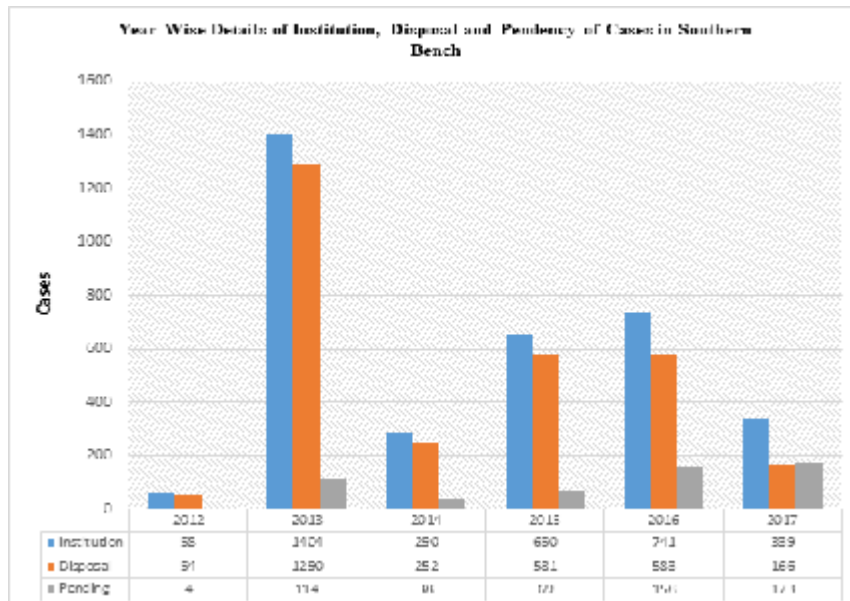
Source: National Green Tribunal International Journal on Environment Vol. 2 (2017)

1.1.1. Southern Bench at Chennai

The Southern Zone Bench at Chennai becomes functional w.e.f. 30th October 2012. Presently two courts are functioning at Chennai. The jurisdiction of the National Green Tribunal, Southern Zone Bench is Tamil Nadu, Kerala, Karnataka, Andhra Pradesh, Union Territories of Pondicherry, and Lakshadweep.

Summary of Statistical Analysis (2012-2017)

- By the end of 2017 almost 3,482 cases were instituted before this bench.
- In the same period 2,926 cases were disposed of by this bench.
- 556 cases were still pending before this bench by the end of this period.
- Rate of disposal of cases is 84.03% of the total number of cases instituted in this tenure.
- Rate of pendency of cases is 15.96% of the total number of cases instituted in this phase.



Source: National Green Tribunal International Journal on Environment Vol. 2 (2017)

6. Conclusion and Suggestions

Environmental justice is a principle that aspires to safeguard the natural world and seeks a more equitable balance between the costs and benefits of environmental protection across human societies. At the international level, regulations about environmental justice primarily manifest as conventions, treaties, protocols, and decisions of international courts. However, these are binding only for the states that are signatories to such agreements. Environmental justice encompasses various legal enactments that govern and manage water, air, noise, and land pollution, all of which have adverse effects on human lives and other living organisms. Distinguished as the first constitution worldwide to include specific provisions for environmental protection and improvement, the Indian Constitution incorporates elements that emphasize the importance of maintaining health, preserving sanitation, and safeguarding the environment. The Indian judiciary has been instrumental in advancing environmental justice, deriving from Article 21 of the Constitution, which recognizes the interconnectedness of environmental well-being and citizens' quality of life. The judiciary's proactive role has been particularly commendable, notably in cases related to environmental pollution, ecological degradation, and conflicts over natural resources. Recognizing the need for expertise in managing environmental justice issues, the National Green Tribunal (NGT) Act was enacted to address techno-scientific challenges in environmental litigation. The NGT has emerged

as a prominent global environmental court, demonstrating a comprehensive jurisdiction and efficient disposal of cases. Despite the optimistic stance on environmental preservation, the escalating levels of pollution over the years point to inadequate government support. Delays in implementing tribunal decisions and inefficiencies in central and state pollution control boards contribute to this issue. The National Green Tribunal, constrained by limited capacity and staff, struggles to maintain vigilance nationwide without adequate government support.

To enhance access to justice in environmental matters, especially concerning the NGT Act, of 2010, several recommendations are proposed:

1. Expand the scope of the Act to cover all aspects of environmental law, renaming it the National Environment Tribunal Act.
2. Grant finality to the decisions of the NGT to reduce the burden on higher courts.
3. Clearly define the tribunal's jurisdiction, moving beyond "substantial questions relating to the environment" to include individuals or groups affected.
4. Introduce provisions to prevent environmental pollution proactively, adhering to the precautionary principle.
5. Increase the number of NGT Benches and establish them in affected areas to ensure justice accessibility.
6. Empower the NGT with contempt of court authority for effective implementation of decisions.
7. Incorporate suo motu jurisdiction as an integral feature of the NGT for improved and efficient functioning.

Decoding Justice: Navigating the Complexities of Criminal Law in the Modern Era

**Adil Rehman*

***Sadaf Sareen Khan*

Abstract

This article navigates the dynamic contours of modern criminal law, examining its evolution amidst societal changes, technological advancements, and global complexities. Exploring the transformative impact of forensic sciences and digital evidence, it showcases landmark cases and legislative responses in Indian jurisprudence. Notable examples include the influential Maneka Gandhi and Shreya Singhal cases, reflecting the adaptability of the legal system to shifting societal norms. Legislative developments, such as the Criminal Law (Amendment) Act, underscore India's commitment to addressing emerging challenges and fostering justice. The article also delves into sociological perspectives, emphasizing the reciprocal relationship between legal principles and societal dynamics. Additionally, it highlights the crucial role of public perception and media influence in shaping legal narratives. In conclusion, the article underscores the imperative for an adaptive legal framework that aligns with evolving societal values and global realities.

Key Words: *Criminal Law, Societal Changes, Technological Transformations, Global Challenges, Legislative Developments, Sociological Perspectives.*

Introduction:

The dynamism of the modern era is profoundly reflected in the ever-evolving realm of criminal law¹. As society undergoes rapid transformations, propelled by technological advancements, shifting cultural norms, and an increasingly interconnected global landscape, the intricacies of administering justice take center stage. This paper embarks on a succinct yet comprehensive exploration of the complexities inherent in contemporary criminal law, aiming to decode

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¹ S. Bhowmik, "The Evolution of Crime: The Dynamic Definition of Crime as Per Society" International Journal of Law Management & Humanities Vol. 6, 3438, Issue 2023.

the multifaceted challenges and opportunities that define the present legal landscape. The significance of scrutinizing modern criminal law lies in its pivotal role as a societal cornerstone, shaping responses to new forms of criminality and ensuring the delicate balance between individual rights and effective law enforcement². This exploration becomes particularly poignant in an age where technological innovations not only revolutionize criminal investigations but also raise ethical questions and privacy concerns. Moreover, societal shifts necessitate a re-examination of the very definitions of criminal offenses, as debates surrounding cybercrime, white-collar offenses, and substance legalization take center stage. As the boundaries of criminality transcend national borders, international law becomes an indispensable tool for addressing the complexities of transnational crimes.³ This paper delves into the collaborative efforts, treaties, and international tribunals shaping the global response to criminal challenges, highlighting the need for a unified approach in an increasingly interconnected world. Through the lens of case studies and legislative developments, the paper illuminates the practical implications of legal principles and their adaptation to contemporary challenges. Additionally, sociological perspectives offer insights into the intricate interplay between legal frameworks and societal dynamics, acknowledging the role of public perception and media influence in shaping the narrative surrounding justice. In navigating this multifaceted terrain, the paper seeks not only to analyze the current state of criminal law but also to provide a foundation for anticipating and adapting to future developments. By decoding justice in the modern era, we endeavor to contribute to a nuanced understanding of the challenges ahead and underscore the imperative for legal systems to evolve in step with the dynamic forces that shape our ever-changing world⁴.

Technological Transformations in Criminal Investigations (Forensic Sciences and Digital Evidence)

The advent of forensic sciences has revolutionized criminal investigations, ushering in an era where evidence speaks with unprecedented clarity.⁵ Traditional forensic methods, such as fingerprint analysis and DNA profiling, have become linchpins of criminal justice, offering irrefutable links between individuals and crime scenes.⁶ The precision and reliability of these techniques have not only enhanced the investigative process but have also played a pivotal

² H Carvalho, *The Preventive Turn in Criminal Law*, Oxford University Press, 1st ed., 2017

³ Gargi Sarkar and Sandeep K. Shukla, "Behavioral analysis of cybercrime: Paving the way for effective policing strategies", *Journal of Economic Criminology*, Vol. 2: 100034, Oct 2023.

⁴ Johnson, C. W., & Parry, D. C. (Eds.). (2022). *Fostering social justice through qualitative inquiry: A methodological guide*. Taylor & Francis.

⁵ Panneerchelvam, S., & Norazmi, M. N. (2003). Forensic DNA profiling and database. *The Malaysian journal of medical sciences: MJMS*, 10(2), 20.

⁶ Bukyya, J. L., Tejasvi, M. L. A., Avinash, A., P, C. H., Talwade, P., Afroz, M. M., ... & Srisha, V. (2021). DNA profiling in forensic science: A review. *Global Medical Genetics*, 8(04), 135-143.

role in ensuring the accuracy of legal outcomes. In the digital age, the scope of forensic sciences has expanded exponentially with the integration of digital evidence.⁷

Electronic trails, communication records, and data analysis have become indispensable tools for law enforcement agencies. Cyber forensics has emerged as a specialized field, enabling investigators to trace digital footprints and uncover hidden connections in cybercrime cases.⁸ The rise of artificial intelligence and machine learning further amplifies the potential for data analysis, aiding investigators in discerning patterns and anomalies that might elude human observation.⁹ However, this technological leap forward is not without its challenges. The sheer volume and complexity of digital evidence pose logistical and analytical hurdles for investigators. Ensuring the admissibility of digital evidence in court requires a nuanced understanding of evolving technologies and rigorous validation processes.¹⁰

Moreover, the rapid pace of technological advancement necessitates ongoing training for forensic professionals to stay abreast of emerging tools and methodologies.

3. Ethical Considerations and Privacy Concerns:

As technology becomes an integral part of criminal investigations, ethical considerations, and privacy concerns come to the forefront. The collection, analysis, and storage of vast amounts of personal data raise questions about the balance between effective law enforcement and safeguarding individual rights. One major ethical consideration involves the potential misuse of technology for surveillance purposes. The ubiquity of surveillance cameras, facial recognition systems, and location-tracking tools raises concerns about unwarranted intrusions into individual privacy. Striking the right balance between public safety and the right to privacy becomes a delicate challenge for policymakers and legal practitioners alike.¹¹

Moreover, the ethical use of digital evidence requires a robust framework to prevent abuse and ensure due process. Authentication, chain of custody, and the reliability of digital evidence demand heightened scrutiny to maintain the integrity of the legal system. Additionally, issues surrounding the transparency of algorithms in predictive policing and the potential for bias in artificial intelligence applications necessitate careful ethical considerations to prevent

⁷ Thribuvana Raj, H. (2022). *Forensic Examination of Portable Electronic Devices (PED)* (Doctoral dissertation, ResearchSpace@ Auckland).

⁸ Ali, A. A., Cahyani, N., & Jadied, E. (2019). Digital forensic analysis on iDevice: Jailbreak iOS 12.1. 1 as a case study. *Indonesia Journal on Computing (Indo-JC)*, 4(2), 205-218.

⁹ A Bohr and K Memarzadeh, The rise of artificial intelligence in healthcare applications, *Artificial Intelligence in Health care*, 2020, 25-60

¹⁰ Homem, I. (2013). LEIA: The Live Evidence Information Aggregator.

¹¹ Tompsett, B. C., & Prior, S. (2006, September). Problems of Privacy, Security, Identity, Integrity, Legality and Confidentiality in Internet Crime investigation and evidence collection. In *European E-Crime and Computer Evidence Conference, Nottingham*.

discriminatory outcomes. In navigating the intersection of technology, ethics, and privacy, legal systems must evolve to establish clear guidelines and ethical standards. This requires ongoing dialogues between legal experts, technologists, and policymakers to ensure that technological advancements in criminal investigations align with the fundamental principles of justice and respect for individual rights.¹²

4. Shifting Paradigms: Evolving Definitions of Criminal Offenses (Societal Changes and Conceptualization):

The ever-changing tapestry of societal norms plays a pivotal role in shaping the definitions of criminal offenses. As cultural, technological, and demographic shifts occur, the legal framework must adapt to reflect contemporary values and concerns.¹³

The evolving nature of societal norms influences how certain behaviors are perceived, challenging the traditional conceptualization of criminality. One notable shift involves the recognition of previously marginalized or misunderstood communities, prompting a reconsideration of certain offenses. For instance, changes in attitudes towards substance use and mental health have led to calls for a more compassionate approach, challenging punitive models in favor of rehabilitative measures.¹⁴

The recalibration of societal attitudes towards issues, such as gender identity, sexuality, and consent further underscores the need for legal definitions that align with evolving social consciousness. Moreover, the rapid pace of technological advancement introduces new dimensions to criminal behavior, necessitating legal definitions that can address novel challenges. As social interactions increasingly occur in digital spaces, issues like cyberbullying,¹⁵ online harassment,¹⁶ and digital property crimes¹⁷ demand a re-evaluation of traditional legal paradigms.

5. Debates on Cybercrime, White-Collar Offenses, and Substance Legalization:

In the realm of criminal law, contemporary debates center on three pivotal fronts: Cybercrime, white-collar offenses, and the legalization of substances. The digital age has ushered in a new frontier of criminality, requiring legal frameworks to grapple with offenses that transcend physical borders.

¹² Pillai, K. C. (2006). Criminal Investigation in India–Human Rights Perspective. *Journal of the Indian Law Institute*, 48(3), 435-438.

¹³ S Bhowmik, The Evolution of Crime: The dynamic Definition of Crime as Per Society, *IJLM*, volume 6(3) page 3438-3439.

¹⁴ Levy, S. J., Kokotailo, P. K., & Committee on Substance Abuse. (2011). Substance use screening, brief intervention, and referral to treatment for pediatricians. *Pediatrics*, 128(5), e1330-e1340.

¹⁵ Cyberbullying: What it is and how to stop it, available at; <https://www.unicef.org> And Cyberbullying: Hiding Behind the Screen, 2014, available at; www.ncbi.nlm.nih.gov

¹⁶ Online Harassment: Meaning, Types and Impact, available at, <https://www.eap-india.com>

¹⁷ Maria Tcherni, Andrew Davies, Giza Lopes, Alan Lizotte, The Dark Figure of Online Property Crime: Is Cyberspace Hiding a Crime Wave, 2016, available at, <https://www.unodc.org>

I. Cybercrime:

The digital landscape has given rise to a host of cybercrimes, ranging from identity theft to sophisticated cyber espionage.¹⁸ As technology evolves, so too do the methods employed by cybercriminals, challenging legal definitions that may struggle to keep pace. The legal community faces the ongoing task of delineating the boundaries of cyber offenses, ensuring that laws remain effective in combating emerging threats while safeguarding individual liberties.

ii. White-Collar Offenses:

The shifting dynamics of the corporate world bring white-collar offenses to the forefront of legal discourse. Financial crimes, corporate fraud, and insider trading pose challenges that require nuanced legal definitions. Balancing the pursuit of justice with the need to maintain economic stability calls for a careful examination of white-collar offenses and the legal mechanisms in place to address them.¹⁹

iii. Substance Legalization:

Changing attitudes towards the recreational use of certain substances challenge traditional definitions of criminal offenses. Jurisdictions around the world grapple with the decriminalization and legalization of substances, sparking debates on public health, individual autonomy, and the role of the criminal justice system. Examples of changing attitudes toward the recreational use of certain substances and the challenges posed to traditional criminal offenses include²⁰

(a) *Cannabis Legalization.*

In several jurisdictions, there has been a shift towards decriminalizing and legalizing the recreational use of cannabis. Countries like Canada, Uruguay, and several U.S. states have implemented laws allowing regulated access to marijuana, challenging the traditional criminalization of its possession and use.²¹

(b) *Psychedelic Substances:*

The re-evaluation of substances like psilocybin (found in psychedelic mushrooms) and MDMA (commonly known as ecstasy) is gaining traction. Some regions are exploring therapeutic uses and reconsidering criminal penalties for their possession, emphasizing potential benefits for mental

¹⁸ Sirohi MN. Cyber Terrorism and Information Warfare. Vij Books India Pvt Ltd; 2015 Jun 1.

¹⁹ Buell, S. W. (2013). Is the white-collar offender privileged? *Duke LJ*, 63, 823.

²⁰ Hammond, A. S., Dunn, K. E., & Strain, E. C. (2020). Drug legalization and decriminalization beliefs among substance-using and non-using individuals. *Journal of addiction medicine*, 14(1), 56.

²¹ Svrakic DM, Lustman PJ, Mallya A, Lynn TA, Finney R, Svrakic NM. Legalization, decriminalization & medicinal use of cannabis: a scientific and public health perspective. *Mo Med*. 2012 Mar-Apr;109(2):90-8. PMID: 22675784; PMCID: PMC6181739.

health.²²

(c) *Drug Decriminalization in Portugal:*

Portugal decriminalized the personal possession of all drugs in 2001, focusing on treating drug abuse as a public health issue rather than a criminal offense. This approach has sparked international debates on the effectiveness of decriminalization in reducing drug-related harm.²³

(d) *Opioid Crisis Response:*

The opioid epidemic has prompted some jurisdictions to reconsider criminalizing substance abuse, focusing on harm reduction and treatment instead. Some areas have implemented safe injection sites and naloxone distribution programs to address public health concerns associated with opioid addiction.²⁴

(e) *Medical Marijuana Legislation:*

Many regions have embraced the medical use of marijuana, recognizing its therapeutic potential. This shift challenges the traditional criminalization of marijuana possession and underscores the evolving perception of certain substances as having legitimate medical benefits.²⁵

These examples illustrate the ongoing global discourse on substances traditionally deemed criminal, showcasing diverse approaches toward balancing public safety, individual autonomy, and the role of the criminal justice system in responding to changing societal attitudes. Legal frameworks must adapt to reflect the evolving societal perspective on substances, striking a balance between public safety and personal freedom. In navigating these debates, legal systems must remain agile, capable of adapting definitions of criminal offenses to reflect the complexities of the contemporary landscape. The ongoing dialogue surrounding these issues is essential for fostering a legal framework that aligns with societal values and addresses emerging challenges in a rapidly evolving world.

6. Beyond Borders: The Role of International Law / Global Challenges and Transnational Crimes:

In an era characterized by unprecedented global connectivity, the realm of criminal law extends beyond national borders to grapple with challenges that transcend geographical boundaries. Globalization has given rise to an intricate web of interconnected issues, including terrorism, human trafficking, and

²² Smith WR, Appelbaum PS. Two Models of Legalization of Psychedelic Substances: Reasons for Concern. *JAMA*. 2021 Aug 24;326(8):697-698. doi: 10.1001/jama.2021.12481. PMID: 34338743; PMCID: PMC8753745.

²³ Maria Olivera, Olga S. Cruz, 20 years of Portuguese Drug Policy- Developments, Challenges and the Quest for Human Rights, 2021, available at; www.policy.biomedcentral.com

²⁴ Akerele, E. (2022). Opioids. *Substance and Non-Substance Related Addictions: A Global Approach*, 179-184.

²⁵ Ecker, N. (2022). The Right Prescription: High-Cost Savings and Other Benefits from Medicare and Medicaid Coverage of Medical Marijuana. *Ohio State Legal Studies Research Paper*, (699).

cybercrime, that demand a collective and coordinated response from the international community. Global challenges, such as climate change, economic inequality, and public health crises, also have a direct impact on the landscape of criminality. Environmental crimes, financial fraud, and the exploitation of vulnerabilities in international supply chains underscore the need for legal frameworks that transcend the limitations of individual jurisdictions.²⁶

Transnational crimes, by their nature, evade conventional legal responses and necessitate an international approach that fosters collaboration and mutual understanding among nations. As the world becomes increasingly interdependent, legal systems must adapt to confront criminal activities that exploit the gaps and disparities between national laws.²⁷

7. International Cooperation, Treaties, and Tribunals:

The complexity of transnational crimes underscores the imperative for international cooperation to effectively combat these offenses. Cooperation takes shape through bilateral agreements, regional collaborations, and international treaties that establish a framework for joint efforts in investigation, prosecution, and extradition. Interpol, Europol, and other international law enforcement agencies play pivotal roles in facilitating communication and coordination among nations. International treaties form the backbone of legal responses to transnational crimes, providing a platform for nations to harmonize legal standards and commitments. Treaties such as the United Nations Convention against Transnational Organized Crime (UNTOC),²⁸ also known as the Palermo Convention, and the United Nations Convention against

²⁶ Jegede, A. E. (2017). Modern information technology, global risk, and the challenges of crime in the era of late modernity. In *Impacts of the Media on African Socio-Economic Development* (pp. 18-33). IGI Global.

²⁷ Transnational Organized Crime: The Globalized Illegal Economy, available at; <https://www.unodc.org>

²⁸ The United Nations Convention against Transnational Organized Crime, adopted by the General Assembly resolution 55/25 of 15 Nov. 2000, is the main International Instrument in the fight against transnational organized crimes. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols which target specific areas and manifestations of organized crime; The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children which entered into force on 25 December 2003, The Protocol against the Smuggling of Migrants by Land, Sea and Air which entered into force on 28 January 2004, and The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition which entered into force on 3 July 2005, available at; <https://www.unodc.org>

²⁹ The United Nations Convention against Corruption is the only legally binding universal anti-corruption instrument. Adopted by the General Assembly on 31 October 2003 by resolution 58/4, it entered into force on 14 December 2005. The Convention covers five main areas, i.e., preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The Convention covers different forms of corruption, such as, bribery, trading in influence, abuse of functions, etc., available at; <https://www.unodc.org>

Corruption (UNCAC)²⁹ exemplify the global commitment to addressing specific forms of transnational criminal activity.

International tribunals further contribute to the enforcement of international law by adjudicating cases that surpass national boundaries. The International Criminal Court (ICC) exemplifies a tribunal with a mandate to prosecute individuals for crimes against humanity, war crimes, and genocide. These institutions not only hold perpetrators accountable but also send a powerful message about the international community's commitment to justice.³⁰

However, the effectiveness of international law in addressing transnational crimes is not without challenges. Sovereignty concerns, disparities in legal systems, and issues of enforcement pose hurdles that require ongoing diplomatic efforts and legal innovations. The balance between respecting national autonomy and fostering global collaboration remains a delicate endeavor, requiring diplomatic finesse and a commitment to shared values. In conclusion, the role of international law in addressing transnational crimes is indispensable in a world where borders are increasingly porous, and challenges are inherently global. Through cooperation, treaties, and tribunals, the international legal framework strives to create a harmonized response to crimes that transcend national jurisdictions, illustrating the collective commitment to fostering a more just and secure global community.³¹

8. Case Studies and Legislative Developments in Indian Criminal Law:

India, with its rich legal history, has witnessed landmark cases that have shaped the trajectory of criminal law. One such case is the *Maneka Gandhi v. Union of India*,³² a watershed moment in Indian jurisprudence that expanded the scope of personal liberty under Article 21 of the Constitution. The Supreme Court held that the right to life and personal liberty is not confined to mere animal existence but includes the right to live with dignity. In the realm of cybercrime, the case of *Shreya Singhal v. Union of India*³³ marked a significant development. The Supreme Court struck down Section 66A of the Information Technology Act, 2000 deeming it violative of the right to freedom of speech and expression. This decision set a precedent for safeguarding fundamental rights in the digital age. Moreover, the *Navtej Singh Johar v. Union of India*,³⁴ case stands as a landmark in the context of LGBTQ+ rights. The Supreme Court decriminalized consensual homosexual acts, overturning the colonial-era Section 377 of the Indian Penal Code, 1860. This decision represented a paradigm shift in recognizing the rights and dignity of the LGBTQ+ community.

³⁰ Oluka, L. N., Ativie, C. A., & Okuguni, O. M. (2019). The New Order, Human Rights and Extradition Laws in Africa: Impacts and Prospects. *JL Pol'y & Globalization*, 82, 103.

³¹ Hauck, P., & Peterke, S. (Eds.). (2016). *International law and transnational organized crime*. Oxford University Press.

³² AIR 1978 SC 597; (1978) 1 SCC 248

³³ AIR 2015 SC 1523

³⁴ 2018 INSC 790

9. Legislative Responses:

India has responded to evolving challenges in criminal law through legislative measures aimed at modernization and effective justice delivery. One such transformative legislation is the Criminal Law (Amendment) Act, 2013, enacted in response to the Nirbhaya case. This amendment strengthened laws related to sexual offenses, introducing new offenses, revising punishment structures, and emphasizing the protection of victims. The Goods and Services Tax (GST) Act, of 2017 introduced a novel approach to combating economic offenses. It replaced a complex tax structure and brought in stringent provisions to curb tax evasion and fraud. The legislation is aimed at streamlining the tax regime and promoting transparency in financial transactions. In response to the increasing prevalence of cybercrimes, the Information Technology (Amendment) Act, of 2008 was enacted to address challenges in the digital domain. This amendment expanded the definition of cybercrimes, introduced new offenses, and enhanced penalties for unauthorized access and data breaches. It also provided a legal framework for the admissibility of electronic evidence. The Juvenile Justice (Care and Protection of Children) Act, 2015 reflects a progressive approach to dealing with juvenile offenders. It emphasizes rehabilitation over retribution, aligning with international standards. The Act recognizes the evolving capacity of juveniles and seeks to reintegrate them into society.

However, legislative responses are not without controversy. The Citizenship Amendment Act (CAA), 2019, sparked debates on the constitutional principles of equality and secularism. Critics argue that the Act introduces religious considerations into citizenship, potentially impacting the social fabric of the country. Legal challenges and public discourse continue to shape the narrative surrounding this legislation.

In conclusion, Indian criminal law has evolved through landmark cases and legislative developments, reflecting the nation's commitment to justice, and adapting to the changing needs of society. While progressive measures address issues like sexual offenses and LGBTQ+ rights, ongoing challenges and debates underscore the dynamic nature of the legal landscape in India.

10. Sociological Perspectives on Criminal Law: Interplay between Legal Principles and Social Dynamics:

Criminal law is not just a set of statutes. It is deeply intertwined with the social fabric, reflecting, and responding to the values, norms, and dynamics of society. The interplay between legal principles and social dynamics is a complex dance where the law both shapes and is shaped by the communities it governs³⁵. Sociological perspectives on criminal law delve into this intricate relationship. Legal principles often arise as society attempts to codify its moral and ethical standards. For example, laws regarding theft or violence not only delineate

³⁵ Lemke, J. L. (2005). *Textual politics: Discourse and social dynamics*. Taylor & Francis.

permissible behavior but also reflect societal notions of property, safety, and justice. The evolving understanding of social issues, such as domestic violence or substance abuse influences the legal response, with changes in legislation mirroring shifts in societal attitudes. Conversely, the law acts as a powerful agent of social change.³⁶

Landmark decisions or legislative reforms can challenge existing norms and pave the way for a more inclusive and just society. The criminalization or decriminalization of certain behaviors can reflect society's evolving perspectives on morality, personal autonomy, and collective well-being.

11. Public Perception and Media Influence:

Public perception plays a crucial role in shaping and sometimes challenging criminal laws. The media, as a powerful societal influencer, plays a significant role in constructing narratives around crime and justice³⁷. The portrayal of criminal incidents, trials and legal outcomes in the media often frames public perceptions and can contribute to misconceptions or biases. Media influence extends to the creation of public opinion on specific offenses or individuals. High-profile cases can capture public attention and the media's portrayal may lead to heightened emotions and calls for harsher legal responses. This phenomenon can impact the legal system, pushing for more punitive measures rather than nuanced, rehabilitative approaches.³⁸

Moreover, media coverage can contribute to the stigmatization of certain groups or communities, influencing how individuals from these groups are treated within the criminal justice system. Racial, socio-economic, or gender biases portrayed in the media may seep into legal decision-making processes challenging the ideal of blind justice. Sociological perspectives on criminal law emphasize the reciprocal relationship between the legal system and society³⁹. Understanding this interplay is essential for crafting laws that not only reflect societal values but also contribute to a fair and just society. Addressing public perceptions and media influences becomes integral to ensuring that legal principles align with the broader goals of justice, equity, and social cohesion. “

12. Conclusion:

In revisiting the multifaceted exploration of criminal law in the modern era, this discourse underscores the dynamic interplay of legal principles with the complexities of society. From technological transformations to shifting societal paradigms and the transcending of borders in the face of global challenges, the evolution of criminal law reflects an ongoing dialogue between legal

³⁶ Meier, J. (1997). Domestic violence, character, and social change in the welfare reform debate. *Law & Policy*, 19(2), 205-263.

³⁷ Lacey, N. (1998). *Unspeakable subjects: Feminist essays in legal and social theory*. Hart Publishing.

³⁸ Thukral, P., & Kainya, V. (2022). How social media influence crimes. *Indian Journal of Law and Legal Research*, 4(2), 1-11.

³⁹ Lacey, N. (1998). *Unspeakable subjects: Feminist essays in legal and social theory*. Hart Publishing.

frameworks and the intricacies of the human experience. Recapitulating the journey, landmark cases in Indian jurisprudence and legislative responses illuminate the responsiveness of the legal system to societal shifts. The nuanced considerations in the Maneka Gandhi case, the progressive strides in LGBTQ+ rights, and legislative measures like the Criminal Law (Amendment) Act, of 2013 showcase the adaptability of Indian criminal law. Sociological perspectives emphasize the reciprocal relationship between the legal system and society, highlighting the integral role of public perception and media influence. As we navigate this intricate landscape, it becomes clear that the implications extend beyond legal statutes. They reverberate through communities, influencing social norms, and shaping the very fabric of justice. Justicelusion, decoding justice in the modern era necessitates not only a keen understanding of legal intricacies but also a commitment to fostering a fair, adaptive, and inclusive legal framework. The implications of our exploration underscore the ongoing imperative to align criminal law with the evolving values and challenges of our dynamic global society.

Economic Empowerment of Women in Developing and Developed Nations: *Bridging the Gender Divide*

Showkat Ahmad Bhat *

Sobiya Manzoor Pullo **

Abstract

Women's economic empowerment is a global imperative, as it not only enhances individual well-being but also contributes to the prosperity and stability of nations. In both developing and developed worlds, gender disparities persist, albeit to varying degrees. These disparities encompass unequal pay, limited access to leadership positions, and cultural biases that hinder women's economic participation. In developing nations, additional challenges such as limited access to education, healthcare, and legal protection compound gender inequality in the workforce. Microfinance programs, vocational training, and grassroots initiatives have played a pivotal role in empowering women economically in these regions. Concurrently, developed countries have made strides in promoting gender equality through policies supporting work-life balance, equal pay, and representation on corporate boards. Entrepreneurship has emerged as a powerful avenue for women's economic empowerment in both settings, necessitating access to capital and mentorship programs. Despite notable progress, challenges persist, including the need to break the glass ceiling in corporate leadership and address the digital gender divide. Achieving economic parity requires a holistic approach that combines policy reforms, cultural transformation, and international cooperation. Men's involvement in advocating for gender equality is also essential. In this paper, an attempt will be made to evaluate the gender disparities in the workplace, challenges in developing nations, economic empowerment initiatives, and participation of women in decision-making and its resultant effects on women empowerment will be made.

Keywords: *empowerment, challenges, equality, disparities, global, reforms.*

Introduction

Women are unequal to men in all aspects in the developing world and gender disparity is more prevalent among poor people (World Bank, 2001). International attention on the discrimination of women was raised in the 1970s, when the United Nations (UN) convened its first World Conference on the

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Status of Women, in Mexico City in 1975. It marked a new era at the international level when it opened a worldwide dialogue on gender equality. It also marked a sharp difference among the women gathered there reflecting the politics and economic realities at that time. While women from the Eastern Block were more concerned with peace issues, women in the West pressed more for equality while those in the developing countries prioritised issues relating to development. The UN, as an international organization, continued to promote gender equality through its track records in organizing the second world women conference in Copenhagen, Denmark, in 1980, the third one in Nairobi, Kenya, in 1985 and the fourth in Beijing, China, in 1995 (UN Women, 2000)

Women are unequal to men in all aspects in the developing world and gender disparity is more prevalent among poor people Women are unequal to men in all aspects in the developing world and gender disparity is more prevalent among poor. Women are unequal to men in all aspects in the developing world and gender disparity is more prevalent among poor people Women are unequal to men in all aspects in the developing world and gender disparity is more prevalent among poor people.

The persistence of gender inequality is most starkly brought home in the phenomenon of “missing women”.

The term was coined by Amartya Sen in a now-classic article in the New York Review of Books (Sen, 1990) to capture the fact that the proportion of women is lower than what would be expected if girls and women throughout the developing world were born and died at the same rate, relative to boys and men, as they do in Sub Saharan Africa². Today, it is estimated that 6 million women are missing every year (World Development Report, 2012) Of these, 23 percent are never born, 10 percent are missing in early childhood, 21 percent in the reproductive years, and 38 percent above the age of 60³. Stark as the excess mortality is, it still does not capture the fact that throughout their lives, even before birth, women in developing countries are treated differently than their brothers, lagging behind men in many domains. For each missing woman, many more women fail to get an education, a job, or a political responsibility that they would have obtained if they had been men⁴. Women are unequal to men in all aspects in the developing world and gender disparity is more prevalent among poor people⁵.

¹ Sen, A. (2017). More than 100 million women are missing. In *Gender and Justice* (pp. 219-222). Routledge.

² Sen, A. (1992). Missing women. *BMJ: British Medical Journal*, 304(6827), 587.

³ World Development Report 2012, *Gender Equality and Development*, Authors/Editors: World Bank available at: <https://doi.org/10.1596/978-0-8213-8810-5>

⁴ Klasen, S., & Wink, C. (2002). A turning point in gender bias in mortality? An update on the number of missing women. *Population and Development Review*, 28(2), 285-312.

⁵ Pasqua, S. (2001). A Bargaining Model for Gender Bias in Education in Poor Countries. *South Asia*, 86(90.5), 102-6.

Discrimination against Women: An Awakening

International attention on the discrimination of women was raised in the 1970s when the United Nations convened its first world conference on the status of women in Mexico City in 1975. It marked a new beginning at the international level when it opened a worldwide dialogue on gender equality. In this regard Beijing Conference⁶ was really important because it marked the beginning of the struggle for gender equality. It also called for a total restructuring of the entire society to re-evaluate the relationship between men and women. It was argued that through these practices women could be truly empowered to take their rightful place as equal partners of men in all aspects of life. In the post-Beijing era, although overall poverty had declined, many women were still trapped in poverty. Over 60% of the women in developing nations engaged in various types of informal employment, meaning unstable earnings and high risks of poverty⁷.

There is a bi-directional relationship between economic development and women's empowerment defined as improving the ability of women to access the constituents of development—in particular health, education, earning opportunities, rights, and political participation. In one direction, development alone can play a major role in driving down inequality between men and women; in the other direction, continuing discrimination against women can, as Amartya Sen has forcefully argued, hinder development. Empowerment can, in other words, accelerate development. Having the capacity to exercise their legal rights to manage and profit from the resources, assets, income, and other resources is referred to as women's economic empowerment. Women's agency, access to official government programs, outside-the-home mobility, financial independence, and purchasing power all rise with economic empowerment. Another strategy for promoting women's economic empowerment is to strengthen their rights to inherit property and access to land. They would be able to better accumulate assets, capital, and the bargaining power necessary to rectify gender inequality as a result.⁸

Importance of Women's Empowerment in Societies

One of the key procedural issues when talking about human rights and development is empowerment, as it increases both the quality and the amount of human resources available for national development. Many world leaders and academicians have emphasized that women's empowerment is essential to sustainable development. Women would be unable to gain from or contribute to the country's development without equal inclusion of women in development.

⁶ Roberts, B. (1996). The Beijing fourth world conference on women. *The Canadian Journal of Sociology*, 21(2), 237-244.

⁷ Santoso, M. (2019, June 27). Women's empowerment in developing countries. Retrieved from <https://borgenproject.org/womens-empowerment-in-developing-countries/>.

⁸ Shahra Razavi, World Development Report 2012: Gender Equality and Development An Opportunity Both Welcome and Missed (An Extended Commentary), Research Coordinator United Nations Research Institute for Social Development (UNRISD)

In undeveloped and underdeveloped countries, women frequently face legal restrictions on access to their land-based solely on their gender⁹.

Women gain a type of bargaining leverage that they ordinarily lack when they have a claim to their land, which leads to increased prospects for economic independence and formal financial institutions. Microcredit is yet another well-liked strategy for the economic empowerment of women. By providing women in their community with access to loans with low-interest rates and no collateral requirements, microfinance companies hope to empower the female population. They specifically want to provide microcredit to women who wish to start their businesses. It is contentious and frequently contested whether microcredit and microloans are effective and successful. According to some critics, microcredit by itself does not ensure that women have control over how it is used. Because microfinance organizations don't challenge the cultural norms that still let males run the household budget, microcredit may be simply given to the husband. Microcredit doesn't free women from their responsibilities of the home, and even if they do have credit, they don't have the leisure to participate in the market as actively as men do¹⁰.

The first way by which economic development reduces inequality is by relaxing the constraints poor households face, thus reducing the frequency at which they are placed in the position to make life-or-death choices. Because these tragic choices are often resolved at the expense of women's well-being, increasing the resources available to families, as economic development does, reduces the excess vulnerability of women¹¹.

Even in the countries where the preference for boys is strongest, the evidence that girls systematically receive less care than boys under normal circumstances is not as clear-cut as one might guess. Angus Deaton in 1989 proposed an ingenious way to use household consumption data to indirectly estimate whether girls are given less to eat than boys. He noted that when a child is born, the household, in effect, becomes poorer, since there is now one more person to feed. This means that the adult members of the household need to cut down on their consumption to make room for the new expenditures. Observing the extent to which the household consumption of "adult goods," such as cigarettes, alcohol, or adult clothing drops when a child is born, provides us with an indirect estimate of the "cost" of the child. It is comparatively lesser in the case of a girl as compared to a girl than in the case of a boy.¹² The lack of evident

⁹ Abdi, A. (2019, August 28). Women are the key to economic development in third-world countries. Retrieved from <https://www.kcl.ac.uk/news/women-are-the-key-to-economic-development-in-third-world-countries>.

¹⁰ S. Garikipati, 2017, Microfinance and Gender: Issues, Challenges and the Road Ahead,

¹¹ Bent, B. B. (2019). The impact of microfinance on poverty reduction and women empowerment. In *Rais collective volume–Economic science* (pp. 72-86). Scientia Moralitas Research Institute.

¹² Angus Deaton, *Economics in America: An Immigrant Economist Explores the Land of Inequality*, Princeton University Press, 2023, 280 pp.

discrimination in everyday life is also apparent, for example, in immunization rates. The differential treatment is observed when either children or parents face extreme circumstances. India has one of the largest discrepancies in gender-specific mortality rates. One reason for this is that girls are treated differently when ill: for example, a study found that in the poor neighbourhoods of New Delhi, girls are more than twice as likely to die of diarrhea. This may cause, not only excess mortality but a progressive deterioration in the nutritional status of girls compared to boys, even if girls eat as much as boys. Differential treatment of girls and boys also becomes acute when the household itself is facing a crisis.¹³

In India, the excessive mortality rate of girls, relative to boys, spikes during droughts. When they cannot afford to feed everyone, families disproportionately sacrifice the welfare of girls. Research conducted in rural Tanzania shows explicitly how the vulnerability of women increases when households face a crisis. When the harvest is bad, due to droughts or floods, and food is scarce, the murder of “witches” (almost always old women) is twice as likely to occur as in normal years.¹⁴

If crises throw poor households into circumstances in which they are more likely to discriminate against vulnerable women, then increasing the ability of poor households to weather crises would disproportionately help women. These two examples suggest that just reducing the grip of poverty on these households or helping them to deal with crises, could improve the welfare of women of all ages. This shows that in seven countries around the world (including Afghanistan and India), there is no difference in the ways that girls and boys are treated by health practitioners once they reach the facility. If facilities were closer and easier to reach, parents would likely be bringing boys and girls more often, and they would then be equally treated¹⁵.

Can economic development cause women’s empowerment?

Gender inequality is often greater among the poor, both within and across countries. For example, while the gender gap in primary and secondary gross enrolment has rapidly gone down between 1991 and 2009 worldwide, it is still wider in poor countries than in middle-income countries and rich countries. The participation of women in the labour market has grown by 15 percent in East Asia and Latin America between 1971 and 1995, a rate faster than that for men and the gender gap in wages has narrowed as well. The life expectancy of women has increased by 20-25 years in developing countries over the past fifty years. Recent research suggests that economic growth, by reducing poverty

¹³ Barcellos, S. H., Carvalho, L. S., & Lleras-Muney, A. (2014). Child gender and parental investments in India: Are boys and girls treated differently? *American Economic Journal: Applied Economics*, 6(1), 157-189.

¹⁴ Aurino, E. (2017). Do boys eat better than girls in India? Longitudinal evidence on dietary diversity and food consumption disparities among children and adolescents. *Economics & Human Biology*, 25, 99-111.

¹⁵ Basu, A. M. (1989). Is discrimination in food really necessary for explaining sex differentials in childhood mortality? *Population Studies: A Journal of Demography*, 193-210.

and increasing opportunity, can indeed have an important positive impact on gender equality¹⁶.

Women in third-world countries and Economic Development

On International Women's Day 2019, the UN Women Partners met with BNP Paribas to promote women's economic empowerment by supporting women in agriculture and sustainable development in Senegal. With this project, the UN aims to demonstrate its commitment to promoting women's empowerment to achieve Sustainable Development Goal 5 – to achieve gender equality and empower women and girls. But, as Acting Regional Director for West and Central Africa, Oulimata Sarr, states it's not just about furthering equality, women are key to the economic development of third-world countries like Senegal:

Women are at the centre of Senegalese development and we want to support them in promising agricultural value chains to ensure their sustainable economic empowerment.¹⁷

Giving women greater economic empowerment means enabling women to increase their right to economic resources and their control over meaningful decisions that benefit themselves, their households, and their communities. These include the right to control their own time, their income, and access to participation in existing markets equally. Greater empowerment improves their well-being and economic status¹⁸.

Gender inequality remains an issue in the Sub-Saharan Africa region, it is one of the most unequal areas in the world and progress is much slower than in other regions. Much of the gender inequality in developing countries is caused by the prevalence of cultural norms that aggravate favouritism towards males.¹⁹ Gender inequality comes at a significant economic cost as it hinders productivity and economic growth globally, countries are losing \$160 trillion in wealth because of differences in lifetime earnings between women and men. In addition, an IMF staff note paper showed that the obstacles to women entering the labour market have more economic cost than was believed to be the case, and benefits from reducing the barrier of gender inequality are likely to be larger than initially thought. Reducing gender inequality is therefore key to economic development. Empowering more women to work, results in better growth of third-world

¹⁶ Ambreen Khurshid, 2022, Exploring the role of microfinance in women's empowerment and entrepreneurial development: a qualitative study, springer nature, available at: [10.1186/s43093-022-00172-2](https://doi.org/10.1186/s43093-022-00172-2)

¹⁷ Ndiaye, M. (2021). Gender and Access Barriers to Education: The Case of Women and Girls in Senegal.

¹⁸ Chant, S. (2016). Women, girls, and world poverty: empowerment, equality, or essentialism? *International Development Planning Review*, 38(1), 1-24.

¹⁹ Malhotra, A., Schuler, S. R., & Boender, C. (2002, June). Measuring women's empowerment as a variable in international development. In *background paper prepared for the World Bank Workshop on Poverty and Gender: New Perspectives* (Vol. 28, p. 58). Washington, DC: The World Bank.

economies.²⁰

This is because women's economic empowerment increases economic diversification, and boosts productivity and income equality, resulting in other positive development outcomes. As a study from the IMF shows, policies that improve access to educational opportunities and finance for women can contribute to a reduction in inequality and an increase in economic growth for the developing country. Providing women and girls with more educational opportunities contributes to:

...reductions in fertility rates and increases in labour force participation rates, which thereby a better quality of human capital for the future economy and generations²¹.

In Sub-Saharan Africa, fewer girls enrol in primary school than boys and there is an even lower enrolment rate in secondary school for girls compared with boys. Girls in this region are often prevented from attending school due to poverty and work demands at home, this is then further aggravated by higher rates of child marriage amongst girls in this situation²². However, poverty decreases when more women and girls are educated. This is because, with basic education, a woman is more likely to obtain a job and earn a higher wage since a one percentage point increase in female education raises the average level of GDP by 0.37 percentage points.²³

It's not only about women earning higher wages, but women also benefit their families and communities as they are often more likely to spend money on things that support their children, the household. This then improves the chances of their family to achieve health and prosperity.

Giving girls equal access to education and opportunities, enables them to eventually grow into educated, resilient women able to take on leadership roles in their countries, resulting in significant positive developmental outcomes for that country. This in turn helps to speed up the reduction in gender inequality, as having more women in leadership roles, means they develop policies that will increase support for women and girls²⁴.

Technological Opportunities for Women's Empowerment

Worldwide, 200 million more men have internet access than women. Women are also 21 percent less likely to own a mobile phone, a key resource in developing countries where phones provide security, mobile health care, and facilitate money transfers. Technology has great potential in closing the gender

²⁰ Available at: <https://www.worldbank.org/en/news/press-release/>

²¹ Grown, C., Gupta, G. R., & Kes, A. (2005). *Taking action: achieving gender equality and empowering women*. Earthscan.

²² Norris, A. (2020). ECONOMIC EMPOWERMENT FOR WOMEN IN SUB-SAHARAN AFRICA.

²³ Yaya, S., Uthman, O. A., Ekholuenetale, M., & Bishwajit, G. (2018). Women empowerment as an enabling factor of contraceptive use in sub-Saharan Africa: a multilevel analysis of cross-sectional surveys of 32 countries. *Reproductive health*, 15(1), 1-12.

²⁴ Olowu, D. (2012). Gender equality under the Millennium Development Goals: what options for sub-Saharan Africa?. *Agenda*, 26(1), 104-111.

gap and empowering women in developing countries. Educating girls in STEM and IT will help women and girls pursue opportunities in these fields. For instance, in Egypt, women have developed an application called HarrassMap. The application maps out areas of high sexual assault and allows women to feel secure within their communities²⁵.

Giving women hope by expanding their opportunities.

The fact that women have fewer opportunities in the labour market may contribute to their unequal treatment in the household. Parents have lower aspirations for their daughters than for their sons, and teenagers themselves have lower aspirations. For example, in West Bengal, find that in places where no woman had ever been the local leader, 86% of parents wanted their daughters to be either a housewife or whatever their in-laws would decide for her (the corresponding fraction was below 1 percent for the boys). If women do not work outside the home, there may be a perception that they do not need to be as strong and healthy and that they do not need a formal education.²⁶

Interviews of parents in five states in north India conducted for the Public Report on Basic Education (PROBE) in India (The PROBE Team, 1999), found that as high as 10 percent of them believed that it was not important for girls to be educated—only up to 1 percent believed the same for boys. Fifty-seven percent wanted their sons to study “as far as possible,” while only 28 percent wanted the same for their daughters. Many parents believed that educating girls is not necessary, since girls are only expected to marry and take care of their households. In another study, 32% of the parents reported that they wanted their teenage boys to graduate from secondary school or college, and only 18% wished the same for their girls. If part of the motivation for educating children is to enhance their employment opportunities, then improving the opportunities available to women in the labour market would provide a strong catalyst for the treatment of women to change for the better. Economic development leads to a change in the nature of work that is more conducive to women’s work²⁷.

This happened in the US from 1930-1950, when expansion of the demand for clerical workers increased the availability of jobs that even respectable women could keep once married. More recently, this has happened not only in China and Mexico, with the rise in factory work suitable for women, but also in India with the rise in service jobs due to outsourcing. It has been shown in several contexts that parents and children are sensitive to the perceived returns to education: those who believe that education is more worthwhile invest more in school (avoiding dropping out, being absent less often, or working harder toward exams). Three recent studies, one in China and two in India, show that

²⁵ Tang, C. S. (2022). Innovative technology and operations for alleviating poverty through women’s economic empowerment. *Production and Operations Management*, 31(1), 32-45.

²⁶ Chen, L. C., Huq, E., & d’Souza, S. (1981). Sex bias in the family allocation of food and health care in rural Bangladesh. *Population and development review*, 55-70.

²⁷ Duflo, E. (2012). Women empowerment and economic development. *Journal of Economic literature*, 50(4), 1051-1079.

increased opportunities for women in the labour market do indeed translate into better outcomes for women²⁸.

The Supreme Court and Empowerment of Women

The supreme court of India has remained in forefront to alleviate the condition of marginalised sections of the society including the women. It has passed landmark judgments like Vishaka's.

and number of women related proactive cases which has been the torch bearers of women empowerment in India. But recently SC Judgments has the tone for women empowerment in two different cases justifying in two divergent ways. The Court dealt with two significant gender equality issues in the year 2022—Karnataka's Hijab Ban in educational institutions²⁹ and access to abortion for unmarried women in India³⁰.

Supreme Court in the Hijab Case wherein A 2-Judge Bench comprising Justices Hemant Gupta and Sudhanshu Dhulia delivered a split verdict in the much talked about Hijab Ban case. Upholding the ban, Justice Hemant Gupta stated that considering whether the hijab is an essential practice was irrelevant to the case. He added that a ban on religious symbols was valid to maintain uniformity in educational institutions. Striking down the ban, Justice Dhulia held that the ban was unjustified. He stressed the importance of education over dress code³¹.

In another remarkable judgment the question whether Marital Status Determine a Woman's Right to Abortion was taken up On September 29th 2022, by a 3-Judge bench comprising Justices D.Y. Chandrachud, A.S. Bopanna and J.B. Pardiwala ,declared that unmarried women have the same right to access abortion as married women³².

A pregnant unmarried woman filed a writ petition in the Delhi High Court seeking an abortion under Section 3(2)(b) of the Medical Termination of Pregnancy Act 1971 (MTP Act) and Section 3B(c) of Medical Termination of Pregnancy Rules 2003 (Rules). As per these provisions, a woman is allowed to terminate her pregnancy before 24 weeks. The Rules further allow women to terminate their pregnancy if there is a change in their marital status. On July

²⁸ Bordo, M. D., Goldin, C., & White, E. N. (Eds.). (2007). *The defining moment: the Great Depression and the American economy in the twentieth century*. University of Chicago Press.

²⁹ Aishat Shifa versus The state of Karnataka & Ors 2022 SC 842, it arose after the following development:

On February 5th, 2022, a Karnataka State Government Order (GO) instructed all College Development Committees to ban Hijabs in educational institutions. On March 15th, a 3-judge Bench of the Karnataka HC upheld the ban. the High Court's verdict was challenged by the Supreme Court. The SC had to deal with key issues: does the Order violate the freedom of religion, freedom of expression, and the right to privacy? Further, the Court was considering if the hijab is an 'essential religious practice'.

³⁰ X v. Principal Health and Family Welfare department, 2022 SC

³¹ Juned, F. (2022). Hijab-Ban, Right to Education and Question of Agency of Muslim Women. *Context*, 1, 03.

³²X Versus Principal, Health and Family Welfare Department 2022 SC 809

15th, 2022, the Delhi HC dismissed her petition stating that the concerned provisions of the MTP Act and Rules do not apply to unmarried women³³

On July 18th, she filed an appeal at the Supreme Court. The SC considered one key issue: Does the exclusion of unmarried women under the provisions of the MTP Act and Rules violate the right to equality?

Advocate (Dr). Amit Mishra, representing the petitioner, stated that the concerned provisions are arbitrary and discriminatory as they explicitly disqualify unmarried women from access to abortion. Additional Solicitor General Aishwarya Bhati submitted that the provisions of ‘change in marital status’ should be read to include unmarried women. Further, she argued that women have the right to reproductive and bodily autonomy irrespective of their marital status³⁴.

Need for Women Empowerment

Gender equality is a fundamental human right and a core principle of social justice. Empowering women ensures that they have equal opportunities, rights, and access to resources, without discrimination based on gender. Empowering women economically contributes to overall economic growth. When women are financially independent and participate fully in the workforce, it boosts productivity and GDP. Their economic activities stimulate markets and create jobs. Women also constitute a significant portion of the world’s poor population. Empowering them economically helps break the cycle of poverty.³⁵

When women earn income, they invest it in their families’ well-being, including education and healthcare. Empowered women tend to have better access to healthcare and education. When women are healthy and educated, they make informed decisions about their family’s health and contribute to healthier, better-educated communities³⁶. Economic empowerment can give women the financial means to leave abusive relationships or seek legal assistance in cases of gender-based violence. It can be a critical step in addressing this pervasive issue. Women’s empowerment also extends to their participation in political processes.³⁷ When women have a voice in decision-making, it leads to more

³³ On July 18th, she filed an appeal at the Supreme Court. The SC considered one key issue: Does the exclusion of unmarried women under the provisions of the MTP Act and Rules violate the right to equality?

³⁴ The Bench found that treating unmarried women as a different class is unjustified and prohibiting their access to abortion violates the right to equality. They further held that unmarried women have the same right to autonomy as married women and forcing a woman to continue an unwanted pregnancy will directly violate that autonomy.

³⁵ Sorgner, A., & Krieger-Boden, C. (2017). Empowering women in the digital age. *G20 Insights*.

³⁶ Banerjee, A. Duflo, E., “Improving Immunization Coverage in Rural India: A Clustered Randomised Controlled Evaluation of Immunization Campaigns with and without Incentives” *British Medical Journal* 340.

³⁷ Alves, E. E. C., & Steiner, A. Q. (2017). Globalization, technology, and female empowerment: breaking rights or connecting opportunities. *Social Indicators Research*, 133, 859-877.

inclusive and representative governance. Diverse perspectives drive innovation and creativity. Empowering women ensures that their unique insights and talents are leveraged in various fields, from science and technology to the arts.

Studies also show that women are often at the forefront of sustainable resource management and environmental conservation efforts. Empowering women in these areas can have a positive impact on our planet. Empowered women often act as agents of positive social change³⁸. They work towards challenging harmful traditions and norms, advocating for human rights, and fostering tolerance and inclusivity. Achieving global development goals, such as the United Nations' Sustainable Development Goals (SDGs), relies heavily on women's empowerment. Many of these goals are directly linked to gender equality and women's rights³⁹.

Women have shown resilience in times of crises, such as conflicts and natural disasters. Empowered women can play pivotal roles in managing and recovering from these situations.

In our increasingly interconnected world, empowering women in one region can have positive ripple effects globally. Progress in gender equality is a shared goal for the international community⁴⁰.

Conclusion

The imperative for women's empowerment is undeniable. It is a matter of human rights, social justice, and practical necessity. Empowering women across the globe holds the promise of a more equitable, prosperous, and sustainable future for all. It addresses gender disparities, promotes economic growth, reduces poverty, improves health and education, and contributes to the overall betterment of societies. By recognizing and promoting the rights and opportunities of women, we not only fulfil a moral obligation but also harness the full potential of half of the world's population. Gender equality is not a women's issue; it is a societal issue that benefits everyone. Efforts to empower women should encompass economic, social, political, and cultural dimensions. It requires policy changes, investment in education and healthcare, promotion of women in leadership roles, and the elimination of discriminatory practices. Additionally, it necessitates the active involvement of men as allies in the journey towards gender equality. In a world facing complex challenges, from economic disparities to climate change, women's empowerment is not only a goal but a means to achieve broader progress and sustainability. The path

³⁸ Beaman, L., Chattopadhyay, R., Duflo, E., Pande, R., and P. Topalova (2009), "Powerful women does exposure reduce bias"? *Quarterly Journal of Economics* 124(4): 1497-1540.

³⁹ Girdhar, S., & Girdhar, M. K. (2022). An Initiative of Women Empowerment for Sustainable Economic Development. *Journal of Women Empowerment and Studies (JWES)* ISSN: 2799-1253, 2(05), 11-21.

⁴⁰ Leal Filho, W., Kovaleva, M., Tsani, S., Îrcă, D. M., Shiel, C., Dinis, M. A. P., ... & Tripathi, S. (2023). Promoting gender equality across the sustainable development goals. *Environment, Development and Sustainability*, 25(12), 14177-14198.

towards empowerment may be challenging, but its rewards are far-reaching and transformative. As societies continue to evolve, the empowerment of women must remain a steadfast commitment, reflecting our shared aspiration for a more just and equitable world. In order to achieve the global sustainable goals women empowerment and intergenerational equity is a must. We need to harness the best technological bounties and prowess at hand with diligence, equity and equanimity to empower one another.

Cryptocurrency And Blockchain Technology: *An Exposition*

Shaziya Sagar Durrani*

Rayees Ahmad Bhat**

Abstract:

Cryptocurrency and blockchain technology have gained popularity in recent years. Cryptocurrency offers a decentralized and secure way to make transactions, separate from traditional banking systems. This research paper provides an overview of cryptocurrency and blockchain technology, exploring their history, advantages, and potential applications. The paper begins by defining key terms, such as cryptography, consensus, and key management, and then delves into the evolution of cryptocurrency, discussing its origins and how it has evolved. It also examines the potential benefits and drawbacks of using cryptocurrency for transactions, including its potential to prevent inflation and its susceptibility to hacking and fraud. The paper then shifts its focus to blockchain technology, explaining how it provides a decentralized and transparent system for recording and validating transactions. It explores the potential applications of blockchain beyond cryptocurrencies, such as supply chain management, voting systems, and identity verification. Throughout the paper, the challenges and risks associated with cryptocurrency and blockchain technology and its regulation, security, volatility, and adoption. The paper concludes by emphasizing the importance of education and awareness in promoting responsible use and development of these technologies. It highlights the potential benefits of using cryptocurrency and blockchain technology while acknowledging the challenges and risks that need to be guarded against.

Key Terms – Cryptocurrency, blockchain, Consensus, Code security, altcoins, Key Management, Identity, Education, and awareness.

1. Introduction

“Bitcoin is a swarm of cyber hornets serving the goddess of wisdom, feeding on the fire of truth, exponentially growing ever smarter, faster, and stronger behind a wall of encrypted energy,” remarked Michael J, former CEO of Micro

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Strategy¹. Cryptocurrency and blockchain technology are two of the most exciting and innovative topics in the world of technology and finance². They offer a new way of creating and exchanging values, without relying on any central authority or intermediary. However, they also pose challenges and risks, such as its regulation, security, volatility, and adoption. In this paper, the authors introduce the basics of cryptocurrency and blockchain technology and explore their applications and implications. Cryptocurrency is a digital form of currency that uses cryptography to secure and verify transactions³. Cryptography ensures that only the intended parties can access and modify the data and that no one can tamper with or counterfeit it. Blockchain technology is the foundation of cryptocurrencies, as it provides a decentralized and transparent system for recording and validating transactions. Blockchain technology consists of interconnected blocks of data that form a digital ledger distributed across a network of computers⁴. Each block also contains a cryptographic hash, which is a unique code that links it to the previous block and ensures its integrity and security.

The first and most well-known cryptocurrency is Bitcoin, introduced in 2009 by an anonymous person or group using the pseudonym Satoshi Nakamoto.⁵ Bitcoin is based on a peer-to-peer network that allows users to exchange value without intermediaries. Bitcoin transactions are recorded on a public ledger called the Bitcoin blockchain, which is maintained by a network of nodes that validate and broadcast transactions⁶. Since the launch of Bitcoin, other cryptocurrencies have emerged, offering distinctive features and functionalities. These are collectively known as altcoins, which stands for alternative coins. The most popular altcoins include Ethereum, Litecoin, Ripple, and Cardano⁷.

¹ Michael J. Saylor Quotes. (n.d.). Brainy Quote.com. Retrieved October 28, 2023, from BrainyQuote.com Web site: https://www.brainyquote.com/quotes/michael_j_saylor_1148045

² Blockchain Technology in Cryptocurrency: Benefits, Challenges & Structure. Retrieved on October 28, 2023, from Upgrad.com Web site: <https://www.upgrad.com/blog/blockchain-technology-in-cryptocurrency/?ssp=1&setlang=en-IN&safesearch=moderate>

³ Cryptography is the science of encoding and decoding information, using mathematical techniques and algorithms.

⁴ Each block contains information about a transaction, such as the sender, the receiver, the amount, and the time.

⁵ Blockchain Facts: What Is It, How It Works, and How It Can Be Used by Adam Hayes. Retrieved on 30 October 2023, from Investopedia.com Web site: <https://www.investopedia.com/terms/b/blockchain.asp>

⁶ Bitcoin uses a consensus mechanism called proof-of-work, which requires nodes to solve complex mathematical problems to create new blocks and earn rewards. Each altcoin has its blockchain and its own rules and protocols. The altcoins aim to improve Bitcoin's limitations, such as scalability, speed, and energy consumption. Others aim to provide new and innovative services, such as smart contracts, decentralized applications, and non-fungible tokens. See <https://www.investopedia.com/>

⁷ 11 Best Cryptocurrency News Websites in the World. Retrieved on 30 October 2023, from crypto-academy.com Web site:

2. Understanding Blockchain: The Foundation of Cryptocurrency

Cryptocurrencies and blockchain technology have the potential to transform various aspects of society, such as finance, commerce, governance, and social interactions. Blockchain technology serves as the foundation for cryptocurrencies like Bitcoin and Ethereum, providing a secure and decentralized platform for transactions. It operates through interconnected blocks of operations, creating a digital ledger across a network of computers. One of the key advantages of blockchain technology is its ability to ensure transparency and consistency. Each transaction recorded on the blockchain is visible to all participants, eliminating the need for trust in a central authority⁸. The widespread adoption of blockchain technology is evident in various industries around the world. Industries such as finance, supply chain, digital identity, energy, healthcare, real estate, and government sectors have recognized the potential of blockchain technology and have started implementing it in their operations⁹. The supply chain industry is also benefiting from blockchain technology. By providing a transparent and immutable record of transactions, blockchain can enhance supply chain transparency, traceability, and efficiency. With blockchain technology, companies can track and verify every step of the supply chain, from the sourcing of raw materials to the delivery of the final product.¹⁰ In the healthcare industry, blockchain technology has the potential to revolutionize the way medical records are stored and shared¹¹.

3. The Evolution of Cryptocurrency: From Bitcoin to Altcoins

The evolution of cryptocurrency is a fascinating topic that covers the history, technology, and innovation of digital money. Cryptocurrency is a form of digital or virtual money that uses cryptography and blockchain to ensure security and transparency. The first and most famous cryptocurrency is Bitcoin, created in 2009 by an anonymous person or group known as Satoshi Nakamoto.¹² Bitcoin was to be a peer-to-peer electronic cash system that would operate without the need for a central authority or intermediary¹³. The origin of cryptocurrency has passed through the following phases:

⁸ Additionally, the immutability of the blockchain prevents tampering with transaction data, providing a prominent level of security. See *supra* note 2

⁹ In the financial industry, blockchain technology has the power to revolutionize payment systems and streamline cross-border transactions. By eliminating the need for intermediaries and reducing transaction costs, blockchain-based solutions can make financial transactions faster, more efficient, and more secure.

¹⁰ This level of transparency not only improves efficiency but also helps to build trust among consumers who are increasingly concerned about the authenticity and ethical sourcing of products.

¹¹ By securely storing patient data on the blockchain, healthcare providers can ensure the privacy and security of sensitive information while also streamlining the process of sharing medical records between different healthcare providers.

¹² History of Cryptocurrency: The Idea, Journey, and Evolution - Worldcoin. Retrieved on 1 November 2023, from worldcoin.org Web site: <https://worldcoin.org/articles/history-of-cryptocurrency>.

¹³ *Ibid*

i. The Genesis–Bitcoin Emerges (2009):

Bitcoin came to the limelight through a whitepaper titled “Bitcoin:¹⁴ A Peer-to-Peer Electronic Cash System” which outlined the basic principles and mechanisms of the new currency. Bitcoin used a novel consensus mechanism called proof-of-work (PoW) to validate transactions and create new coins. PoW requires computers to solve complex mathematical puzzles to add new blocks of transactions to the blockchain, a public ledger that records all transactions on the network. Bitcoin also introduced the concept of a limited supply of 21 million coins, which mimics the scarcity and value of gold¹⁵.

ii. The Expansion–Altcoins Emerge (2011-2015):

As Bitcoin gained popularity and value, developers and enthusiasts began to create their cryptocurrencies, often based on Bitcoin’s code or technology¹⁶. These alternative coins, or altcoins, aimed to improve or innovate Bitcoin’s features, such as speed, scalability, privacy, or functionality¹⁷. Some of the earliest altcoins include Litecoin¹⁸, Namecoin¹⁹, Ethereum²⁰, and Peercoin.²¹ Ethereum, launched in 2015, was a momentous change in the crypto space.

iii. The Speculation – ICO Boom (2017):

In 2017, the cryptocurrency market experienced a massive surge in interest and investment, fueled by the emergence of initial coin offerings (ICOs). ICOs are a form of crowdfunding, where startups or projects sell their tokens or coins in exchange for established cryptocurrencies, such as Bitcoin or Ethereum²². ICOs allow anyone to raise funds and launch their cryptocurrencies, leading to a proliferation of new and diverse projects in the crypto space. However, ICOs have attracted a lot of scams, fraud, and regulatory scrutiny, as many of the projects failed to deliver on their promises or comply with the laws.

iv. The Stabilization–Stablecoins Rise (2018-2019):

One of the main challenges of cryptocurrency is its volatility or the frequent

¹⁴ The Evolution of Cryptocurrency: A Brief History. Retrieved on 1 November 2023, from blog.bings.com web site: <https://blog.bingx.com/insights/bingx-insights/the-evolution-of-cryptocurrency-a-brief-history/>.

¹⁵ Ibid

¹⁶ Altcoins are the alternative digital currencies to Bitcoin. Retrieved on 2 November, 2023, from businessinsider.com website: <https://www.businessinsider.in/investment/news/altcoins-are-the-alternative-digital-currencies-to-bitcoin-heres-what-they-are-and-how-they-work/articleshow/85848625.cms>.

¹⁷ See supra note 2.

¹⁸ offered faster transaction times and lower fees.

¹⁹ allowed users to register and transfer domain names.

²⁰ it enabled the creation of smart contracts, and programmable and self-executing agreements that can facilitate various applications and transactions on the blockchain.

²¹ introduced a hybrid of PoW and proof-of-stake (PoS) as a consensus mechanism.

²² The Evolution of Cryptocurrency: A Brief History. Retrieved on 2 November 2023, from blog.bings.com web site: <https://blog.bingx.com/insights/bingx-insights/the-evolution-of-cryptocurrency-a-brief-history/>.

and unpredictable fluctuations in its price. Volatility makes it difficult for cryptocurrency to be used as a medium of exchange or a store of value, as its purchasing power can change dramatically in a brief period. To address this issue, a new type of cryptocurrency emerged, called stablecoins. Stablecoins are digital assets that are pegged to real-world assets, such as fiat currencies, commodities, or other cryptocurrencies, to maintain a stable and predictable value. The most widely used stablecoins today include Tether, which is backed by the US dollar; Dai, which is backed by Ethereum; and Libra, which is backed by a basket of currencies and assets.²³

v. The Innovation–DeFi and NFTs Explode (2020-2021):

The latest phase in the evolution of cryptocurrency is marked by the rapid growth and innovation of decentralized finance (DeFi) and non-fungible tokens (NFTs)²⁴. DeFi is a movement that aims to create a decentralized and open financial system that operates without intermediaries, such as banks, brokers, or exchanges. DeFi leverages the power of smart contracts and blockchain to enable various financial services and products, such as lending, borrowing, trading, investing, and saving. NFTs are a form of digital asset that represents a unique and indivisible item, such as a piece of art, a collectible, a game item, or a digital identity²⁵. NFTs use blockchain to verify the ownership and authenticity of the item, creating a new way to create, trade, and monetize digital content. The evolution of cryptocurrency is still ongoing, as modern technologies, trends, and challenges emerge every day. Cryptocurrency has come a long way since its inception, but it still has a long way to go before it achieves its full potential and adoption. The future of cryptocurrency is uncertain, but it is certainly exciting and promising²⁶.

4. How Cryptocurrency Works: A Simplified Explanation

Unlike traditional money, cryptocurrency is not controlled by any central authority, such as a government or a bank²⁷. Instead, cryptocurrency transactions are verified and recorded by a network of computers using cryptography, which is a method of securing and encrypting information. One of the key features of cryptocurrency is that it uses a system called blockchain, which is a public

²³ Arner, D. W., Auer, R., & Frost, J. (2020). Stablecoins: risks, potential and regulation.

²⁴ Popescu, A. D. (2021, May). Non-fungible tokens (NFT)–innovation beyond the craze. In *5th International Conference on Innovation in Business, Economics and Marketing Research* (Vol. 32).

²⁵ Valeonti, F., Bikakis, A., Terras, M., Speed, C., Hudson-Smith, A., & Chalkias, K. (2021). Crypto collectibles, museum funding, and OpenGLAM: challenges, opportunities, and the potential of Non-Fungible Tokens (NFTs). *Applied Sciences*, 11(21), 9931.

²⁶ Raman, R., & Raj, B. E. (2021). The world of nfts (non-fungible tokens): The future of blockchain and asset ownership. In *Enabling blockchain technology for secure networking and communications* (pp. 89-108). IGI Global.

²⁷ How Does Cryptocurrency Work? (for Beginners). Retrieved on 2 November 2023, from cryptocurrencyfacts.com website: <https://cryptocurrencyfacts.com/how-does-cryptocurrency-work-for-beginners/>.

ledger that records all transactions in a decentralized and transparent way. Blockchain ensures that no one can tamper with or counterfeit the transactions and that everyone can see the history and balance of any cryptocurrency account²⁸. To use cryptocurrency, you need a digital wallet, which is a software program that stores your private and public keys. Your private key is like your password, and your public key is like your account number²⁹.

There are many types of cryptocurrencies, each with its features and functions. Some of the most popular ones are Bitcoin, Ethereum, Litecoin, and Ripple³⁰. The use of technology and high technical stakes makes cryptocurrency scarce and valuable and in default may work to prevent inflation³¹.

5. Potential Uses and Applications of Blockchain Technology

Blockchain technology is a system of storing and transferring data in a decentralized, distributed, and secure way. It has many potential uses and applications in various fields and industries, such as:

i. Cryptocurrency:

Blockchain is the underlying technology behind digital currencies like Bitcoin, Ethereum, Dogecoin, and others. Cryptocurrencies use blockchain to enable peer-to-peer transactions without intermediaries or central authorities. Cryptocurrencies can be used as a medium of exchange, a store of value, or a unit of account³².

ii. Smart contracts:

Smart contracts are self-executing agreements that are written in code and stored on a blockchain. They can automate processes, enforce rules, and verify outcomes in various domains, such as finance, law, insurance, real estate, and coordination³³. A smart contract can automatically transfer funds to a seller once a buyer receives a product or executes a will according to the predefined conditions³⁴.

iii. Internet of Things (IoT):

IoT is a network of connected devices that can collect and exchange data.

²⁸ How Does Cryptocurrency Work? A Beginner's Guide. Retrieved on 3rd November 2023, from, Coursera.org website: <https://www.coursera.org/articles/how-does-cryptocurrency-work>

²⁹ What is cryptocurrency? A beginner's guide to digital currency. Retrieved on 3rd November 2023, from, cointelegraph.com website: <https://cointelegraph.com/learn/what-is-a-cryptocurrency-a-beginners-guide-to-digital-money>.

³⁰ Each cryptocurrency has a limited supply, which means that there can only be a certain number of coins in existence.

³¹ Hossain, M. S. (2021). What do we know about cryptocurrency? Past, present, future. *China Finance Review International*, 11(4), 552-572.

³² Applications and Uses of Blockchain – Retrieved on 4 November 2023, from, GeeksforGeeks.com website: <https://www.geeksforgeeks.org/applications-and-uses-of-blockchain/>.

³³ 34 Top Blockchain Applications to Know for 2023 – Retrieved on 4 November 2023, from Built.in Website: <https://builtin.com/blockchain/blockchain-applications>.

³⁴ Harness the Power of Blockchain Uses for 2023 & beyond. Retrieved on 4 November 2023, from imiblockchain.com website: <https://imiblockchain.com/blockchain-technology-applications-use-cases/>.

Blockchain can enhance IoT by providing security, scalability, and interoperability. Blockchain can ensure that the data collected by IoT devices is authentic, immutable, and traceable. It can also enable decentralized coordination and communication among IoT devices without relying on a central server³⁵. Blockchain can enable smart cities, where IoT devices can monitor traffic, pollution, energy, and waste management, and optimize resources and services³⁶.

iv. Personal identity security:

Blockchain can provide a secure and decentralized way of storing and managing personal identity information, such as biometrics, credentials, and digital certificates. Blockchain can protect the privacy and sovereignty of individuals and prevent identity theft and fraud. Blockchain can also enable verifiable and transparent identity verification for various purposes, such as voting, banking, travel, and education³⁷. Blockchain can enable self-sovereign identity, where individuals can control their identity data and share it only with trusted parties³⁸.

v. Healthcare:

Blockchain can improve the efficiency and quality of healthcare services by enabling secure and interoperable data sharing among various stakeholders, such as patients, providers, insurers, and researchers. Blockchain can also enhance the privacy and security of health records and facilitate patient consent and data ownership. Blockchain can also enable innovative solutions for drug development, supply chain management, clinical trials, and telemedicine. Blockchain can enable a global health data exchange, where patients can access and share their health data across borders and platforms³⁹.

These are just some of the examples of how blockchain technology can be used for various purposes and applications. Blockchain technology is still evolving and has the potential to transform many more sectors and industries in the future.

6. Investing in Cryptocurrency: Opportunities and Risks

Investing in cryptocurrency is a topic that has gained a lot of attention in recent years. Cryptocurrency is a type of digital or virtual currency that uses cryptography to secure its transactions and prevent counterfeiting. There are many opportunities and risks associated with investing in cryptocurrency. Some of the potential benefits are:

i. High returns:

Cryptocurrency can offer high returns in a brief period, as the prices are determined by supply and demand in the market. For example, Bitcoin, the

³⁵ Supra note 33

³⁶ Harness the Power of Blockchain Uses for 2023 & Beyond. Retrieved on 4 November, 2023, from imiblockchain.com website: <https://imiblockchain.com/blockchain-technology-applications-use-cases/>.

³⁷ Supra note 33

³⁸ See supra note 34

³⁹ 26 Top Blockchain Applications to Know for 2023 – Retrieved on 4 November, 2023, from learn.g2.com Website: <https://learn.g2.com/blockchain-applications>.

first and most well-known cryptocurrency, has increased in value from less than \$1 in 2009 to over \$60,000 in 2023⁴⁰.

ii. Diversification:

Cryptocurrency can provide diversification to a portfolio, as it has a low correlation with other asset classes, such as stocks, bonds, and commodities. This means that cryptocurrency can reduce the overall risk and volatility of a portfolio.

iii. Innovation:

Cryptocurrency is based on blockchain technology, which is a distributed ledger that records transactions securely and transparently. Blockchain technology has many potential applications in various sectors, such as finance, healthcare, supply chain, and social media. Investing in cryptocurrency can give exposure to this emerging and disruptive technology.⁴¹

However, there are also significant risks involved in investing in cryptocurrency. Some of the main challenges are:

i. Volatility:

Cryptocurrency is highly volatile, as the prices can fluctuate dramatically in a short period. This can be influenced by numerous factors, such as market sentiment, regulatory developments, technical issues, and cyberattacks. For example, in 2022, Bitcoin dropped by more than 50% in a matter of weeks, after reaching an all-time high of over \$40,000⁴².

ii. Security:

Cryptocurrency is vulnerable to security breaches, as hackers can target the platforms, wallets, and exchanges that store and trade cryptocurrency. This can result in the loss or theft of cryptocurrency, which may be irreversible and unrecoverable. For example, in 2014, Mt. Gox, the largest Bitcoin exchange at the time, was hacked and lost 850,000 Bitcoins, worth about \$450 million⁴³.

iii. Regulation:

Cryptocurrency is not regulated by any central authority, which means that there is no legal protection or recourse for investors in case of disputes, fraud, or insolvency. Moreover, the regulatory environment for cryptocurrency is uncertain and evolving, as different countries have different laws and policies regarding cryptocurrency. This can create legal and tax implications for

⁴⁰ Advantages and Disadvantages of Cryptocurrency in 2023 – Retrieved on 5th November, 2023, from Frobes.com website: <https://www.forbes.com/advisor/in/investing/cryptocurrency/advantages-of-cryptocurrency/>.

⁴¹ Chuen, D. L. K., Guo, L., & Wang, Y. (2017). Cryptocurrency: A new investment opportunity. *The journal of alternative investments*, 20(3), 16-40.

⁴² Should You Invest In Crypto? – Forbes Advisor. Retrieved on 5th November, 2023, from Forbes.com website: <https://www.forbes.com/advisor/investing/cryptocurrency/should-you-invest-in-crypto/>.

⁴³ How to Invest in Cryptocurrency in the UK | Step-by-Step – Retrieved on 5th November, 2023, from finbold.com website: <https://finbold.com/guide/how-to-invest-in-cryptocurrency-uk/>.

investors, as well as affect the availability and accessibility of cryptocurrency⁴⁴. Therefore, investing in cryptocurrency is not a risk-free investment, and it requires a lot of research, due diligence, and risk management. Investors should be aware of the advantages and disadvantages of cryptocurrency, and only invest what they can afford to lose.⁴⁵

7. Regulation and Legal Aspects of Cryptocurrency

Regulation and Legal Aspects of Cryptocurrency is a complex and evolving topic that involves various legal, economic, and technological challenges. Cryptocurrency as noted above, is a form of digital or virtual currency that uses cryptography or encryption to secure and verify transactions⁴⁶. Different countries have different approaches to regulating cryptocurrency, ranging from outright bans to legal recognition and taxation. Some of the factors that influence the regulation of cryptocurrency are:

- The definition and status of cryptocurrency as a legal tender, a commodity, a security, or a digital asset.
- The potential benefits and risks of cryptocurrency for the economy, the financial system, the consumers, and the investors.
- The legal and technical challenges of enforcing laws and regulations on cryptocurrency transactions, such as anti-money laundering, consumer protection, taxation, and dispute resolution.
- The international coordination and cooperation among regulators and law enforcement agencies to address cross-border issues and challenges.

8. Position in India

In India, the regulation of cryptocurrency is still unclear and uncertain, as there is no specific law or framework that governs it.⁴⁷ The Reserve Bank of India (RBI) has issued several warnings and circulars to caution the public and financial institutions against dealing with cryptocurrency, citing concerns over its volatility, security, and legality. However, the Supreme Court of India quashed the RBI's circular that prohibited banks from providing services to entities dealing with cryptocurrency, stating that it was disproportionate and unconstitutional⁴⁸. The Supreme Court also directed the government to produce

⁴⁴ Pakhnenko, O., Rubanov, P., Girzheva, O., Ivashko, L., Britchenko, I., & Kozachenko, L. (2023). Cryptocurrency: Value Formation Factors and Investment Risks. *WSEAS Transactions on Financial Engineering*, 1, 1-14.

⁴⁵ Additionally, investors should diversify their portfolios, use reputable and secure platforms and wallets, and follow the best practices for storing and transferring cryptocurrency.

⁴⁶ See Demertzis, M., & Wolff, G. B. (2018). *The economic potential and risks of crypto assets: is a regulatory framework needed?* (No. 2018/14). Bruegel Policy Contribution.

⁴⁷ Legal Aspects of Cryptocurrency in India | Cryptocurrency regulation. Retrieved on 7th November 2023, from the website: <https://www.ahlawatassociates.com/blog/legal-aspects-of-cryptocurrency-in-india/>.

⁴⁸ legal challenges and issues in the regulation of cryptocurrency in India: a critical and exploratory analysis – Retrieved on 7th November 2023, from juscopus.com website: <https://www.juscopus.com/legal-challenges-and-issues-in-regulation-of-cryptocurrency-in-india-a-critical-and-exploratory-analysis/>.

a clear and comprehensive policy on cryptocurrency regulation⁴⁹.

The government of India formed an Inter-Ministerial Committee to study the issues and challenges related to cryptocurrency and to propose a draft bill for its regulation. The committee has recommended a blanket ban on private cryptocurrencies in India, except for those issued by the state. The committee has also suggested the creation of a digital rupee as the official digital currency of India, to be issued by the RBI. The draft bill, however, has not been introduced or passed by the parliament yet, and its fate remains uncertain⁵⁰. Therefore, the regulation and legal aspects of cryptocurrency in India are still evolving and subject to change, depending on the government's stance and the public's response.

9. Security Measures in Cryptocurrency and Blockchain Technology

Security measures in cryptocurrency and blockchain technology are a complex and evolving topic. There are still various risks and challenges that need to be addressed to ensure the security of both the technology and the users. Some of the security measures that are used or proposed for cryptocurrency and blockchain technology are:

i. Cryptography:

Cryptography is the science of encrypting and decrypting information using mathematical techniques and algorithms. Cryptography is essential for securing the data and transactions on a blockchain, as well as the identities and keys of the users. Cryptography ensures that only authorized parties can access and modify the data and that the data is authentic and consistent. Cryptography also enables features such as digital signatures, zero-knowledge proofs, and homomorphic encryption, which enhance the security and privacy of the users and the network⁵¹.

ii. Decentralization:

Decentralization is the principle of distributing the power and control of a system among multiple nodes or participants, rather than having a single central authority. Decentralization reduces the risk of single points of failure, censorship, corruption, and collusion. Decentralization also increases the resilience and scalability of the network, as well as the diversity and innovation of the participants. Decentralization can be achieved through various mechanisms, such as peer-to-peer networks, distributed consensus algorithms,

⁴⁹ Regulating cryptocurrency in India | International Bar Association. Retrieved on 8 November 2023, from ibanet.org website: <https://www.ibanet.org/article/2E4FB646-4FFD-4660-A5BE-5E41E79C5576>.

⁵⁰ Cryptocurrency Regulations Around the World – Retrieved on 8 November 2023, from investopedia.com website: <https://www.investopedia.com/cryptocurrency-regulations-around-the-world-5202122>.

⁵¹ Security Risks & Concerns for Blockchain Cryptocurrencies. Retrieved on 9 November, 2023, from, businessinsider.com website: <https://www.businessinsider.com/cryptocurrency-blockchain-security>.

and incentive schemes⁵².

iii. Consensus:

Consensus is the process of reaching an agreement among the participants of a network on the state and validity of the data and transactions. Consensus is necessary to ensure the security and consistency of the blockchain, as well as to prevent double-spending, fraud, and malicious attacks. Consensus can be achieved through various methods, such as proof-of-work, proof-of-stake, proof-of-authority, and Byzantine fault tolerance.⁵³

iv. Code security:

Code security is the practice of ensuring that the software and protocols that run the cryptocurrency and blockchain systems are free of errors, vulnerabilities, and malicious code. Code security is crucial for preventing bugs, exploits, hacks, and thefts that could compromise the functionality and integrity of the systems. Code security can be improved through various techniques, such as code review, testing, auditing, verification, and formal methods⁵⁴.

v. Key management:

Key management is the practice of generating, storing, protecting, and using the cryptographic keys that are used to access and control the cryptocurrency and blockchain accounts and assets. Key management is vital for ensuring the security and privacy of the users and their funds. Key management can be challenging, as users need to balance the trade-offs between convenience, accessibility, and security. Key management can be facilitated by various tools, such as hardware wallets, software wallets, multi-signature wallets, and recovery phrases.⁵⁵

vi. Identity and access management:

Identity and access management is the practice of verifying, authenticating, and authorizing the identities and access rights of the users and entities that interact with the cryptocurrency and blockchain systems. Identity and access management is important for ensuring the security and accountability of the systems, as well as for enabling features such as reputation, governance, and compliance. Identity and access management can be implemented by various methods, such as public-key cryptography, digital certificates, biometrics, and

⁵² Security Risks & Concerns for Blockchain Cryptocurrencies. Retrieved on 9 November, 2023, from, businessinsider.com website: <https://www.businessinsider.com/cryptocurrency-blockchain-security>.

⁵³ What is Blockchain Security? Retrieved on 10 November, 2023, from, ibm.com website: <https://www.ibm.com/topics/blockchain-security>.

⁵⁴ What Makes a Blockchain Secure? Retrieved on 10 November, 2023, from, academy.binance.com website: <https://academy.binance.com/en/articles/what-makes-a-blockchain-secure>.

⁵⁵ How cyber secure is blockchain technology? Retrieved on 11 November, 2023, from, icaew.com website: <https://www.icaew.com/insights/viewpoints-on-the-news/2022/oct-2022/How-cyber-secure-is-blockchain-technology>.

decentralized identity solutions.⁵⁶

vii. Education and awareness:

Education and awareness are the practice of informing and educating the users and stakeholders of cryptocurrency and blockchain systems about the benefits, risks, and best practices of the technology and its applications. Education and awareness are essential for ensuring the security and adoption of technology, as well as for preventing scams, phishing, and social engineering attacks. Education and awareness can be promoted by various means, such as online courses, webinars, podcasts, blogs, forums, and events.⁵⁷

These are some of the security measures that are used or proposed for cryptocurrency and blockchain technology. However, security is not a static or absolute concept, but a dynamic and relative one. Security is constantly evolving and adapting to the changing needs, challenges, and opportunities of technology and its users. Therefore, security measures need to be continuously updated, improved, and evaluated to ensure the optimal level of security for the cryptocurrency and blockchain systems.

10. The Future of Blockchain and Cryptocurrency

Cryptocurrency is a type of digital currency that uses cryptography to secure and verify transactions, and to control the creation of new units. The possible benefits of blockchain and cryptocurrency include Increased transparency, security, and trust in transactions and data sharing Reduced intermediaries, fees, and friction in transactions and value exchange Enhanced innovation, efficiency, and scalability in various sectors and applications Greater financial inclusion, empowerment, and sovereignty for individuals and communities.

⁵⁸The future of blockchain and cryptocurrency is likely to be shaped by numerous factors, such as the adoption and integration of blockchain and cryptocurrency by mainstream institutions, such as governments, banks, corporations, and organizations. The innovation and competition among different blockchain and cryptocurrency platforms, protocols, and projects, such as Bitcoin, Ethereum, Cardano, Solana, and others.⁵⁹

11. The Impacts of Cryptocurrency and Blockchain on the Economy

The impacts of cryptocurrency and blockchain on the economy are complex and

⁵⁶ Complete Guide on Cryptocurrency Security- Retrieved on 11 November, 2023, from, blockchain- council.com website: <https://www.blockchain-council.org/cryptocurrency/complete-guide-on-cryptocurrency- security/>.

⁵⁷ What Makes Blockchain Secure: Key Characteristics & Security- Retrieved on 11 November, 2023, from, upgrad.com website: <https://www.upgrad.com/blog/what-makes-blockchain-secure/>.

⁵⁸ What is the Future of Blockchain and Cryptocurrencies. Retrieved on 15 November, 2023, from, online.stanford.edu website: <https://online.stanford.edu/future-blockchain-and-cryptocurrencies>.

⁵⁹ The future of bitcoin, cryptocurrency, blockchain, and NFTs – Retrieved on 15 November, 2023 , from fastcompany.com website: - Fast Company. <https://www.fastcompany.com/90645628/future-of- cryptocurrency-bitcoin-ethereum-nft>.

multifaceted. Cryptocurrency and blockchain are not only technologies, but also social and political phenomena that have implications for various aspects of the economy, such as money, finance, trade, innovation, and growth. Cryptocurrency and blockchain have both positive and negative impacts on the economy and some of the challenges and opportunities that they present for the future.⁶⁰

Cryptocurrency operates independently of a central authority, such as a government or a bank, and relies on a distributed network of computers, called nodes, to maintain a shared ledger of transactions, called a blockchain that enables the creation and management of a decentralized, transparent, and immutable database of records, without the need for intermediaries or trusted third parties.⁶¹

One of the most significant impacts of cryptocurrency and blockchain on the economy is the creation of new forms of money that challenge the traditional notions and functions of money.⁶² Another major impact of cryptocurrency and blockchain on the economy is the transformation of the financial system and the intermediation process. Cryptocurrency and blockchain can also enhance the efficiency, transparency, and resilience of the financial system, by enabling faster and cheaper transactions, reducing information asymmetry and agency problems, and increasing trust and security. However, cryptocurrency and blockchain can also pose challenges and risks for the financial system, such as regulatory arbitrage, market fragmentation, systemic instability, and cyberattacks. A third important impact of cryptocurrency and blockchain on the economy is the stimulation of innovation and entrepreneurship in various sectors and industries.⁶³

Cryptocurrency and blockchain can foster a culture of innovation and experimentation, by providing new opportunities and incentives for entrepreneurs, developers, and investors, and by creating new markets and business models. Cryptocurrency and blockchain can also enable the development and diffusion of new and disruptive technologies, such as artificial intelligence, the internet of things, and biotechnology, and facilitate the convergence and integration of different technologies and domains.

⁶⁰ The macroeconomic impact of cryptocurrency and stablecoin economics Retrieved on 17 November, 2023, from, weforum.org website: <https://www.weforum.org/agenda/2022/11/the-macroeconomic-impact-of-cryptocurrency-and-stablecoin-economics/>.

⁶¹ Impact Of Cryptocurrency On Digital Economy - 101 Blockchains. Retrieved on 18 November, 2023, from, 101blockchains.com website: <https://101blockchains.com/impact-of-cryptocurrency-on-digital-economy/>.

⁶² What is the economic impact of cryptocurrencies? – Retrieved on 20 November, 2023, from, cointelegraph.com website: <https://cointelegraph.com/explained/what-is-the-economic-impact-of-cryptocurrencies>.

⁶³ Impact Of Cryptocurrency On Economy- Benefits Or Hurdles- Retrieved on 22 November, 2023, from, finscorpio.com website: <https://finscorpio.com/impact-of-cryptocurrency-on-economy/>.

12. Conclusion

Cryptocurrency and blockchain technology are now a reality. It has advantages and potential applications. It has potential benefits containing future financial transactions, preventing inflation, and increasing financial inclusion, while also acknowledging the risks and challenges associated with these technologies, such as its security and regulation. Cryptocurrency and blockchain technology are disruptive and transformative innovations that have the potential to reshape the world in the 21st century. Therefore, it is essential to understand their concepts, applications, and implications, and to foster a collaborative and responsible approach to their development and adoption. Education and awareness are crucial in promoting the responsible use and development of these technologies, and policymakers, businesses, and individuals need to stay informed and up to date on the latest developments and trends in this fast-changing and dynamic field.

LAND OWNERSHIP RIGHTS AND WOMEN IN INDIA: A STUDY

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Abstract

Men and women in India are afforded equal rights under the Constitution. Inheritance, which is controlled by regional and state-specific norms, is essentially how women get access to land. The Succession Acts of various religious laws, which govern women's rights to property and inheritance, are among the current property rights systems. The Hindu Succession Act (Amendment), 2005 has increased the room for improved women's land rights and applies to the bulk of the country's territory and people. By distinct indigenous community rules, the fifth and sixth Scheduled Areas have separate customary tribal laws regarding women's property rights and inheritance. To achieve the objective of secure and fair land tenure for everyone, both the federal government and state governments have implemented several progressive changes in recent years. Recent times have seen an increase in the proportion of land that women get through land grant schemes, whether jointly or in their names, at least in the form of shared ownership of homestead lands. For evaluating the development of women's economic autonomy and tracking the effects of progressive policies in practical scenarios, gender disparity in land ownership must be measured. However, it takes a variety of measures to accurately examine gender differences in land ownership, and particularly the significance of land ownership in India's remote regions and the consequent effect of women in family decision-making, shall be the focus of this study.

Key Words: *Propriety rights, succession, women's ownership, new registration rules.*

1. Introduction:

For their survival, rural people are reliant on a variety of natural resource assets, including land, water, trees, and other resources¹. As the cornerstone of agricultural output, land is without a doubt, the greatest asset in the portfolios of most rural households. As far as women are concerned, women's secured

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¹ Elder, C. L. (1994). Laws, natures, and contingent necessities. *Philosophy and Phenomenological Research*, 54(3), 649-667.

land rights are crucial for long-term food security, peace, and, ultimately, poverty alleviation². Owning land improves a woman's standing in her family and community, gives her more opportunities in the non-farm sector, and guarantees that her children will take better care of her as she ages. Women's property rights in India are controlled by several legal and social frameworks, and institutions are regularly changed because of patriarchal and gender standards as well as several socioeconomic and political influences. Land continues to be a vital backup plan for women who are single because of widowhood, abandonment, or separation.³

2. Women's Right to Succeed/Inherit

Succession is the term used in law to describe the transference of legal rights from one generation to the next, or more simply, the conveying of legal rights. When a person passes away without leaving a will, this situation is referred to as being "intestate," and the distribution of property is regulated by personal laws, which imply that these laws will have a strong religious undertone and adhere to more traditional patriarchal family structures.⁴ Early on in Hindu society's history, the socio-economic circumstances acknowledged that property was a component of a common stock known as Joint Hindu Family Property; as a result, the Mitakshra School of Law focused on developing rules for succession of solely these joint holdings.⁵

Hindu civilization has seen considerable changes and advancements throughout the years, which have led to the emergence of individual holdings, often known as self-acquired property. According to the terms of the existing law, people who pass away intestate are entitled to both the devolution of Hindu family property and the property they earned. On the other hand, there are legal and judicial gaps in the way a Hindu woman's property is devolved, which has led to uncertainties and, in turn, to court precedents that are against gender equality.⁶ This is partly because, at the time the statute was passed, the legislature could not have foreseen a day when women would acquire property on their own. Like how it governs Hindus, the Hindu Succession Act, of 1956 likewise governs the non-testamentary succession of Buddhists, Jains, and Sikhs.⁷

² Agarwal, B. (1994). Gender and command over property: A critical gap in economic analysis and policy in South Asia. *World Development*, 22(10), 1455-1478.

³ Roy, K. C., & Tisdell, C. A. (2002). Property rights in women's empowerment in rural India: a review. *International Journal of Social Economics*, 29(4), 315-334.

⁴ Halder, D., & Jaishankar, K. (2008). Property rights of Hindu women: A feminist review of succession laws of ancient, medieval, and modern India. *Journal of law and religion*, 24(2), 663-687.

⁵ Rawat, A. (2022). Property Rights of Hindu Women: Critical Analysis. *Issue 1 Indian JL & Legal Rsch.*, 4, 1.

⁶ Suman Yadav, Hindu female instate Succession: an epitome of discrimination, IX, KJLS, 223, (2021-22)

⁷ Jain, P. C. (2003). Women's Property Rights Under Traditional Hindu Law and the Hindu Succession Act, 1956: Some Observations. *Journal of the Indian Law Institute*, 45(3/4), 509-536.

The Hindu Succession Act was a pioneering piece of legislation that granted women complete ownership rights over all types of property. The term “woman’s property” is defined in Section 14 of the Act to include both moveable and immovable property that she already possesses, as well as property that she has acquired through her efforts. It does not distinguish between assets acquired via inheritance and those acquired through purchase. Additionally, it covers any such property obtained “by a gift from any person, whether a relative or not, before, at, or after her marriage, or by her effort or labour, or buying or by prescription, or in some other method, as well as any other assets owned by her being strident.” According to Sections 15 and 16 of the 2005 amended statute, which allows women to function as coparceners and have undivided shares in Mitakshara Coparcenary Property.⁸

As far as Muslim women and their law regarding inheritance are concerned, The Holy Qur’an makes it obvious that women have all their rights and have their position as persons, independent of whether they are mothers, wives, sisters, or daughters. Islam guarantees women’s financial security as well. The woman becomes entitled to support (nafaqah) for the continuance of the marriage, which is one of the fundamental legal outcomes of a legitimate Muslim marriage⁹.

Until they are married, daughters are entitled to support. The divorced lady has a right to maintenance during the iddah¹⁰. The widow’s right to retain the property of her husband till her dower debt is not satisfied¹¹. To protect the widow’s status from other heirs and creditors and to pursue her rights, Muslim law grants her a personal right. In Islam, a woman has comprehensive rights over all her property, including everything she earns, acquires, owns, gets as a gift, or is left to her as a bequest¹².

A mother has the right to maintenance from her children in a similar vein. When a couple gets married, the husband is obligated by law or by mutual consent to give the woman a sum of money known as a dower. The wife has the authority to restrict access to the husband if a timely dower is rejected. If the widow is lawfully in possession of her late husband’s property, she is entitled to retain ownership of that property until her outstanding dower duty is satisfied¹³.

Since the state has sovereignty in India, it can control and legislate on everything under the Constitution though there is no express reference to state authority over land. The Directive Principles, which mandate that the state ensure that

⁸Hindu Succession Act, 1956

⁹Surah Al Nisa, Verse 34.

¹⁰Iddah of Muslim women is 3 months & 10 days or if pregnant then till delivery.

¹¹ Widow’s Right to Retention under Muslim Law-Lawminds, available at: <https://lawminds.co.in>

¹² Despite all, her spouse must provide for her. She is not required to work or provide financially for her family. Even if the woman is affluent, the husband is still obligated to provide for her.

¹³ Supra note 11.

both genders are treated equally, and the constitutional obligations of equality and the abolition of discrimination under Articles 14 and 15 of India's Constitution have prompted Parliament to act in response to the growing need to legislate on property rights. Whether women's rights have been considered while making policy decisions, putting policies into effect, or creating budgets and budgetary allocations. However, for the fact India has increased data generation, usability, and availability related to land attributes throughout time by strengthening institutional capacity. They offer convenient ways to keep an eye on and enhance land governance and women's land rights.¹⁴

3. The notion of women's land rights:

The first issue becomes whether each plan, plan of action, and choice made about the property is gender-just. Despite, implementing important improvements in the socio-legal order, lawmakers had to make certain compromises due to the situation prevailing over here related to women's proprietary rights to set them in tune with the modern times¹⁵. The word "land rights" is wide and includes both economic and legal aspects. These rights may be divided among many parties, or they may be combined into what we often refer to as ownership. Statutory or customary tenure systems may be used to hold title to land. Five land-related rights have been identified by one widely used framework¹⁶. The right to enter a property is known as access. The right to withdraw refers to the ability to take goods of private land, for as by hunting in a forest or fishing in a lake. Management is the authority to make changes to the land, such as planting trees or growing crops. Exclusion is the power to bar others from a space. The ability to assign ownership rights to others through a sale, bequest, or gift is known as alienation¹⁷.

The women's land rights study frequently discusses usage, administration, and full ownership of property and draws on gender and wealth studies in doing so¹⁸. Use rights refer to the capacity or authorization to make use of a resource; control rights denote higher degrees of authority, which may include management, exclusion, and alienation¹⁹.

¹⁴ Jackson, C. (2003). Gender analysis of land: beyond land rights for women. *Journal of agrarian Change*, 3(4), 453-480.

¹⁵ Jain, C., Saxena, D., Sen, S., & Sanan, D. (2023). Women's land ownership in India: Evidence from digital land records. *Land Use Policy*, 133, 106835.

¹⁶ Edella Schlager and Elinor Ostrom, Property-Rights Regimes and Natural Resources: A Conceptual Analysis, 68, *Land Economics*, 249 (1998), <https://www.jstor.org/stable/3146375>

¹⁷ Zolotareva, A. E., Starodumova, S. J., Neznamova, A. A., Lenkovskaya, R. R., & Volkova, M. A. (2017). Land plots as a variety of immovable things. *Journal of Advanced Research in Law and Economics*, 8(7 (29)), 2308-2314.

¹⁸ Ruth Meinzen-Dick, Sophie Theis, Agnes Quisumbing, Cheryl Doss, Women's land rights as a pathway to poverty reduction: Framework and review of the available evidence, 172, *agricultural systems*, 72 (2019) <https://www.sciencedirect.com/science/article/pii/S0308521X1730505X#bb0255>

¹⁹ Ownership is the condition of holding all these rights, including the ability to sell or otherwise dispose of property, on one's own and supported by established legal structures. However, the distinctions are sometimes hazy, and men and women might profit from property even if they do not fully possess it.

According to the United Nations agency FAO women's land rights have a level of intricacy about real ownership rights. Most of the research considers household land rights without specifying who in the home is the owner of those rights. Comparisons are based on the sex of the household head when land rights are solely measured at the household level. Relying on headship misses the significance of the property rights of women worldwide who live in dual-adult homes. However, as information on individual land rights becomes more generally available, greater studies of Women's land rights are possible.²⁰

4. Women's Land Inheritance in India:

The Hindu Succession Act of 1956, which governs the current rights of inheritance of Hindus, Buddhists, Jains, and Sikhs, is the basic legislation in India. The Act provides the basis for a rule of succession that accords boys and daughters the same rights to inherit family property²¹. However, the females might share in the inheritance of property their fathers personally obtained, but sons could only inherit ancestral property. Because a sizable portion of land is family-held, particularly in rural regions, the joint family property itself is a source of gender prejudice.²²

To address the issue of discrimination in the inheritance of women, some Indian states changed the Act between the 1970s and 1990s to permit women to inherit ancestral property, provided that they were married at the time of the reform.²³

The modifications stipulated that women who were single at the time, the reform was enacted in their state, would be given rights in ancestral or joint family property that were equal to those of their brothers, including the right to a share through survivorship²⁴.

These regulations were altered by the 2005 Hindu Succession (Amendment) Act, which granted women an equal stake in ancestors' assets. There is a consensus on women's inheritance rights that severe gender prejudice still exists in India. However, given the data available from 2004–2005 through the Indian Human Development Survey, the amendment had a favourable influence on women's years of schooling.²⁵

²⁰Food and Agriculture Organisation of the United Nations, Gender and Land right database, <https://www.fao.org/gender-landrights-database/en/> (last visited on July 15, 2022)

²¹Sanchari Roy, Empowering Women? Inheritance rights, Female Education and dowry Payments in India, 114, Journal of Development Economics, 1, (2014) , available at: https://www.researchgate.net/publication/270596008_Empowering_Women_Inheritance_Rights_Female_Education_and_Dowry_Payments_in_India

²²Nayana Bose and Das, Women Inheritance Rights, Household Allocation and Gender Bais, 107(5), American Economic Review, 150 (2017) <https://ideas.repec.org/a/aea/aecrev/v107y2017i5p150-53.html>

²³*Id*

²⁴Sanchari Roy, Empowering Women? Inheritance rights, Female Education and dowry Payments in India, 114, Journal of Development Economics, 1, (2014) https://www.researchgate.net/publication/270596008_Empowering_Women_Inheritance_Rights_Female_Education_and_Dowry_Payments_in_India

²⁵Bose and Das, *Supra*, at 22

a) Coparcenary Interest Acquired By A Hindu Female:

In a joint Hindu family, every person is a part of the family, but every member is not allowed to be referred to as a coparcener. According to the Act, a coparcener is a person who has the right to inherit ancestors' property. The main issue with the statute was that initially, women could not be a coparcener or claim a part of inherited property. But thanks to a 2005 modification to the Hindu Succession Act, females now have the same coparcenary rights as boys. To make up for the long-standing prejudice against daughters, women were given an equal portion to that of sons. These characteristics are still there for the coparcener's degeneration²⁶. Even though it stemmed from her father's side, this coparcenary right was given to her at birth²⁷.

Women's situation in terms of having property rights has improved thanks to many wise legal precedents. In *Vineeta Sharma v. Rakesh Sharma*²⁸, the Supreme Court reversed earlier rulings in *Dannamays Amar & Prakash v. Phulwati*²⁹ and ruled that girls have the same share of rights to inherited property as males, and that right exists since the daughter's birth, regardless of the father's passing. This removes any doubt about how the 2005 amendment should be applied and makes daughters an equal co-owner of the land³⁰.

b) Self-Acquired Property By A Hindu Female:

Self-acquired property is that which a person owns or achieves through one's efforts, without the aid of family finances, and with their talent and merit. Self-acquired property devolution is a murky, ambiguous issue, although Section 15 of the Act has provided judicial guidance. However, when section 15³¹ was applied in the case of *Om Prakash v. Radhacharan*³², an undesired result was noted³³. The court held that in

²⁶Abhinav Verma and Krishna Kant Choudhary, women equal shareholders in Hindu joint family with special reference to Vineeta and Rakesh Sharma & ors, 8, Int. J of Adv. Res. 167 (2020-21)

²⁷ Under Section 15(1) of HSA, the property is acquired by the female Hindu through coparcenary rights.

²⁸(2020) 15 SCC 1

²⁹SLP (C) NOS.21814 OF 2008

³⁰ It also does not impact their rights to the ancestral property.

³¹The Hindu succession Act, 1956, Sec. 15, Act of parliament 1956

³²(2009) 15 SCC 66

³³ The Hindu girl lost her spouse within three months of their marriage, at the age of 15. She was forced to return to where she was born. She acquired property of her earnings. She died intestate, or without a will, after 42 years of employment, leaving behind cash and real estate under her name. Such a property was not inherited; it was self-purchased. The matter gave rise to a dispute between Narayani's mother, brother, and in-laws.

the situation of self-acquired property, Section 15(1)³⁴

A woman is not prohibited from creating a will or signing a testament under the Hindu Succession Act. The assertion that women are unable to make decisions based on sympathy or emotion, cannot be accepted as a gospel truth. According to the court, “if the appellants’ claim is accepted, the Court will have to interpret Section 15(1) in a way that the Legislature did not intend”. Hindu women who are not married now have the same legal rights as married women when it comes to property, according to legislation approved by the Parliament. In this case, the court arrogantly disregarded its obligation to provide justice by ignoring the extremely important and material facts that the deceased Narayani’s property was self-acquired and that the husband’s family made not a single contribution to her education or career prospects.³⁵

5. Inheritance Rights of Women under Islamic Law

Females were completely forbidden from inheriting any property from a deceased person in pre-Quranic Arab society. It was common procedure for all estates to pass to the male heirs. Women’s economic rights were completely ignored; hence they were completely denied property rights. However, in Islamic inheritance law, women are seen as significant legal heirs. Islam gave women the legal right to not only inherit property from their fathers, mothers, husbands, children, and other close relatives but also to own it outright. Even though Islam recognizes women as substantial legal heirs, many Muslim countries deny women the ability to inherit property after their parents pass away. This is mainly because Islamic inheritance laws, both at the individual and family levels, are not being followed. Nevertheless, Islam has given women a

³⁴ General rules of succession in the case of female Hindus. —

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16, —

- a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband.
- b) secondly, upon the heirs of the husband.
- c) thirdly, upon the mother and father.
- d) fourthly, upon the heirs of the father; and
- e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in subsection (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband, or her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in subsection (1) in the order specified therein, but upon the heirs of the husband.

³⁵ The court ignored the case’s facts and gave a literal interpretation. To everyone’s surprise, the court agreed with the claimants, reaffirming the society’s long-standing policy of disregarding the natal families of females.

respectable position in the family and society overall. The Holy Qur'an makes plain the idea of property inheritance³⁶.

The laws of custom are largely patriarchal and unfair to women. When you attack inheritance rights, you are also challenging patriarchy and values relating to families and relationships. It is alleged that fathers and sons are loath to share their property with married women because they feel she had received a dowry at the time of her marriage, making her a member of the husband's family. It is said that society's alleged bias against women stems from its failure to implement Islamic inheritance law³⁷.

a) Islamic Inheritance Law:

One of Islam's most significant and emphasized aspects of law is the law of inheritance. Ilm-ul-Faraiz is the name of this statute in Arabic. The Holy Quran's Surah Al-Nisa contains the precise guidelines for the law of inheritance. This statute governs how a decedent's inheritance is divided. It should be emphasized that inheritance and death of the owner or individual are closely related. In other words, the law of inheritance only applies after the property's owner passes away. According to reports, close to 70 of the Prophet Muhammad SAW's companions perished at the Battle of Ahud, and the rehabilitation of their widows became one of the key issues in that community as it increasingly adopted Islamic ideals.³⁸ Before the Prophet, there were several unresolved societal problems, such as widow remarriage, orphan property rights, guardianship problems, heir rights, etc. According to reports, the widow of one Sayeed ibn Rabi, who had three daughters, complained to the Prophet of Allah that Sayeed ibn Rabi's brother had seized the entire estate (his date orchards) and left nothing for the orphans.³⁹ It should be remembered that in Arabian tradition, women were completely barred from inheriting anything. The verses of surah Al-Nisa about ilm-ul-Faraiz were revealed against this backdrop. The Prophet of Allah also vehemently underlined the critical need to learn the ilm-ul-Faraiz law of inheritance and impart it to others:

Learn the laws of inheritance and teach them to the people, for they are one-half of useful knowledge.⁴⁰

Every Muslim was ordained to Learn:

The laws of inheritance with the same sincerity as they learn the Holy Quran.⁴¹

³⁶ Khan, I., Abdullah, M. F., Rahman, N. N. A., Nor, M. R. B. M., & Yusoff, M. Y. Z. B. M. (2016). The right of women in property sharing in Bangladesh: Can the Islamic inheritance system eliminate discrimination? *SpringerPlus*, 5, 1-8.

³⁷ Basri, H., Miswar, A., Hasan, H., Pabbajah, M., & Khalik, S. (2022). Inheritance Rights of Women in Makassar Society: A Study of Living Qur'an and Its Implications for Islamic Law. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 6(2), 537-555.

³⁸ Syed Shahid Rashid, Inheritance Rights of Muslim Women, IX, KJLS, 125, (2021-22)

³⁹ *Id*

⁴⁰ Narration of Hazrat Abu Huraira reported by Bahiqi and Hakim in Durri Manzoor.

⁴¹ Darmi reports the narration of Hazrat Umer®.

b. woman as sharer under Islamic law

I. Wife: If the deceased's kid or children are present, the wife of the deceased is entitled to one-eighth (1/8) of the property. If the deceased's wife (widow) has no children, she is entitled to a one-fourth (1/4) portion of the property. If the deceased's widow has more than one kid, they are each entitled to a share of 1/8 or 1/4. It should be emphasized that the wife's part of the inheritance excludes maintenance and mahr, which are independent claims.

II. Daughter: If there is no son of the deceased and the daughter is the only child of the deceased, the daughter is entitled to one-half (1/2) of the part in the property of the deceased. If the dead had two or more daughters and no son, then each of the girls would be entitled to a two-thirds (2/3) portion of the deceased's property. If the dead had sons, those daughters would be entitled to a 2:1 split, giving two shares to the son and one share to the daughter.

III. Mother: If there is no child of the dead, no agnatic descendant of the deceased, and no more than one brother or sister of any kind, the mother of the deceased is entitled to one-third (1/3) of the share in the net inheritance. The mother of the dead is entitled to one-sixth (1/6) of the deceased's net wealth if there is a child of the deceased, a child of the son of the deceased, two or more brothers or sisters of the deceased, or a brother, sister, and the father of the deceased. The mother of the deceased has a right to one-third of the residual if the deceased leaves behind a husband and a father. Mother is entitled to 1/3 if the deceased only left behind his or her father and mother.

IV. Son's Daughter: If the deceased person's daughter is by herself or if there isn't another son or daughter, the son's daughter is entitled to one-half of a share in the estate. If there are more than two daughters of a deceased son but no living children, then each of those daughters is entitled to 2/3 of the estate. When a deceased person has a daughter or higher son's daughter but no son or son's son, the SD is entitled to 1/6 of the total estate, whether there are one or more. If there is an equal son's son, that son's daughter inherits the remaining property.

V. Full Sister: When there is no kid, child of a son, father, real grandpa, or full brother of the dead, the sister has the right to receive 1/2 (one-half) of the share (if alone) and 2/3 (if there are two or more). When a brother is involved, the 2:1 rule is applied to the sister. Sister of the dead is not included when it is the father. If the mother of the dead is present and the deceased person has no children, the sister is not disqualified.⁴²

6. International Obligations Under CEDAW:

The need to stop and prevent gender discrimination is one of the fundamental tenets of CEDAW⁴³. The Supreme Court has ruled that international conventions

⁴² Khatun, N. (2023). Women's Rights to Inheritance and Property Ownership in Islam. *International Journal of Applied Ethics*, 9.

⁴³ Following India's signing of this agreement in 1980, the Indian parliament approved it in 1993 to end pervasive discrimination against women and pledged to take action to end this social ill.

add urgency and teeth to the process by which these principles and rights can be put into effect immediately, even though the Indian Constitution has provided an exhaustive framework through fundamental rights and DPSPs for the development of human personality and the elimination of discrimination. Therefore, the state must remove all obstacles and criminalize all kinds of gender-based discrimination as required by fundamental rights under Art. 14 and 15. The government and its organs are required by the Supreme Court to uphold India's obligations abroad.⁴⁴

Article 2(f) of the CEDWA, along with other articles, calls on the State to take appropriate action by enacting laws to stop gender-based discriminatory practices. This action may include overturning current regressive laws and regulations and changing customary practices that are discriminatory toward women⁴⁵. The obligation under CEDAW extends to permitting gender equality in all personal laws as well, thus it is important to note at this point that personal laws must be changed to accommodate gender equality. Several clauses and loopholes in the Hindu Succession Act of 1956 continue discrimination rather than eradicating it, and several legal precedents have recognized the obvious prejudice that the act mandates. According to the conclusions of the Hindu Law Committee, women are less well-off economically than men, and this subjection is still maintained by centuries-old customary Hindu Laws. According to the Bombay High Court, the Hindu Succession Act discriminates against women and violates their right to equality, even though this discrimination is justified by the need to maintain familial ties⁴⁶.

In some instances, this discrimination against women is so pervasive that it may be found just by reading a copy of the legislation that the legislature has approved. The procedures, laws, and regulations governing the transfer of property among members of a joint Hindu family are particularly troublesome since they are convoluted and hard to comprehend. There is a strong probability that because this discrimination is so widespread and entrenched in society, women have been disproportionately affected.⁴⁷

7. Conclusion:

Property is a crucial indicator of a person's socioeconomic standing in society, and traditionally, women have been denied the right to own property, which hurts the socioeconomic level of the female population, who makes up half of the population. Women have historically been placed on a lower pedestal when it comes to rights since legislators have historically sought to protect and prioritise the property rights of families with a male serving as the head of household. However, the legislation governing women's property rights has

⁴⁴Vishaka & ors Vs State of Rajasthan (1997) 6 SCC 241

⁴⁵Madhu Kishwar vs State of Bihar (1996) 5 SCC 125

⁴⁶Sonubahi Jadhav vs. Bala Govinda Yadav, AIR 1983 Bpm 156

⁴⁷Law Commission of India, 174th report on property rights of women: Proposed Reforms under Hindu Law, (2000)

waited too long to even recognize the notion that women have ownership rights in property and may hold property on their own. The legislation after the amendments and judicial intervention is now considered to be gender-neutral, however, this is not sufficient, since the status quo is maintained to the point that gender discrimination is protected by the law as it currently stands. Despite being more gender equal than ever before, the Hindu Succession Act of 1956 lacks clarity in explicitly granting women equity. It is safe to conclude that the current statute breaches India's international commitment to abolish gender discrimination and is unjust, if not unconstitutional. It is up to the legislature to create a non-discriminatory devolutionary scheme that keeps men and women on equal footing as a positive affirmation in the direction leading towards gender equality. The legislature holds the key to ending this inequality and bringing uniform rules of succession of property of Men and women, which will be the touchstone of improving the subservient position of women in our social set-up. Islam gives women a special position and place in the family and community. Islam promises though that women shall have financial security, which would be taken care of by capable men in their family and community in theory at least. However, it becomes clear from the various studies made in this regard that many factors, including sociocultural traditions, patriarchal societal structures, and a lack of religious knowledge and practice in daily life, hinder women's ability to inherit property in the family.

Insolvency and Bankruptcy in Individuals and Partnership Firms: *Indian Legal Perspective*

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Abstract

Financial distress, insolvency, and bankruptcy are recurring challenges faced by individuals and partnership firms in the ever-evolving economic landscape. There remains a need to provide an in-depth analysis of the insolvency and bankruptcy processes as they pertain to these entities. Again, there remains a necessity to explore the fundamental concepts, the legal framework, the intricate processes involved, contemporary trends, challenges, and practical insights through case studies. There are some complex intricacies involving the matters leading to insolvency and bankruptcy. This study aims to illuminate the nuances and significance of these processes for individuals and partnership firms. The step-by-step procedures involved in insolvency and bankruptcy are elucidated, emphasizing the choices available to stakeholders, such as liquidation or reorganization. This research paper aims to contribute to a broader understanding of insolvency and bankruptcy for individuals and partnership firms. It underscores the significance of adeptly managing financial distress in these contexts and the far-reaching consequences for individuals, businesses, and the overall financial stability of society. The paper has been designed to include the objectives of the study followed by the hypothesis to be proved or disproved along with the annotated review of literature and methodology to evaluate and assess the problem of insolvency and bankruptcy vis-à-vis the national law both for individuals and partnership firms. The legal framework for insolvency and bankruptcy in individuals and partnership firms is delineated in a bit of detail to highlight the theme of the problem.

Keywords: *Insolvency, Bankruptcy, Individuals, Partnership Firms, Liquidation*

1. Introduction

Insolvency refers to a financial state where an individual or partnership firm is

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unable to meet its financial obligations, while bankruptcy is a legal status that an individual or firm may enter when they are insolvent. Insolvency and bankruptcy are often used interchangeably, but in the legal context, insolvency is considered as a state whereby an entity is unable to pay off its debts when they became due, whereas, bankruptcy is a legal declaration by a court of competent jurisdiction of an entity's inability to pay off its debts.¹ The term 'insolvency' in simple terms means that the concerned person or corporation has not been able to meet its liability and therefore, has been declared insolvent. In the case of a corporation, it may be wound up if it cannot pay its debts while a person or partnership may be declared bankrupt. The specter of insolvency and bankruptcy looms over individuals and partnership firms, presenting a dual challenge: the personal financial turmoil faced by individuals and the collective dilemmas confronted by partnerships. These challenges are compounded by factors, such as economic downturns, pandemics, and shifts in market dynamics, underscoring the need for a comprehensive understanding of the insolvency and bankruptcy processes. The dynamics of financial distress and insolvency have never been more pertinent than in the present era, where individuals and partnership firms face mounting economic challenges. This research paper explores the intricate landscape of insolvency and bankruptcy, shedding light on the critical issues surrounding these phenomena as they pertain to individuals and partnership firms. It delves into the legal framework, the processes, and the implications for stakeholders, in the context of a rapidly changing financial world.

2. Objectives of the study

This research paper seeks to provide a detailed analysis of insolvency and bankruptcy concerning individuals and partnership firms, offering a comprehensive overview of key concepts, the legal framework, the processes involved, the latest trends, challenges, and case studies. The primary objectives of this research are as follows:

1. To elucidate the fundamental concepts of insolvency and bankruptcy in the context of individuals and partnership firms.
2. To analyze the legal framework governing these processes in various jurisdictions.
3. To outline the key steps involved in insolvency and bankruptcy proceedings for individuals and partnership firms.
4. To identify current trends and developments in insolvency and bankruptcy that are shaping the landscape.
5. To highlight the challenges and dilemmas faced by individuals and partnership firms in navigating insolvency and bankruptcy.
6. To present case studies that exemplify real-world scenarios, offering

¹ CA Rajkumar S. Adukia, A Study on Insolvency Laws in India Including Corporate Insolvency, available at: <http://www.mbcindia.com/Image/18%20.pdf> (last visited on 4.12.2023)

practical insights into the application of insolvency and bankruptcy laws.

3. Literature review

Following is the summarized literature review highlighting key findings and insights from existing literature:

1. Conceptual Framework:

Insolvency is defined as the inability of an entity to meet its financial obligations. Bankruptcy is the legal status that often follows insolvency, resulting in a structured resolution of financial distress². Insolvency and bankruptcy processes can differ significantly between individuals and partnership firms, primarily due to the distinct legal and financial structures³.

2. Legal Framework and Regulations:

The legal framework governing insolvency and bankruptcy varies widely by jurisdiction, with countries like the United States having specific bankruptcy codes⁴. The European Union introduced the EU Insolvency Regulation, which facilitates cross-border insolvency proceedings within the EU (Becker et al., 2017).

3. Insolvency and Bankruptcy Procedures:

Insolvency proceedings for individuals often involve personal bankruptcy filings, where assets may be liquidated, and debts discharged or restructured (Mann, 2006).

Partnership firms may opt for formal insolvency procedures, such as administration or liquidation, to address financial difficulties (Tse, 2008).

4. Challenges and Dilemmas:

For individuals, insolvency can bring not only financial challenges but also social stigma and personal consequences (Hann, 2010).

Partnership firms may face complex negotiations among partners, creditors, and the court during insolvency proceedings (Fraser and Hann, 2011).

5. Recent Trends and Developments:

The COVID-19 pandemic has had a significant impact on insolvency and bankruptcy, with governments implementing temporary relief measures and changing legal frameworks to address the economic fallout (Mokal and Davies, 2020).

Digitalization of insolvency processes is gaining prominence, making filings and case management more efficient (Buksh and Khan, 2019).

1. 4. HYPOTHESIS

“The legal framework, challenges, and outcomes of insolvency and

² Skeel, David A. Jr., “Behaviorism in Finance and Securities Law” (2014). *All Faculty Scholarship*. 473. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/473

³ Douglas G. Baird, Theodore Eisenberg, Thomas H. Jackson · 2007, Commercial and Debtor-creditor Law: Selected Statutes. (2007). United States: Foundation Press.

⁴ (Warren et al., 2020)

bankruptcy proceedings differ significantly between individuals and partnership firms, and the impact of external factors, such as economic crises, legal reforms, and digitalization, has a substantial influence on the processes and results of these financial distress resolutions.”⁵

5. Research methodology

The research paper relies on a multi-faceted methodology, including a comprehensive review of relevant literature, an analysis of legal documents and regulations, and the examination of case studies, to provide a well-rounded view of the subject matter. It also draws on current data and statistics to illuminate the evolving landscape of insolvency and bankruptcy. This framework provides the rules and regulations that govern these processes. Below is an overview of the legal framework:

6. Legal Framework

There are three ways to think about eligibility for the IBC process:

- a) The Threshold at which a Filing Can Be Made,
- b) Entities who make the filing, and
- c) The debt that qualifies for a filing.

The eligibility threshold for filing in the IBC is low - a single default of at least Rs.1, 000 would suffice. The Code makes it possible for the government to raise this to Rs.1, 00,000 but not higher.⁶ The IBC permits either the debtor defined as an individual or partnership firm, or the creditor to file for insolvency. However, for the process of “Fresh Start”, only the debtor is eligible. A creditor includes a financial, operational, secured, and unsecured creditor, as well as a decree holder.⁷ This suggests that that all kinds of creditors including moneylenders, friends, and family could technically file for insolvency.

i. Bankruptcy Laws:

Individuals:

In many countries, individuals can file for personal bankruptcy under specific chapters or sections of the law. For example, in the United States, Chapter 7 and Chapter 13 bankruptcy provide legal procedures for individuals. Chapter 7 leads to the liquidation of non-exempt assets, while Chapter 13 establishes a plan for debt repayment.

Partnership Firms:

Bankruptcy laws for partnership firms are typically distinct from personal bankruptcy laws. Legal procedures may vary depending on the type of partnership (e.g., general partnership, limited partnership) and the jurisdiction’s laws. Partnership firm insolvency often involves corporate bankruptcy

⁵ This hypothesis sets the stage for the research to investigate and substantiate the differences and commonalities between insolvency and bankruptcy procedures for individuals and partnership firms, considering various factors that can affect the outcomes of these proceedings. The research aims to explore how legal, economic, and technological factors shape the experiences of debtors and creditors in these distinct contexts.

⁶ . Section 78, IBC

⁷ .Section 3(10) IBC

procedures. The IBC has two kinds of processes. The first is the route of the “insolvency resolution process” followed by “bankruptcy”. The second is the route of a debt waiver through the “fresh start”. The choice of the route depends on specific eligibility criteria, and the IRP-bankruptcy route seems to be the preferred route for most insolvencies.

7. The IRP-bankruptcy route

The Insolvency Resolution Process (IRP) is the process through which all creditors and the debtor agree on a negotiated repayment plan.⁸ The IRP can be initiated by the debtor or the creditor at the relevant DRT,⁹ through an application, the form and manner of which will be prescribed by regulations. The application is to be examined by a Resolution Professional (RP) who is responsible for making a recommendation of acceptance or rejection to the DRT.¹⁰ Once the IRP application has been accepted, a moratorium of six months will commence on all collection actions.¹¹

A public notice is to be issued by the DRT, and creditor claims are to be collected by the RP.¹² The debtor is required to propose a repayment plan under the supervision of an RP, which should meet the approval of most creditors, defined as more than three-fourths in value.¹³ Once approved by the creditors and sanctioned by the adjudicating authority, the plan would be binding on the debtor and all the creditors mentioned in the plan. The IBC does not guide the content of the plan or require the plan to provide at least a minimum living standard for the debtor. These details might get drafted in the regulations that would govern the process. However, it requires that the consent of the debtor is mandatory for any modifications to the plan the creditors may suggest.¹⁴ The IBC thus balances the propensity in India of the law and regulations to micro-manage every process with the welfare of the debtor. The approved plan must be submitted to the DRT who then passes a final order on the plan.¹⁵ The implementation of the plan is to be supervised by the RP. A discharge order may be granted to the debtor by the content of the resolution plan.¹⁶

The IBC envisages three grounds for failure of the IRP which can lead to bankruptcy proceedings:

- (a) If the application to the IRP is not accepted due to failure to provide the requisite information,
- (b) If creditors and the debtor cannot agree on a repayment plan, and
- (c) If the debtor fails to implement the repayment plan within the period

⁸ . Chapter III, Part III, IBC

⁹ Debt Recovery Tribunal, (hereinafter called DRT)

¹⁰ . Section 99, IBC

¹¹ . Section 101, IBC

¹² . Sections 102, 103 and 104, IBC

¹³ . Section 111, IBC

¹⁴ . Section 108(3), IBC

¹⁵ . Section 114, IBC

¹⁶ . Section 116, IBC

prescribed for such implementation in the plan.¹⁷

The bankruptcy proceeding will not start automatically: the creditor or the debtor would have to make an application to trigger it. The rationale for this lies in the higher stigma attached to an individual's bankrupt status. On the admission of the application for bankruptcy, an insolvency professional will be nominated as the bankruptcy trustee by the IBBI if either the debtor or creditor has failed to propose one.¹⁸ A bankruptcy order will be passed by the DRT.¹⁹ It will have the effect of declaring the debtor as 'bankrupt' and vesting the estate of the bankrupt with the bankruptcy trustee.²⁰

A certain class of assets of the debtor would remain outside the estate such as property held by the bankrupt on trust for any other person, sums due to workmen or employees from the provident or pension fund, and assets that may be specified by the Central Government or a financial sector regulator.²¹ On the vesting of the estate of the bankrupt, the bankruptcy trustee will undertake the due process for registering claims, and administering them in the order of priority encapsulated in the IBC.²² For both of these processes, the Code does not specify fees for filing either the IRP or bankruptcy and leaves open the possibility that the fees may be prescribed later.²³ Fees to the insolvency profession in the IRP as well as bankruptcy are expected to be accommodated in the respective procedures.²⁴

8. The Fresh Start Route

The IBC proposes a concept of a Fresh Start, aimed at providing debt relief to the poorest. A debtor with gross annual income of less than Rs.60, 000, assets less than Rs.20, 000, qualifying debts²⁵ of less than Rs.35, 000, and no home ownership, will be eligible to get a complete waiver of debts. Only the debtor can trigger this process.²⁶ The default must be on "qualifying debts". If the debtor has triggered the process through a resolution professional, then the DRT will only check if there is a disciplinary proceeding against the RP and allow the RP if no such proceeding is found. If the debtor triggers the process without an RP, then the IBBI will be required to nominate an RP for the process.²⁷ The Code specifies a list of particulars that must be submitted with the application.²⁸ On examination of the information, the RP will make a

¹⁷ . Section 121, IBC

¹⁸ . Section 125, IBC

¹⁹ . Section 126, IBC

²⁰ . Section 128, IBC Section 154, IBC

²¹ . Section 155, IBC

²² . Sections 129-137, IBC; Section 178, IBC

²³ . Section 94(6), IBC

²⁴ . Section 105(2) (b), and Section 178, IBC.

²⁵ . Qualifying debt includes debt that is due for repayment provided it is not part of the excluded debt category, is not secured, and has been incurred three months before the fresh start application. See Section 79(19) of the IBC

²⁶ . Section 80, IBC

²⁷ . Section 82, IBC

²⁸ . Section 81(4)

recommendation to the DRT to accept or reject the application.²⁹ The DRT will accept the application based on the RP recommendation.³⁰ A moratorium will become applicable on all the creditors of the applicant for six months, to provide a conducive environment for the process to go through.³¹ The DRT shall pass a discharge order for the qualifying debts by the end of the moratorium period.³² The details of the discharge order will be forwarded to the IBBI for record-keeping.³³ The motivation behind the fresh start seems to be the difficulties in the transaction costs of the IRP-bankruptcy route being larger than the debt at stake for low-income, low-asset debtors. The fresh start also provides an insurance function³⁴ by essentially providing a more systematic debt waiver.

9. The role of the Debt Recovery Tribunal

The role of the Tribunal is wider in personal insolvency relative to corporate insolvency. For example, once the IRP has been triggered, the DRT is responsible for accepting the application based on the report submitted by the RP³⁵. The law does not provide any guidance on what the DRT should base its judgment on, and whether it should solely rely on the recommendations of the RP. If the RP requests, the DRT may also provide instructions for the conduct of negotiations, between the debtor and creditors.³⁶ Similarly, when the repayment plan is submitted by the RP to the DRT, it may accept or reject the plan based on the report. The DRT, in its order of approving the plan, may provide directions for implementing the plan or may direct the RP to reconvene a meeting of creditors if it feels that the repayment plan requires modification.³⁷ The DRT also has a role to play when deciding the priority of payments in bankruptcy in specific cases related to the creditor having given any indemnity or having made payments through which the bankruptcy has been protected. In such an event the Code allows the DRT to give that specific creditor an advantage over other creditors.³⁸ Through these provisions, the DRT may end up playing a far greater role in the conduct of the IRP related to the corporate insolvency process, and what was envisaged by the BLRC.

i. Automatic Stay:

Upon filing for bankruptcy, individuals and partnership firms typically benefit from an automatic stay. This legal provision halts all collection activities, including creditor harassment, foreclosure, and repossession. It provides debtors with a reprieve to address their financial challenges.

²⁹ . Section 83, IBC

³⁰ . Section 84, IBC

³¹ . Section 84, IBC

³² . Section 92, IBC

³³ . Section 92(5)

³⁴ . See Feibelman 2005

³⁵ . Section 100(1), IBC

³⁶ . Section 100(2), IBC

³⁷ . Section 114, IBC

³⁸ . Section 178(3), IBC

ii. Asset Valuation and Exemptions:

The legal framework includes guidelines for valuing assets, as well as provisions for exempt property. Exempt assets are protected from liquidation to ensure that individuals and partnership firms maintain essential belongings.

iii. Creditor Claims:

Creditors are an integral part of the legal framework. They have the right to file claims to collect debts owed to them. The bankruptcy court reviews these claims and determines the distribution of available assets.

iv. Repayment Plans:

In cases of reorganization, such as Chapter 13 bankruptcy for individuals or corporate reorganization for partnership firms, legal provisions outline the development and approval of repayment plans. These plans detail how debts will be repaid over a specified period.

v. Discharge of Debts:

The legal framework provides provisions for the discharge of eligible debts. In personal bankruptcy, the discharge may result in the complete forgiveness of certain debts, allowing individuals a fresh start. Partnership firms may have debts discharged through the bankruptcy process.

vi. Legal Forms and Documentation:

The legal framework dictates the forms and documentation required for bankruptcy filings, ensuring that cases are processed efficiently and according to the law.

vii. Amendments and Reforms:

The legal framework is subject to ongoing amendments and reforms. Governments regularly update bankruptcy laws to adapt to changing economic conditions and ensure a fair balance between debtors and creditors.

viii. International Considerations:

In cases involving cross-border insolvency, the legal framework may include international agreements or regulations, such as the UNCITRAL Model Law on Cross-Border Insolvency.

The legal framework provides the structure and procedures necessary for navigating insolvency and bankruptcy in individuals and partnership firms. It is essential to understand and adhere to these legal provisions to ensure that the process is conducted fairly and transparently, protecting the rights of debtors and creditors.

10. Key Findings:

i. Diverse Legal Framework:

The legal framework governing insolvency and bankruptcy differs significantly for individuals and partnership firms. While individuals often file for personal bankruptcy, partnership firms navigate corporate bankruptcy procedures, leading to distinct processes and outcomes.

ii. Variety of Outcomes:

Bankruptcy procedures offer a range of outcomes, from liquidation and asset distribution to reorganization and debt repayment plans. The choice between these options depends on the nature of the debtor, whether it is an individual or a partnership firm.

iii. Impact of External Factors:

External factors, such as economic crises, legal reforms, and digitalization, significantly influence the insolvency and bankruptcy landscape. The COVID-19 pandemic has led to temporary legal adjustments and increasing bankruptcy filings.

iv. Challenges and Stigma:

Individuals and partnership firms both face unique challenges during insolvency and bankruptcy proceedings. Individuals often grapple with the stigma associated with personal bankruptcy, while partnership firms may encounter complex negotiations among partners and creditors.

Implications:

i. Legal Clarity:

A clear legal framework is essential for ensuring the fair and orderly resolution of financial distress. Policymakers should continue to refine and adapt bankruptcy laws to address the unique needs of both individuals and partnership firms.

ii. Protection of Stakeholders:

The legal framework must prioritize the protection of creditors' rights and the interests of debtors. This balance is crucial for maintaining confidence in financial transactions and economic stability.

iii. Adapting to Change:

The impact of external factors, such as economic crises and digitalization, calls for agility in the legal system. Governments and legal authorities should be prepared to respond to evolving circumstances.

iv. Reducing Stigma:

Efforts should be made to reduce the social stigma associated with bankruptcy, particularly for individuals. Education and public awareness campaigns can help individuals understand that bankruptcy is a legal mechanism for addressing financial challenges.

In a world where financial turbulence is a constant presence, a deeper understanding of insolvency and bankruptcy for individuals and partnership firms is essential. As these processes continue to evolve, adapting to a changing economic landscape, the knowledge gained from this research is invaluable for stakeholders, policymakers, and individuals alike. By navigating financial turbulence with knowledge and adaptability, we can foster financial resilience and ensure a more stable economic future for all.

11. Conclusion

In conclusion, the research paper "Insolvency and Bankruptcy in Individuals

and Partnership Firms: Indian Legal Perspective” has explored the multifaceted landscape of insolvency and bankruptcy in the context of individual and partnership firm financial distress. This paper has delved into fundamental concepts, the legal framework, processes, challenges, and the impact of external factors, providing a comprehensive understanding of the subject.

Moreover, the dynamic shifts within economic models demand a continuous reevaluation of these legal structures. It is crucial to constantly adapt to evolving economic dynamics and emerging challenges to ensure an effective and fair system for handling insolvency among individuals and partnerships. In summary, this investigation highlights the importance of the insolvency and bankruptcy framework in India concerning individuals and partnerships. It emphasizes the significant role that legal mechanisms play in navigating financial instability, aiming for a delicate balance between creditor recovery and debtor rejuvenation. As the financial environment progresses, the insights from this study provide direction toward a more robust and empathetic approach to insolvency and bankruptcy proceedings in India.

Lawyering for the Poor: *A Path to Social Justice In India*

Fatima Shah*

Abstract

This paper delves into the imperative need for a more progressive approach to lawyering for the poor in India. The current legal landscape often perpetuates socio-economic disparities, hindering access to justice for marginalized communities. This study proposes a multifaceted strategy to transform the legal framework, ensuring that it becomes a beacon of equity and empowerment and at the same time argue for a robust pro bono culture within the legal profession, encouraging private practitioners and law firms to actively contribute their expertise to the underprivileged. Simplifying legal procedures and advocating for policy reforms are pivotal elements, aiming to create a more accessible and responsive legal system. The study also emphasizes the importance of nurturing public defenders and legal aid lawyers, ensuring their competence through continuous training. By monitoring and evaluating the effectiveness of legal aid programs seek to create a dynamic feedback loop for continuous improvement, tailoring services to the unique needs of the poor. Ultimately, this paper envisions a legal landscape in India that not only addresses the immediate legal needs of the poor but also works towards dismantling systemic barriers, fostering inclusivity, and championing the cause of justice for all. Through a comprehensive and progressive approach, it aspires to reshape the lawyering for the poor to be a catalyst for positive social change, embodying the principles of equality, fairness, and empowerment.

Keywords: *Legal Aid, Lawyering, Poor, Constitutional Rights, Legal Profession*

Introduction

“Justice Is Not Available On A Platter But Has To Be Fought For.”

Chandra Kangasabi

The expression lawyering for the poor literally means voluntary extending of legal services by lawmen viz lawyers, law teachers, law students to the poor and needy and in broader context also includes taking up cause of poor in law courts by NGO's and public-spirited persons. But by and large the job primarily

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rests upon the lawyer who can in course of his profession become a people's lawyer. Having said that, at the outset we need to differentiate legal aid for indigents or traditional legal aid from lawyering for the oppressed and exploited sectors of our society. Legal aid derives its mandate from the state pursuant to Article 39-A of the constitution which provides "state shall secure that the operation of legal system promotes justice, on the basis of equal opportunity, and shall, in particular provide free legal aid by suitable legislation or schemes or any other way opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".² on the other hand Lawyering for the oppressed and exploited poor derives its mandate from the struggles and aspirations of a public spirited person for a just, democratic and humane society and particularly in the promotion and defense of basic human rights. Lawyering for the poor is a pro bono service rendered by a public-spirited lawyer or a group of lawyers who also include individuals and organizations genuinely representing the interest and working for the poor including organizers, social activists, mass leaders, human rights workers and, of course, the revolutionaries to agitate the cause of the poor, lawyering for the poor is also known as pro bono lawyering and the lawyer is called as people's lawyer.³

Lawyering for the poor plays a crucial role in promoting equal access to justice, upholding human rights, and addressing the broader social and economic issues that contribute to poverty and legal inequality. Legal professionals engaged in this practice contribute to building a more equitable and inclusive legal system. Lawyering for the poor is a citizen's initiative to promote the cause of justice. Lawyering for the poor refers to the legal practice that specifically addresses the legal needs and challenges faced by individuals and communities with limited financial resources. It involves providing legal services, representation, and advocacy to those who may not otherwise have access to justice due to economic constraints. The concept of lawyering for the poor encompasses a range of approaches and strategies aimed at promoting social justice and ensuring equal access to legal resources.⁴

The concept of lawyering for the poor was pointed out way back in 1970 in the case of **Goldberg v. Kelly** ⁵, the case enacts a dilemma that cannot be avoided when lawyers can seek justice for the socially and politically disempowered. However, the function of a lawyer has considerably changed in last few decades of the present century and lawyer is no longer being regarded as legal craftsman whose function is only to represent his clients in court of law and win their

¹ M. Galanter Krishnan, Hastings IJ, 2003, HeinOnline.

² Inserted by Constitution (42nd Amendment) Act, 1976.

³ David W Tushaus, SK Gupta, Sumit Kapoor, 2015, India Legal Aid Clinics: Creating Service-Learning research Projects to Study Social Justice, Asian Journal of Legal Education 2(2) 100-118, sage publications.

⁴ Shruthy Kesavan, (2023), Public Interest Lawyering: An Analysis, issue 2 Indian Journal of Law & Legal Research, 5,1. Available at: <https://www.HeinOnline.org/>

⁵ 397 U.S 254 (1970).

cases by effective legal representation, he is a social engineer too, who is also responsible for effecting socio economic changes which are considered essential for people's welfare. Now it is widely accepted that it is morally incumbent upon the lawyers to ensure equality fairness in their professional activity and render their professional help to those who cannot afford cost of their services. In addition to legal professionals public spirited persons NGO'S and nonprofit Organisations are coming forward to take up the causes of poor before the courts of law in doing so they take the help or services of a legal professionals. The activities of the Organisations also fall within the purview of the concept of lawyering for the poor.⁶

Myth Of Legal Aid

The 1973 Expert Committee on Legal Aid, titled "Processual Justice to the People," which eventually led to the enactment of the Legal Services Authorities Act, discussed the futility of the court-centric litigative aid to the poor and marginalized sections, and recommended a series of alternative strategies⁷. Obviously, the emphasis was on legal empowerment and mobilization, preventive and strategic legal services intended to avoid victimization, and the development of a public sector in the legal profession capable of responding to the problems of the rural and tribal communities. Unfortunately, when the legal aid law was enacted, the focus again was on assigning a lawyer to the needy client who took the task in a traditional style of protracted litigation with its attendant costs, uncertainty, and delay — much to the dismay of the poor. Moreover, the system was premised on three assumptions which were contrary to ground realities — that the victim was aware of her rights and knew how to approach courts; that legal aid offices were available in far-flung villages and tribal settlements; and that the lawyer assigned had the right values, attitudes, and competence to do a professional job appropriate to the justice needs of the rural/tribal population. These assumptions did not hold good in a majority of villages and, as such, conventional legal aid became irrelevant to the rural population. Language and communication compounded the situation, alienating the marginalized from a court-centric justice system. One alternative the Legal Services Authorities Act provided was the "Lok Adalat", which lawyers disliked. The judges, honourable exceptions apart, turned it into an exercise to reduce arrears in courts through what some people call "forced settlements or hurried justice."⁸

Nonetheless, the Lok Adalat did serve the cause of justice for those who could reach the court despite all the odds. For others, legal aid had very

⁶ Michael R Anderson, (2003), Access to Justice and Legal Process: making legal institutions responsive to poor people in LDCs , available at : <https://www.opendocs.ids.ac.uk>.

⁷ R. Dhavan,(1986), Managing Legal Activism: Reflections on India's Legal Aid. Anglo-American Law Review, sage publications.

⁸ Serving the justice needs of the poor, N R Madhava Menon, The Hindu, Dec 3,2013

little to offer. The Supreme Court did help them in a big way in the 1980s and the 1990s through the instrument of public interest litigation (PIL), which later lost its importance because of wide abuse by the urban elite and vested interests. Although it is difficult to generalize the legal needs of the rural poor because of the diversity of population, the need for food, shelter, education, health, and work are admittedly the priority. The Constitution has left it to the legislature and the executive to progressively realize these needs through laws, schemes, and special measures.⁹

At the same time, the Constitution promises to all its citizens equality of status and opportunity, as well as equal protection of the law. Finding that large sections of the poor are unable to fulfil their basic needs even after decades of democratic governance, the Supreme Court sought to interpret socio-economic rights (Directive Principles) as civil and political rights (Fundamental Rights), compelling the state to come forward with laws empowering the poor with rights enforceable under the law. The Right to Education Act, the Food Security Act, and the Employment Guarantee Act were promising initiatives in this direction. However, the poor continue to be at the receiving end of an indifferent administration because of the difficulties in accessing justice through conventional legal aid. We, therefore, need an alternative delivery system of legal service providers, people's lawyer (a public-spirited person working pro bono) for the poor¹⁰.

Attributes of a Peoples Lawyer

A people's lawyer embodies a deep sense of social responsibility, advocating for justice not only in the courtroom but also in the broader community, and contributing to positive societal transformation. A people's lawyer is characterized by a set of attributes that reflect a commitment to justice, equality, and the well-being of the community they serve. These attributes are based on legal ethics, principles of social justice, and community engagement. Here are key attributes of a people's lawyer:

1. **Social Justice Advocacy:** The people's lawyer has or must have a very high degree of personal integrity and commitment to contribute his or her share to the struggle of the poor clients for social justice and meaningful reform.¹¹ He should give premium to these principles and causes over and above personal and material agenda. Unlike the traditional practitioner, who merely pleads the clients cause in an adversarial proceeding, usually with the cold neutrality of a skilled legal technician, the peoples lawyer has a high degree of dedication to the legal as well as the social cause of the

⁹ Ibid

¹⁰ G. Mallikarjun, (2013), Legal Aid In India And The Judicial Contribution, NALSAR Law Review, 7(1).240

¹¹ Drawing inspiration from the works of Rawls, J. (1971). A Theory of Justice. Harvard University Press.

client, pleading such cause in and outside the legal forum, in dialogues, in networking, in the streets, in the media and in conferences, and the gathering of distinguished leaders of the bar.

2. **Community Engagement:** A people's lawyer must be accessible to the community, approachable, and engages in open communication, involving in community initiatives, understanding local needs, and contributing to community empowerment.¹²
3. **Legal Empowerment:** Conducts legal literacy to educate public about their rights and legal processes and encouraging them to actively participate in their legal matters, thereby fostering a sense of empowerment.
4. **Pro bono Service:** A people's lawyer willingly contributes time and expertise to serve clients who cannot afford legal representation. Advocacy for causes that serve the public interest and contribute to positive social change.¹³
5. **Ethical Conduct:** Adherence to ethical principles, including honesty, integrity, and confidentiality. Upholding the rule of law and maintaining professional standards in all legal activities.
6. **Passion for Justice:** A genuine passion for justice and a commitment to using legal skills to bring about positive societal change. A people's lawyer perseveres in the face of challenges and remains dedicated to the pursuit of justice.¹⁴
7. **Collaborative Approach:** Working collaboratively with community organizations, NGOs, and other stakeholders to address systemic issues. Engaging in interdisciplinary collaboration to provide holistic solutions to legal issues.
8. **Commitment to Systematic Change:** A people's lawyer actively advocates for systemic changes and legal reforms to address root causes of injustice.¹⁵
9. **Involvement in policy discussions** and initiatives aimed at promoting social justice and legal equality¹⁶.

Six Basic Principles To Guide The Public Interest or Peoples Lawyer

According to prominent lawyer of Philippines, Romeo T Capulong there are six basic principles that should guide a public interest lawyer

1. The issue fundamentally affects the lives of a large number of people, usually a sector or our society or even the whole society itself.

¹² The importance of community engagement in legal practice, as highlighted in Rhode, D. L. (1997). *Access to Justice*. Oxford University Press.

¹³ Ibid.

¹⁴ Gottesman, M. H., & Wickersham, L. R. (2005). *Persuasion or Persistence? Public Interest Legal Advocacy and the (Un)Raveling of the New Deal State, 1933-1943*. *Law & Social Inquiry*.

¹⁵ Galanter, M. (1974). *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*. *Law and Society Review*.

¹⁶ D. Nahmias, (2018) *The Changemaker Lawyer: Innovating The Legal Profession For Social Change*, *California Law Review*, available at ,JOSTOR.

2. The issue arose out of a conflict or rights or interests and exploitation and oppression of the numerous poor by the tiny, privileged sector and/or government policy or program.
3. Unlike the traditional practitioner, the public interest lawyer views and handles the legal issue and the case in the larger context of the nature and problems of our society.
4. Having accepted the professional responsibility to handle the public interest case, the lawyer initiates and assists in a process whereby the public Interest issue and the legal battle are utilized for organizing, and raising the social awareness, unity of the clients and those people who support the cause of the clients.
5. The legal battle is not confined to the courtroom. The public interest lawyer uses meta-legal tactics, mobilizing and utilizing the client's strength, unity, bringing the issues to the public, and rallying support for the clients cause.
6. In the handling of the case, the public interest lawyer interacts with his clients in a mutually beneficial way whereby He Or she learns and deepens his or her commitment to the clients' struggle for the empowerment and betterment of their lives. The relationship is broadened from a mere professional one to a one-off understanding of the problems society and common goals for fundamental reforms.

The Basic Principles on the Role of Peoples Lawyers, set forth above, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.¹⁷

Lawyering for the poor in India

In India the lawyering efforts for the poor have not been institutionalized as such except for Rule 46 of Sec vi of chapter ii of the Bar council of India rules which says" every advocate shall in the practice of the profession of law bear in that any one genuinely in need of a lawyer is entitled to legal assistance even though he but in not pay for it fully or adequately and that within the limits of an advocates economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an advocate owes to society"; but this has remained only a clause on the paper such an public effort is by and large lacking among Indian lawyers but in some countries like Philippines lawyering for the poor has evolved as a separate branch of legal profession. They have developed lawyering for the exploited and oppressed poor as a viable field of specialty in law practice just like corporate lawyering, criminal defense,

¹⁷ Basic Principles on the Role of Lawyers, adopted by Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba on 07 September 1990

civil law practice or any other field of specialty. In the Philippines people's lawyers are active across urban and rural areas, across various sectors of civil society such as industrial workers, peasants, fisherfolk; they are engaged with issues such as the many environmental problems of mining and logging which have led to degradation of life in rural areas especially loss of drinking water, loss of life through mudslides and flooding. Instances are rear in India where lawyers and public-spirited persons have agitated the cause of poor, but the media of public interest litigation (PIL) has often been used to good effect by some lawyers. One of the few being Mr. M.C Mehta, who has filed many cases in addition to cases for protection of Environment, to agitate the causes of poor and oppressed in the society.

In *M C Mehta v State of T.N* ¹⁸, M C Mehta, an advocate, filed or public interest petition in the supreme court under \articles 32 to of the Constitution ventilated the plight of children employed in cracker factories at Sivakasi. The court allowed the petition and laid down certain guidelines. The court held that the children below the age of 14 years cannot be employed in any hazardous industry or mines or other works the court directed that children cannot be employed in the match factory in process of manufacturing. It further stated that the can be employed in Process of packing. Which is done in the area away from place of manufacturing. The court directed that the children while working should be provided better conditions of work. Thus, it can be seen that plight of poor and oppressed children was taken up by a lawyer is in public sprit.

Similarly public-spirited persons and social action groups have also been instrumental in agitating the cause of poor and downtrodden in the society. For instance, *Oliga Tallis V Bombay Municipal Corporation And Others*,¹⁹ in this case petitioner a journalist filed a writ petition in supreme court of India to portray the plight of lakhs of poor who live on pavements and in slums in city of Mumbai. In this case Bombay municipal corporation sought to deport the pavement and slum dwellers and demolish some of the huts and shelters the petitioner challenged this action as being volatile of Articles 19 and 21 of the constitution. The court directed that slum dwellers wherever situated will not be removed until alternative sites for their settlement are provided.

Also, the People's Union for Civil Liberties PUCL²⁰ supports grassroots movements that focus on organizing and empowering the poor rather than using state initiatives for change. They have brought to light the cases of the bonded laborers²¹, children in prisons and violence committed against women undertrials. The PUCL has worked on the issue of the hundreds

¹⁸ 1991 SCC 283

¹⁹ AIR1986 SC 180.

²⁰ People's Union for Civil Liberties (PUCL) is a human rights body^[1] formed in India in 1976 by Jayaprakash Narayan.

²¹ People's Union for Civil Liberties v Union of India(1998) 8 SCC 485

of people detained by India and Pakistan's governments and accused of espionage after trivial crimes like minor trespassing, a problem linked to the tension caused by the Kashmir conflict.²²

Alternative Approaches Of Lawyering For The Poor

Lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest. Not only the lawyers, but also the law students, law teachers and social organizations in the interest of public good must come forward to provide legal services to the poor and needy they may render the services by drafting the plaint, petition, preparing written statements. They may organize free legal aid clinics and legal literacy camps to extend legal advice and impart legal education to the people they may help by providing for counseling and negotiations so as to avoid disputes and dragging the poor man into vicious circle of litigation.

Chief Justice of India (CJI) Justice Dipak Misra once remarked to the law students to engage in the practice of "Cause Lawyering" and develop the idea of serviceability to the law by taking up 'pro bono' cases at a low income to protect human rights. Cause lawyering is described as a practice of "lawyering for the poor" or using law to empower members of the weaker layers of society.²³

Causes Of Non-Development Of Peoples Lawyering In India.

In present times legal profession has been taken up as a means of earning livelihood and is in total contrast to of 20th century when pursuit of legal profession was not child of materialistic gains. Persons who chose law chose it mainly with an intention of interest in social reform. In present times the public spirit is lacking among the legal professionals and ends are motivated by materialistic gains. Legal aid is not an alternative charity and the 'sin' of lawyers treating the pro bono work as a 'stepchild' remains a cause for concern, said Attorney General R Venkataramani. The law officer said those who think that the progress in legal profession is through corporate or governmental work alone are blind to the fundamentals of their professional calling²⁴. At the same time there is not enough support from the governmental institutions when one contrast it with the countries like USA. In USA Public interest lawyers get financial support from office of

²² Your World: The Nowhere Man, Rupa Jha, October 21, 2012, (Program link: The Nowhere Man)

²³ While addressing the law students at NLU Delhi, 6th annual convocation, August 4, 2018.

²⁴ Lawyers treating legal aid as stepchild cause for concern: AG Venkataramani Nov 27, 2023, available at : http://timesofindia.indiatimes.com/articleshow/105538381.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst Last visited Dec 26, 2023.

economic opportunity (OEO) of federal government of USA. In India though legal aid funds are created under legal services authorities act they are not enough to attract good lawyers.

Conclusions and suggestions

In conclusion it may be submitted that lawyering for the poor is a public spirited and voluntary act and it is the public spirit and desire for social work which can mobilize lawyers to take up the cause of poor. For inculcating public spirit in future lawyers' law school can play a pivotal role. it is suggested that social studies dealing with the plight of poor and oppressed masses should form an integral and compulsory part of law courses. The infusion of social consciousness will go a long way in creating young lawyers with social spirit. Law should not be taught in isolation of moral and ethical value. Law students should encourage to do sociological research so that they can come into contact with real problems facing the world.

As mentioned, lawyering for poor is a public-spirited approach and voluntary in nature and thus it requires a strong moral base, the need of the hour is to inculcate sense of social responsibility in the future lawyers and students at large. Financial support alone will not help unless every law knowing member of the society takes to himself a moral duty to help the needy and the poor and those who cannot afford to vindicate there Cause due to lack of resources. Another important tool in providing legal assistance to the poor is the establishment of legal aid clinics in the law schools where law students will come in contact with the real problems facing the poor in the society and may assist them in arriving at solutions to their problems. Law students can also appear for the poor in those tribunals where the presence of advocates is not necessary for example the consumer dispute fora. But unfortunately, the establishment of legal aid clinics has become a distant dream as the law schools themselves are not enthusiastic about such program. it is an obligation upon the law schools to establish legal aid clinical and Involve their students in such programmes.

To sum up, lawyering for the poor is not just about providing legal representation; it involves a commitment to social justice, equality, and addressing the underlying issues that contribute to poverty and legal vulnerability. It requires creativity, empathy, and a dedication to making the legal system more accessible and equitable for all.

EMPOWERMENT OF WOMEN THROUGH NATIONAL EDUCATIONAL POLICY 2020

Nusrat Pandit*

Abstract:

Increased knowledge, self-confidence, and awareness of gender equality are indicators of the empowerment process; these components are developed through education. Educated women are aware of their rights and when women are aware of their rights then they will not face discrimination. Even Hon'ble Prime Minister Shri Narendra Modi in the 82nd edition of "MANN KI BATT" has spoken for women's empowerment. Education enables & builds confidence to make decisions in a better way but on the contrary, it's not easy to do away with gender stereotypes, especially in the Indian context. National Education Policy 2020 can be looked after as a ray of hope in this context & can be viewed leveller in the field, as it's based on four pillars Accessibility, Equality, Culture, and accountability. The sociocultural construct of our society itself is an obvious reason for girls dropping out of school & it's hoped that through the pillar of equality in National Education Policy, this gap can be bridged. In the present paper, the researcher will discuss critically various provisions of NEP related to gender equality & their impact on women's empowerment as a whole. It will suggest the ways & loopholes of the given policy for better upliftment of half section of the population.
Keywords: *National Education Policy (NEP), Fundamental right, Gross enrolment ratio (GER), socio-poor groups (SEDGs), Gender justice*

1. Introduction:

Education is the single greatest tool for achieving social justice & equality¹. It's critical to achieve an inclusive & equitable society in which every citizen has the opportunity to dream, thrive, and contribute to the nation². Right to education as envisaged in Art 21 of our constitution has always been appreciated as a game changer so far as education at the primary level is concerned, based

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¹ Zajda, J., Majhanovich, S., & Rust, V. (2006). Introduction: Education and social justice. *International Review of Education/Internationale Zeitschrift für Erziehungswissenschaft/Revue Internationale de education*, 9-22.

² Lall, M., & Nambisan, G. B. (Eds.). (2020). *Education and Social Justice in the Era of Globalisation: Perspectives from India and the UK*. Taylor & Francis.

on the Right to Education Act was introduced, which practically brought gender parity at the primary level, but biggest loop-loophole of this Act was it left the child in mid-way without any vocational training, as is required for sustenance³. In this regard, the New Education Policy 2020 is a welcome step & can be viewed as magna-carta in the Indian education system as it brought within its ambit the secondary level of education also⁴. NEP is based on 4 pillars Access, Affordability, Equality, and accountability. It aims to put India on Par with the leading educational system across the world by achieving 100% GER (Gross Enrolment Ratio) from preschool to secondary by the end of 2030, with the aim

of overall enrolment be that male, female, and transgender, so that nation as whole may grow⁵. Compared with the past women today in India are in a much better position but it's not something to celebrate. The statistics provided are not gender specific but still worrisome. The retaining rate of girls keeps on decreasing with an increase in education level. NEP policy mentions GER for grades 6-8 was 90.7% while for grades 9-10 and 11to12, it was only 79% & 51.5% respectively⁶

II. Indian Women: A Historical Retrospect

India has historically been a land where women continue to be worshiped in the name of Mata Laxmi, Mata Kali, and Mata Durga, but at the same time counted among the nations, with maximum violence against women. For the sake of social bonding women here sacrifice a lot and consequently bear a lot of mental, physical, and emotional stress. This situation is generally attributed to their strong affinity to native culture and tradition. However, gender discrimination seems to be visible in various forms at the family level in the name of socialization⁷. From the beginning of their life, here women are taught how to manage to survive and this tag continues throughout their life cycle, from womb to tomb⁸. These social adjustments result in their survival without dignity, and the mindset of society seems to be against the girl child. It is perhaps because of such cultural moorings, that thousands of women in India suffer in silence⁹. It is also discernible through the ritual practices which, day

³ Bandyopadhyay, M. (2006). Education of marginalized groups in India: From the perspective of social justice. *Social Change*, 36(2), 98-113.

⁴ Kumar, K., Prakash, A., & Singh, K. (2021). How National Education Policy 2020 can be a lodestar to transform future generations in India. *Journal of Public Affairs*, 21(3), e2500.

⁵ Chatterjee, N., & Mahmood, Z. (2022). Looking Back, Moving Forward: Educational Policies in Postcolonial India—Issues, Opportunities, and Challenges. *Education, Magazine*, 29.

⁶ NEP2020: Introduction -Source https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf

⁷ Chakrapani, C., & Kumar, S. V. (Eds.). (1994). *Changing status and role of women in Indian society*. MD Publications Pvt. Ltd..

⁸ Dasgupta, A. (2021). Literature of the Womb: A Study of Select Indian Texts (1900s-2000s). *Academia Letters*, 2.

⁹ Stone, P. K. (2018). From womb to tomb? Disrupting the narrative of the reproductive female body. *Bioarchaeological analyses and bodies: New ways of knowing anatomical and archaeological skeletal collections*, 165-189.

in and day out, emphasize the role of women as faithful wives and devout mothers. In a way, women are tacitly trained not to challenge discrimination, subordination, and exploitation, in the social agglomeration. To free the women from these cultural shackles our constitution makers took strong steps by incorporating women-friendly provisions in Part-III, IV, IV (A) of the Indian Constitution¹⁰. The state through the doctrine of protected discrimination and allied women-related legislation tried to reverse the age-old gender discrimination¹¹.

II Constitutional Protection to Women

Our nation is a sovereign, secular, democratic republic where in provisions of constitutions apply in equal measures to men and women. Certain provisions accord special protection to women throughout the modern world including India. These provisions in India can be divided into two categories. One conferring rights on women as provided in fundamental rights and the other in nature of directions to the state to take appropriate measures for the welfare of women.¹² Art. 14 by way of parity in addition to conferring equality of status in women recognizes women as a class different from men¹³.

Art 15(3) provides nothing in this article shall prevent the state from making any special provisions in favour of women¹⁴. Art. 16(2) provides that no citizen shall be discriminated against or be ineligible for any employment of office under a state on the grounds only of religion, race, caste, sex, descent, place of birth, or residence.¹⁵ Sexual harassment at the workplace is a violation of the right to work under Article 19(1)(g) of the Indian constitution. Further directive principles and fundamental duty no. six also provide for the protection of the rights of women.¹⁶

III. Women-friendly Provisions in National Education Policy 2020

A report by the Times of India states that 57% of girls are out of school up to standard XI, the obvious reason for this is the socio-cultural construct itself¹⁷.

¹⁰ Basu, S. (1999). *She comes to take her rights: Indian women, property, and propriety*. Suny Press.

¹¹ Saxena, K. (1994). Empowerment of women: The Indian context. *The Indian Journal of Political Science*, 55(4), 391-400.

¹² Brown, B. A., Emerson, T. I., Falk, G., & Freedman, A. E. (1970). The equal rights amendment: A constitutional basis for equal rights for women. *Yale Lj*, 80, 871.

¹³ Brown, B. A., Emerson, T. I., Falk, G., & Freedman, A. E. (1970). The equal rights amendment: A constitutional basis for equal rights for women. *Yale Lj*, 80, 871.

¹⁴ Varghese, A. E. (2023). Protective Discrimination in Post-Independent India: An Analysis. , *No. 1 Int'l JL Mgmt. & Human.*, 6, 1534.

¹⁵ Singh, P., & Pattanaik, F. (2020). Unequal reward for equal work? Understanding women's work and wage discrimination in India through the meniscus of social hierarchy. *Contemporary Voice of Dalit*, 12(1), 19-36.

¹⁶ Sarma, A. (2014). Discrimination against Women at Workplace in India: A Legal Perspective. *GMLU JL Dev. & Pol.*, 4, 23.

¹⁷ Over 30% of girl students drop out of school by the time they reach the secondary level of education, .. Read more at: http://timesofindia.indiatimes.com/articleshow/66900622.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

The national education policy outlines the steps that Govt has to take, One of which is gender balance in education at higher educational institutions. The aim of the policy is a complete overhaul and energizing of the higher education system, based on equal opportunities of accessibility, availability, and accessibility of these institutes to all irrespective of gender¹⁸.

Its main aim is to take care of the weaker section so that they take part in the mainstream. Some of the provisions of NEP in this regard are as follows:

1. Curtailing dropout rates & ensuring universal access to education at all levels.
The primary goal of the schooling system must be to ensure that children are enrolled in & are attending school Once infrastructure & participation are in place, ensuring quality will be the key to retention of students so that they (particularly, girls & students from other socio-economically disadvantage groups) do not lose interest in attending school.
2. To facilitate learning for all standards with special emphasis on Socio–economically disadvantaged groups (SEDGs) the scope of schooling should be broadened to facilitate multiple pathways to learning involving both formal & non-formal education modes¹⁹.
3. The Indian Education System & successive Govt. policies have made steady progress towards bridging gender & social category gaps in all levels of school education, but large disparities remain – especially at the secondary level particularly for socio-economic disadvantageous groups (SEDG’s) females & transgender while overall enrolment in schools declines steadily from Grade I to Grade 12. Even greater decline for female students²⁰.
4. According to U-Dise-2016-17 data the enrolment rate in educational institutions of SC stood at 19.6% at the primary level and 17.3% at the higher secondary level, while for ST it was 10.6% and 6.8% respectively. With an even greater decline for female students in each of these categories.²¹
5. discusses that women cut across all under-represented groups making up about half of all SEDGs. The policy recognizes the special role played by women in shaping social mores. The policy recommends that policies & schemes designed to include students from SEDGs should be specially targeted towards girls in these SEDGs ²²
6. For providing equitable quality education to all girl students GOI will constitute a “Gender Inclusion Fund”. The funds were to be made available

¹⁸ Kumar, A. (2021). New education policy (NEP) 2020: A roadmap for India 2.0. *University of South Florida M3 Center Publishing*, 3(2021), 36.

¹⁹ Page no. 9 and 10 of National Educational Policy 2020, under chapter 3 titled as dropout rate and ensuring universal access to education at all levels. For further details refer to https://niepid.nic.in/nep_2020.pdf

²⁰ Page no. 22-25 of NEP 2020 placed under the heading Equitable and inclusive education: learning for all chapter 6 for details ibid

²¹ Aktar, S. (2021). New education policy 2020 of India: A theoretical analysis. *International Journal of Business and Management Research*, 9(3), 302-306.

²² Para 6.7 of NEP 2020

to states to implement priorities determined by the central government, greatest for assisting female & transgender children in gaining access to education.²³

7. Mentions that special Education Zones (SEZ) should be declared, where all schemes & policies are to be implemented in full through additional concerted efforts, to thereby change their educational landscapes²⁴.

8. Free boarding facilities shall be built for SEDGs especially girls to expand & increase participation in quality schools (up to Grade 12)²⁵

The policy also provides for additional actions that are specific to higher education shall be adopted by all governments & higher education institutions (HEIs)²⁶.

I. Earmark suitable govt. funds for the education of SEDGs.

II. Set clear larger for Higher GER for SEDGs.

III. Enhance gender balance in admission to HEIs.

IV. Enhance access by establishing more high-quality HEIs in aspirational districts & SEZ containing large no of SEDGs.

V. Provide more financial assistance & scholarships to SEDGs in both public & private HEIs²⁷.

IV Critical Analysis of National Education Policy 2020

The All-India Survey on Higher Education (AISHE)²⁸ notes that women account for a very low proportion of enrolments in institutes of national importance & state-open universities, pointing to the skewed distribution of state resources based on gender. The composition of students across disciplines of Higher education presents an ominous practice of gender-based stereotypes influencing young people's choices & access.²⁹ While the proportion of female enrolment remains lowest in science & technology streams, the opposite is true in the case of arts & humanities³⁰.

Several structural inequalities relating to the present model of higher secondary schooling, high dropout rate & gendered nations give rise to such skewed distribution. NEP document does address the issues of unequal access, structural

²³ Aithal, P. S., & Aithal, S. (2020). Implementation strategies of higher education part of the national education policy 2020 of India towards achieving its objectives. *International Journal of Management, Technology, and Social Sciences (IJMTS)*, 5(2), 283-325.

²⁴ Para 6.6 of NEP 2020

²⁵ Para 6.9 of NEP 2020

²⁶ chapter 14: Equity and inclusion in higher education of National Education Policy 2020

²⁷ Kem, D. (2020). National education policy and inclusion. *EPH-International Journal of Educational Research*, 4(3), 7-13.

²⁸ All India Survey on Higher Education (AISHE) was initiated in the year 2011 by the Ministry of Human Resource Development (MHRD), Department of Higher Education, Government of India to identify and capture the data of higher education institutions in the country.

²⁹ Tilak, J. B. (2019). Promising but perplexing solutions: A critique of the draft national education policy 2019. *Social Change*, 49(4), 686-712.

³⁰ For further details refer to <https://www.ndtv.com/education/enrolment-of-female-students-lowest-in-institutes-of-national-importance-moe>

patriarchal norms & practices that often lead to the marking of choices for women largely left untouched.³¹ It remains to be seen whether the proportion of incorporating a gender inclusion fund along several smaller ways in policy aims modified curricular to address “replace for women” would be in any way instrumental in addressing such stereotypes.³²

VI. Women And Marginalized Sections

The policy should impact the most vulnerable & marginalized sections of society. It should address newer challenges that we need to foresee due to some of the propositions made by this policy. The policy also does not mention any long-term institutional redressed mechanisms to reduce cases of sexual harassment or child abuse while also not making scope for providing a definite framework as to how gender & caste sensitization on educational campuses can be provided while simultaneously also looking into dimensions of tackling identity-based violence.³³

Women in Higher education along with people from other marginalized backgrounds are routinely neglected due to discrimination & harassment in higher education institutes that often promote early dropout under their enrolments altogether. Besides, lack of care & everyday discrimination based on caste, gender & religion is rampant across university campuses and needs to be addressed & eliminated to create an environment for truly inclusive & egalitarian education like in the USA³⁴. Policy proposes the formation of a Gender Inclusion Fund to promote equal access to women & transgender students. Those who are underprivileged also mention the institutions of special Education Zones (SEZs) for this purpose that shall be sum by philanthropist partnership, thus absolving the govt. from its duties³⁵.

I. Women and the Digital Era

The digital era is marked by the widespread use of information and communication technology has opened new vistas in the learning process across the globe. However, the digital reach vis-à-vis women has not gone well for some of the interested stakeholders.

As Joy Liddicoat says:

Because they are women, women human rights defenders face many unique threats and obstacles. The reasons include the nature of patriarchal systems for the subordination of women, various socially constructed gender roles and norms, and religious and other fundamentalisms that seek to constrain women's

³¹ Com, B. (2021). National Education Policy 2020.

³² Ravi, S., Gupta, N., & Nagaraj, P. (2019). Reviving higher education in India.

³³ Breakstone, J., McGrew, S., Smith, M., Ortega, T., & Wineburg, S. (2018). Why we need a new approach to teaching digital literacy. *Phi Delta Kappan*, 99(6), 27-32.

³⁴ Schilling, J. (2020). How States Can Use CARES Act Funds to Promote and Support Educational Choice. Sketching a New Conservative Education Agenda. *American Enterprise Institute*.

³⁵ Nand, R. (2020). National Education Policy-2020 and Marginals: A Primer. *National Education Policy*.

public and private lives. This results in restrictions on women's autonomy, freedom of movement, freedom of expression, and freedom of association, constraining their activism and their right to be human rights defenders.³⁶

It has influenced every aspect of human activities courtesy of the use of internet technology for dissemination, transmission, and communication of knowledge without any physical whatsoever. The impact of this technology on education throughout the globe has been tremendous and every section of society has benefitted due to its virtual growth and span³⁷. The fact that the policy emphasizes digital learning online courses in regional languages while giving no details about a suitable infrastructure that can enable such an objection is yet another flaw on its part. It's important to note that provisions of learning from home through digital means would also restrict the freedom of girls from physically attending school³⁸. Moreover, where compared to men, a smaller percentage of women have access to the internet & technological devices, therefore such a provision would drive towards their exclusion from gaining access to knowledge³⁹. With the introduction of mobile phone technologies and their increasingly ubiquitous reach, more activists began to see the possibilities of using the internet and digital channels for advocacy, communication, and information sharing. ICTs are now being used to advocate, meet, protest, communicate, and interact with new speed and with positive results.⁴⁰

The New Educational policy also talks about consolidating nearby school complexes to better the infrastructure facilities for school-going kids but it may not yield the given results as it shall restrict them since even today girls are not permitted to travel far to pursue education. For years communication rights activists encouraged women to get online, to use the new technologies that could be used to connect, mobilize, advocate, and bring worlds together in quick and responsive ways.⁴¹

Another significant factor that leads girls to drop out at an early age is the lack of menstrual hygiene management at schools. Unsurprisingly neither is there, no mention of facilitating access to menstrual products such as

³⁶ (Liddicoat, 2013)

³⁷ Eshet, Y. (2004). Digital literacy: A conceptual framework for survival skills in the digital era. *Journal of educational multimedia and hypermedia*, 13(1), 93-106.

³⁸ Nand, R. (2020). National Education Policy-2020 and Marginals: A Primer. *National Education Policy*.

³⁹ Arimatsu, L. (2019). Silencing women in the digital age. *Cambridge International Law Journal*, 8(2), 187-217.

⁴⁰ Digital security as feminist practice Author(s): Jennifer Radloff

Source: *Feminist Africa*, December 2013, No. 18 (December 2013), pp. 145-155 Published by: Institute of African Studies available at: <https://www.jstor.org/stable/10.2307/48725831>

⁴¹ Ibid

sanitary products in either policy or increasing female-friendly toilets⁴² Karan Babbar,

Absence Of Menstrual Hygiene Management In NEP 2020; The purpose of this article is to understand the attention paid to menstrual hygiene and menstrual management needs through an analysis of the recently released NEP 2020.

Aug 10, 2020

V Conclusion:

Our nation is a sovereign, secular, democratic republic, and the topmost priority of our nation is to promote the welfare of all citizens and prevent discrimination of all forms. Women are considered as a weaker section and have always remained on the priority list be that five-year developmental plan or welfare legislation. To bring her into the mainstream one good attempt has been made by National Educational Policy 2020. NEP is based on 4 pillars Access, Affordability, Equality, and accountability. One of which is gender balance in adnoun at higher educational institutes. The aim of the policy is a complete overhaul & energizing of the higher education system, based on equal opportunities of accessibility, availability & accessibility of these institutes to all irrespective of gender. Its main aim is to take care of the weaker section so that they take part in the mainstream. The policy proposes the formation of a Gender Inclusion Fund to promote equable access to women & transgender students, but the policy has certain loopholes that need to be looked after to make it more effective.

VI Suggestions:

- To cut the higher dropout rate among girls, there is a need to provide relatively higher financial incentives for girl's education until class XII.
- Additional emphasis should be placed on e-governance so that there is a timely check on expenditures released by the centre & various state governments for scholarships to girl students.
- For security purposes, gender-friendly facilities should be provided in hostels.
- Education policy needs to be more inclusive to ensure girls into education.
- Women can be organized into different professional groups so that there is improvement in their bargaining power.
- There is a need to evaluate these propositions & their implications in addressing the present challenges in the Indian higher education sector using a framework of gender equality and the right to education.
- There is a need to envisage the implication of this policy in the light of the framework provided by the Right of Education Act.

⁴² Karan Babbar, Absence Of Menstrual Hygiene Management In NEP 2020; The purpose of this article is to understand the attention paid to menstrual hygiene and menstrual management needs through an analysis of the recently released NEP 2020. Aug 10, 2020

Changing Dynamics of Medical Negligence and Criminal Liability in India

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Abstract

Medical service and health care have grown tremendously in terms of accessibility over the last few years and consequently, there has also been a rise in the number of medical negligence or malpractice cases. There has also been a rise in the number of medical negligence or malpractice suits filed all over the world. The existing system of malpractice or negligence either does not deter or is over deterrent. On one hand, due to the trouble with litigation, very few victims of negligence file a suit, ensuring that some doctors get away lightly with negligence. Other consequences of such a system could be that some doctors become very cautious and the threat of suits results in a substantial amount of unnecessary defensive medical practice. This leads to increasing costs within the field of medicine. In this paper, an attempt has been made to examine the concept of medical negligence in detail, the legal dimensions, and highlight the ever-changing contours of comparative criminal liability in India.

Keywords: *Medical, Negligence, Litigation, Malpractice, Health Care, Consumers, Liability.*

I-Concept of Medical Negligence and Grounds of Liability

The profession of medicine has benefited mankind immensely through the restoration of good health. Medical service means assistance or benefits about medicine or its practice offered. The competent patient's inalienable rights to understand his treatment and to accept or refuse it are now well established¹. It should be clear, therefore that medical service implies delivering quality medical care to the community (i.e., service of mankind'), in treating and curing afflictions of the human body. The doctor is a teacher who guides his patients about how to maintain health and prevent disease². A doctor must use the

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¹ Mason & McCall Smith, Law and Medical Ethics, 4th Edn, 1994, Butterworths Press.

² Doctor has been defined as a qualified practitioner of medicine or surgery in any of its branches and patient means a person undergoing treatment for disease or injury. See The New International Webster's Comprehensive Dictionary of the English Language. 374.

necessary skill, care, judgment, and attention in the treatment of his patient. Any failure to exercise the above-mentioned duty would lead to action for medical malpractice or negligence.³

Writings on medical responsibility can be traced back to 2030 BC when the Code of Hammurabi provided that if the doctor has treated a gentleman with a lancet of bronze and has caused the gentleman to die or has opened an abscess of the eye for a gentleman with a bronze lancet and has caused the loss of the gentleman's eye, one shall cut off his hands⁴. Under Roman law, medical malpractice was a recognized wrong⁵. These records provide an unbroken line of medical malpractice decisions, all the way to modern times. One early medical malpractice case from England, for example, held that both a servant and his master could sue for damages against a doctor who had treated the servant and made him more ill by employing unwholesome medicine⁶.

Article 25 of the Universal Declaration of Human Rights, declares :

...Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control... Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection⁷

Article 12 UDHR states:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for.
3. The provision for the reduction of the stillbirth rate and infant mortality and the healthy development of the child.
4. The improvement of all aspects of environmental and industrial hygiene.

³ Lupton, D. (1997). Doctors in the medical profession. *Sociology of Health & Illness*, 19(4), 480-497.

⁴ Powis Smith JM. *Origin & History of Hebrew Law*. Chicago, IL: University of Chicago Press; 1931.

⁵ Around 1200 AD, the law was expanded and introduced to continental Europe. After the Norman conquest of 1066, English common law was developed, and during the reign of Richard Coeur de Lion at the close of the 12th century, records were kept in the Court of Common Law and the Plea Rolls.

⁶ *Everad v. Hopkins*, 80 English Reports 1164 (1615). In 1532, during the reign of *Charles V*, a law was passed that required the opinion of medical men to be taken formally in every case of violent death; this was the precursor to requiring expert testimony from a member of the profession in medical negligence claims, to establish the standard of care.

⁷ General Assembly of the United Nations Proclamation dt.10th December 1948; Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, by article 27.

5. The prevention, treatment, and control of epidemic, endemic, occupational, and other Diseases.
6. The creation of conditions that would assure all medical services and medical attention in the event of sickness⁸.

The World Health Organization has also played a pioneering role for the last fifty years, in guiding health policy development, and action at the global and national levels, with an overall objective of ensuring and attaining the highest standards of health care for all people around the world.⁹ Medical negligence is the lack of action by a medical professional, often without intent; negligence can be done either with or without intent; and medical malpractice is done with intent to harm¹⁰.

In the event of negligence, the action creates consequences that hurt an individual or group. Negligence involves the lack of action out of inaction or ignorance, rather than the accompaniment of intent to harm. Any civilian could act negligently; avoiding negligence includes upholding civic duties as an individual¹¹. Specific elements are involved in a case of negligence.¹² Negligence is an umbrella term that is categorized based on the specific details of the individual case, which can include neglect, criminal negligence, medical negligence, and medical malpractice. In all cases, proof must be provided in terms of the specific duty to the patient or individual, the breach of that specified duty, the causation in the aftermath of the breach, and the damages¹³. Common examples are a failure of diagnostic revision, failure to warn patients of the risk of treatment, failure to treat a patient, and a wrongful diagnosis. With the mistakes of medical negligence in mind, medical malpractice includes the opposite of mistake: intent¹⁴. Medical malpractice is those in which the doctor does not perform their duties to the legal medical standards, which include wrongful death, mistakes during childbirth, errors in aesthesia, and surgical

⁸ The aforesaid rights of 1966, the UN declaration on the elimination of all forms of discrimination against Women 1967, the Convention on the Elimination of all forms of discrimination against Women 1979, and the Convention of the Rights of the Child provide, inter alia, for the protection of health care rights of persons including women, children, and other disadvantaged sections of society. See Hannum, H. (1998). The UDHR in national and international law. *Health and Human rights*, 144-158.

⁹ Kickbusch, I. (2003). The contribution of the World Health Organization to a new public health and health promotion. *American journal of public health*, 93(3), 383-388.

¹⁰ Negligence occurs when an individual ignores basic civil responsibilities and the lack of action thus causes another individual or group of individuals to be hurt. See Agrawal, A. (2016). Medical negligence: Indian legal perspective. *Annals of Indian Academy of Neurology*, 19(Suppl 1), S9.

¹¹ Keeton, P. (1978). Medical Negligence-The Standard of Care. *Tex. Tech L. Rev.*, 10, 351.

¹² duty, breach, causation, and damages See id at 352.

¹³ Bryden, D., & Storey, I. (2011). Duty of care and medical negligence. *Continuing Education in Anaesthesia, Critical Care & Pain*, 11(4), 124-127.

¹⁴ The term mal in malpractice is a negative prefix derived from the Latin meaning bad, which is a good way to remember the inclusion of intent.

errors¹⁵.

II-Medical Malpractice

Medical negligence lacks intent, medical malpractice includes the aspect of intent, and negligence may or may not have intent based on the situation. While every case is different, the inclusion of intent often provides a clue in determining the type of case. Negligence applies to any case involving a civic duty, while the other two categories involve the professional and medical fields.¹⁶ Medical malpractice is an illegal event in which the bond of trust between a medical professional and the client has in some form been breached with intention. It is under the umbrella of negligence, as it is the occurrence in which malign negligence is committed by a healthcare provider¹⁷. Medical negligence can lead to a medical malpractice claim if the event of malpractice is proven to be involved in four areas with intent:

- i) a duty was owed and was never followed through.
- ii) a professional responsibility was breached and the care was not standard.
- iii) the breach caused an injury or death and
- iv) the patient was negatively affected in some form by the damage¹⁸.

In India, though the concept of Medical Malpractice has not evolved unlike in the United States and countries like the UK, the definition given under Section 2(1)(g) of the Consumer Protection Act states:

...any fault, imperfection, shortcoming, or inadequacy in the quality, nature, and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise about any service...

Hon'ble Supreme Court of India in *re IMA Vs V.P.Shantha* and others¹⁹ held: ...not possible to hold that given the definition of "deficiency" as contained in Section 2(1)(g) medical practitioners must be treated to be excluded from the ambit of the Act and the service rendered by them is not covered under Section 2(1)(o)...

Before the 1960s, even in the US legal claims for medical malpractice were rare and had little impact on the practice of medicine²⁰. Since the 1960s the frequency of medical malpractice claims has increased; and today, lawsuits

¹⁵ Oyeboode, F. (2013). Clinical errors and medical negligence. *Medical Principles and Practice*, 22(4), 323-333.

¹⁶ Kessler, D. P. (2011). Evaluating the medical malpractice system and options for reform. *Journal of Economic Perspectives*, 25(2), 93-110.

¹⁷ Healthcare providers refer to most professionals in the medical field, such as physicians, doctors, dentists, nurses, and therapists.

¹⁸ Medical malpractice occurs when any medical professional does not provide the standard legal care to their patient regarding their profession. The element of damage refers to any damages that affected the client in any way, including monetary, physical, or emotional. The time frame required from the incident to the case filing varies between locations and types of medical malpractice.

¹⁹ AIR 1996 SC 550.

²⁰ In the United States, medical malpractice suits first appeared regularly in the 1800s.

filed by aggrieved patients alleging malpractice by a physician are relatively common in the United States. One survey of specialty arthroplasty surgeons reported that more than 70% of respondents had been sued at least once for medical malpractice during their careers²¹.

III. When Medical Negligence becomes Medical Malpractice

Medical negligence becomes medical malpractice when the doctor's intentional and wanton negligent treatment causes undue injury to her patient. This one sentence implies two additional legal concepts required for a medical malpractice case viz., injury and causation²². Medical malpractice occurs when a healthcare provider – doctor, hospital, HMO, nurse, other individual or entity licensed to provide medical care or treatment – does something that competent doctors would not have done or fails to do what a competent doctor would have done, resulting in personal injury or wrongful death. This includes failure to take necessary action or taking an inappropriate action to qualify a medical malpractice, three elements must be present:

- a. There must have been a professional relationship between the patient and the Health Care Provider (HCP).
- b. The HCP must have acted below the standard level of care that any other healthcare provider would have used in the same situation.
- c. The substandard care must have harmed the patient in some way.²³

IV-Concept of Medical Negligence

Negligence was added to the common law in the seventeenth century with the increase of horse and buggy highway collisions. The beginning of the seventeenth century noticed a slow but steady transformation from an action of trespass on the case to an action for negligence²⁴. The concept of negligence in its present form is not of Indian origin but is patterned in English law, where negligence is a separate tort. In the beginning, it was considered as inadvertence as opposed to intentional dereliction of legal duty. Carelessness is actionable only when there is a duty to take care and when failure in that duty has resulted in damage, carelessness assumes the legal quality of negligence and entails the consequence in law of negligence²⁵. Every profession requires some specialized skill and learning and persons involved in the exercise of the requisite skill could be liable for negligence if they failed to take that special care²⁶. Winfield has defined negligence as a tort which is the breach of a legal duty to take care which results in damage, undesired by the defendant to the

²¹ Upadhyay A, York S, Macaulay W, McGrory B, Robbennolt J, Bal BS. Medical malpractice in hip and knee arthroplasty. *J Arthroplasty*. 2007;22(6 Suppl 2):2–7. [PubMed].

²² Medical malpractice is the failure of a medical professional to meet the standard of good medical practice in the field in which the medical professional practices.

²³ See supra note 11 at 351

²⁴ Dr.Gourdas Chakrabarti., *The law of Negligence*, Calcutta, Cambray & Co, Private Ltd Publication, 8th edition, 1996, p.4.

²⁵ *Donoghue v. Stevenson*, (1923) A.C. 562 per Lord Mc Millian.

²⁶ In English law, the rule is imperative culpa innumerate (want of skill is reckoned as a fault).

plaintiff²⁷. An act involving the above ingredients is a negligent act Baron Alderson defines negligence:²⁸

... an omission to do something which a reasonable man guided upon by that consideration which ordinarily regulates human affairs, would do, or doing something which prudent and reasonable man would not do...

Charlesworth modifies Alderson's definition and defines negligence as a tort that involves a person's breach of duty that is imposed upon him to take care, resulting in damage to the complainant²⁹. The breach of duty may be occasioned either by not doing something that a reasonable man, under a given set of circumstances, would do or by doing some act that a reasonable prudent man would not do³⁰.

Medical negligence law is generated chiefly by civil actions. Any crime of gross negligence manslaughter has survived but is rarely prosecuted in the Health Care Context³¹, and it would otherwise appear that instances of gross negligence are swiftly settled by the profession in private to minimize bad publicity. According to Winfield, in one form or another a fair amount of negligence in the sense of doing what a responsible man could not do, or not doing what he would do was covered by medieval law³².

In *re R. V. Bateman*, the liability of physicians and their duties was discussed³³. The court stated that if a medical practitioner holds himself out to be a skilled practitioner he is under an obligation to use due caution, diligence, care, knowledge, and skill in the treatment. The law requires a fair and reasonable standard of care and competence; irrespective of the fact that he is a qualified or unqualified practitioner by a lower standard. The standard of care and competence ought to be a fair and reasonable one. It should neither be an abnormally high standard nor a very low one. While adjudicating upon the standard of care to be observed by medical man, one should also have regard to some other relevant factors, such as professional position, specialization, state of medical knowledge, development, availability of facilities, locality, etc³⁴.

V- Evolutionary process in India, United Kingdom & USA

Notable works on medical science in ancient India are Charak Samhita, Sushruta Samhita and Vagbhata³⁵. Sushruta Samhita, a work comprehending the surgical tradition of Indian medicine, is one of the four treatises regarded as the

²⁷ Winfield and Janowicz, Tort, 5th, p.4.

²⁸ Blyth v. Birmingham Water Works Company (1856) 11 Ex 781.

²⁹ Charlesworth & Percy, Negligence, 19th ed, p. 16.

³⁰ Poonam Verma v. Aswin Patel, AIR 1996 SC 2111.

³¹ R. v. Bateman (1925) 94 L.J.K.B.791.

³² Malcolm Khan and Michelle Robson, Medical Negligence, London, Cavendish Publication, 1997 ed.34, p23.

³³ 1925 94 L. J. KB 791.

³⁴ Supra.

³⁵ Bhishagrantha. Kunja Lal. Shusrutha Samhita (1-2). Culkatta (1907)

sourcebook for all the later surgical works in India. Later Manusmriti laid down comprehensive measures for the protection of the layman from irresponsible Physicians³⁶. The penalties provided by the king in the cases of negligence of the physicians varied as per the severity of the lapse on the part of the physician taking into account all other accompanying circumstances³⁷. But Manu was never concerned with the class of the victim in inflicting punishment. Sushrutsamhita states that the physician should obtain the permission of the king before commencing the treatment. A person was unqualified for practice without practical training. The practical training was to be carried on various objects for learning so that the scholar did not experiment on human bodies³⁸. The *Arthashastra* also provided a code of ethics for physicians. If a physician while treating a person finds that the disease is dangerous to the life, the matter should be informed to the authorities. The physician had to pay a fine if death occurred due to any mistake on the part of the physician. It was considered that the person treating a patient was bestowed with a divine duty of care towards the patient. Apart from that, the duties of the physician were pre-fixed by the ancient documents³⁹.

a. Duties of Physicians

Apart from the qualifications of physicians' ancient literature speaks of professional ethics and Physicians' duties and their liabilities for causing harm to patients. Thus, the foremost duty of the Physician was to diagnose the disease very carefully and only after ascertaining the disease, he could start the treatment with his ability and good sense. The physician (Vaidya's) was not free to treat any person. There were restrictions on them to treat hunters, fowlers, outcastes, or sinners⁴⁰.

In Kautilya's *Arthashastra*, it is stated that physicians had to inform the administrative authority about the treatment of patients. If any physician took any person for treatment without informing the administrative authority called gopa or Sthanika, he would be penalized. Therefore, it was the duty of the physician to inform the administrative officer about the treatment of an injury. At that time, there were sufficient developments in medico-legal ethics to cope with the problems arising out of medical pressure⁴¹.

³⁶ Retrieved from Manusmriti IX,

³⁷ In both the Yajnavalkya Smriti and the Vishnu Smriti fines were prescribed for improper treatment by the physicians. The penalties imposed depended on whether a human or nonhuman suffered. It also depended on the class of the victim, the higher the social class, the higher the penalty.

³⁸ Retrieved from Sushruta Samhita.

³⁹ SS, G. (2022). An Analysis of Medical Negligence. *Part I Indian J. Integrated Rsch. L.*, 2, 1.

⁴⁰ Retrieved from Susrutha Samhita.

⁴¹ Kautilya 's –work depicts a splendid picture of the legal duties and liabilities in the medical profession. These are the concepts of professional ethics, duties, and liabilities of doctors specified in ancient documents. The concept of punishment had its origin and development.

b. Concept of Punishment:

The concept of punishment was specified in several literature⁴². Charak Samhita used this word in the sense of wrong treatment⁴³. Sushruta Samhita uses the word 'Mithyopachara' in the sense of improper conduct. It is stated that physicians who act improperly are liable to punishment⁴⁴. The Quantum of the penalty varied according to the status of the victim. As Yajnavalkya Smriti says, a physician who acts improperly should pay the first fine in the case of animals, the second highest in the case of man, and the highest in the case of kingsmen⁴⁵. *Sushruta Samhita* stated that 'If the death of a patient under treatment is due to carelessness, the physician shall be punished with severe punishment, growth of disease due to negligence or indifference of a physician should be regarded as assault or violence'⁴⁶.

c. Fine as a Specific form of punishment

Ancient Indian law relating to the practice of medicine furnishes examples of penalties for injuries due to negligent treatment. The pecuniary penalty was based on the social status of the victim, i.e., whether the victim of maltreatment was an animal (horse, cow, elephant, and so forth) or a person of the middle class or king's retinue. Physician's duty to care varied with the social status of the person under treatment, but the degree of pecuniary penalty was not dependent on the degree of guilt⁴⁷. It was the absolute discretion of the judge to impose a penalty, taking into account all factors⁴⁸. Thus, the law prevailing in ancient India sought to impose fines, which were deposited in the state exchequer, but no compensation was to be given to the aggrieved person.

V-Changing Dimensions of Criminal Liability

a) Crime of Battery

Medical procedures that involve bodily touching might come within the potential scope of the crime of battery⁴⁹. However, the absence of consent is an essential element of the offense⁵⁰. If legally effective consent has not been given to the doctor the therapeutic medical touching will amount to the offence of battery. The law insists that the application of force to which

⁴² The word Mithya has several meanings. It was applied according to the various situations. It means false, wrong, improper, error, illusive, or incorrect.

⁴³ Retrieved from Bhishagrantha p 370.

⁴⁴ Retrieved from Manav Dharmasastra.

⁴⁵ Retrieved from Yajnavalkya smriti. by Shastri.V.L. 4th Edition 1936.

⁴⁶ Supra.

⁴⁷ Code of Hammurabi=Law relating to surgeons in ancient world by JMM Datta & MK Sahray.vol17 1968.

⁴⁸ The rules relating to the responsibility of physicians for their improper medical treatment were not introduced merely to safeguard the patient, but also for good administration of the State.

⁴⁹ Foulkner v.Tubaf (1981) 1 W.L.R. 1538, 1534.

⁵⁰ Fagan v. Commissioner of Metropolitan Police (1969) 1 Q.B.439, 444E.

legally effective consent could not be obtained is the offense of battery⁵¹. The leading cases, which supported the existence of such a category, were concerned with issues as far removed from medical practice as prize fights and flagellation for sexual gratification. But the importance of these cases has been diminished by the Attorney General's Reference⁵². According to the opinion of the Court of Appeal⁵³, touching occurs in the course of medical practice and does not involve any hurt or injury calculated to health or comfort. In the course of medical practice, there is often good reason to attempt something beneficial to a patient's health, even though there is a risk of harm resulting⁵⁴. All medical procedures are not intended to benefit the person on whom they are performed⁵⁵. Sometimes a procedure is conducted on a person with the knowledge that it will certainly be to that person's bodily detriment, like in the case of a kidney taken from a healthy person, for transplantation into someone who is in need of it. The operation is a major one, and is not without risks⁵⁶. But it is not always unreasonably dangerous, and the probable benefit to the recipient outweighs the probable detriment to the donor⁵⁷. The courts may be expected to take the view that the operation did not amount to the offense of battery, even though the operation caused serious bodily harm.

b) Causing Grievous Bodily Harm

Causing grievous bodily injury is a crime. Consent given to a doctor absolves him of the crime. The essential element of the most serious non-fatal offense against the person is the intention to cause grievous bodily harm⁵⁸. It must be determined whether the act constitutes an offense under medical procedure and, if so, whether consent will protect the doctor from liability being incurred. It is an offence under Section 18 of the Offence Against Person Act, 1861 to cause any grievous bodily harm to any person. Grievous bodily harm is nowadays treated as a synonym for serious bodily harm⁵⁹. Hence a medical procedure, that does not cause really serious bodily harm, does not come within the definition of the offence. If a medical procedure causes grievous bodily harm, a doctor would not be guilty of the offence if he did it without intention to cause such harm⁶⁰.

⁵¹ Chiesa, L. E. (2011). Consent is not a defence to battery: A reply to Professor Bergelson. *Ohio St. J. Crim. L.*, 9, 195.

⁵² (1981) Q.B 719 E.F.

⁵³ Ibid.

⁵⁴ R v. Hyam (1975) A.C. 55,74, 77-8.

⁵⁵ Bravery v Bravery (1954) 1 W.L.R.1169, 1180 Denning L.J.

⁵⁶ R.G.Simmons & A.B .Cosimi, The Donor and Donor Nephrectomy ,in kidney Transplantation, Oxford Publication, London, 2000, p.234.

⁵⁷ Edmand Davies, "Transplants" p.634 see also Ormrod, Medical Ethics Oxford Publication, London 1998 ,p.341.

⁵⁸ R v . Austin (1973) 58 Cr. App.R.163.

⁵⁹ D.P.P.v. Smith (1961) A.C. 290,334. R. v. Hyam (1975) A.C. 55, 68-9.

⁶⁰ R.v. Belfon (1976) 1 W.L.R. 741.

In the Offences Against the Person Act, of 1861, there is a specific requirement that the act described be committed, Unlawfully. Consent alone is not sufficient to prevent the intentional causing of grievous bodily harm from amounting to this offence⁶¹. In England, criminal negligence is virtually confirmed as the situation in which the patient has died, and it implies negligence of such a degree of recklessness as to amount to manslaughter or culpable homicide⁶²See, J.K. Manson, Foransic

Medicine for Lawyers , Butterworth's Publications, London, 2nd ed., 1983,

c) Criminal Liability in India

Penal liability originated from English common law. In medical negligence case, patient may die during or as a result of the treatment. The death is therefore incidental, accidental or amounts to the crimes of manslaughter or murder (Collectively termed homicide). The crime of murder occurs when a person's death is caused by someone who intends to kill or cause grievous bodily injury likely to cause death. The distinction between murder and manslaughter is the intention to kill or cause serious injury. The jury in a trial may find that the defendant intended to kill or cause grievous harm when that was his purpose or when the death (or really serious injury) was a virtually certain consequence of the action⁶³. A person may be found guilty of murder even if the victim is dying from other causes like terminal cancer if he is killed deliberately by any other means. However, it is different when a patient dies due to the effect of a drug given to relieve pain, as it is the act of doctors to alleviate pain and suffering. The primary purpose of administering medicine is to relieve pain and suffering will be lawful even if death is hastened (referred to as the side effects). If this were not allowed, then a lot of palliative treatment would become unlawful⁶⁴.

The doctors may face criminal offenses like assault, battery, hurt, and grievous hurt and the maintainability of the case depends upon the factual situation. Medical liability under criminal law usually focuses on two bases. One is a crime of battery and the other is a crime of causing grievous bodily harm. Criminal liability has only limited application in India⁶⁵.

In a few instances, criminal liability may occur because of the proof of intentional negligence. The relevant area of criminal liability under Indian law is explained as follows.

⁶¹ R v Clarence (1888) 22 Q.B.D. 23.

⁶²See, J.K. Manson, Foransic Medicine for Lawyers , Butterworth's Publications, London, 2nd ed., 1983 , p.337.

⁶³ Smith J, Smith and Hogan Criminal Law, Butterworth's, 8th Edn, Oxford , 2001, p.58.

⁶⁴ Ibid.

⁶⁵ The presumption is that the Medical profession itself is at risk and we cannot enjoy the benefits of this profession unless we take this risk. So, in negligence cases, criminal liability is not an accepted end of liability.

d) Indian Penal Code

Indian Penal Code 1860 consists of 511 sections out of which some of the sections specifically deal with health and injury.⁶⁶ The offenses affecting public health, safety, convenience, decency, and morals, include Sections 269 and 284. The offenses affecting the human body: 304A, 312, 314, 315, 31, 328, 337, and 338. However, the Indian Penal Code does not specify the crime of medical negligence, but if any act causes hurt, grievous hurt, or death it may fall within the ambit of the penal provision of the India Penal Code and the person can be punished under section 304-A. The section states that whoever causes the death of any person by doing any act, so rashly or negligently as to endanger human life or the personal safety of others, is punishable by penal code, with imprisonment of either description for a term which may extend to two years or with fine which may extend to five hundred rupees or with both⁶⁷.

Similarly, for causing hurt and grievous hurt⁶⁸ to any person by doing an act so rash or negligent, as to endanger human life or the personal safety of others, a person is liable to be punished under IPC with imprisonment of either description for a term, which may extend to two years or with fine, which may extend to one thousand rupees or with both⁶⁹.

Under Criminal law, the injured person or representatives of deceased victims get nothing in monetary form, but the wrongdoer is to be penalized or convicted. But under the Code of Criminal Procedure, 1973, the Court can make an order to pay compensation to the aggrieved, out of the penalty imposed on the accused⁷⁰. The most important legal provision regarding criminal liability in Indian law is section 304 A of the IPC.⁷¹

In addition to the Indian Penal Code, there is another enactment entitled the Consumer Protection Act of 1986 'which controls medical malpractice'⁷². The Act protects not only the interest of the consumer when he purchases goods and services for daily use, but also protects his interests when he goes for treatment to a medical professional. Many medical associations lodged their protests against the application of the Act 1986, to the doctors because the relationship between a doctor and a patient is not that of a buyer and seller. However, this contention was not accepted. In the initial period after the enactment of the Act, there was a lot of confusion in the Indian judiciary as well as the medical fraternity regarding the application of the Act to this profession. All the confusion regarding the scope of the Act of 1986 to adjudicate the claims against the medical profession was cleared by the Hon'ble Supreme

⁶⁶ The general exceptions inter alia include Sections 80, 81, 87, 89, 90, 92, and 93.

⁶⁷ Section 337 of I.P.C.

⁶⁸ Section 338 of I.P.C.

⁶⁹ Ibid.

⁷⁰ Section 357 (1) (2) (3) of Cr. P.C 1973.

⁷¹ Medical personnel may be guilty under the provision but their criminal liability depends on rash or negligent acts. The rashness or negligence must be such that the victims of medical malpractice have lost their lives; limbs or sustained bodily injuries.

Court in the landmark judgment in the case of *Indian Medical Association vs V.P. Shantha*⁷³. About the provisions of the Consumer Protection Act 1986, some relevant sections are necessary⁷⁴. The injured patient must show that the physician acted negligently in rendering care and that such negligence resulted in injury. To do so, four legal elements must be proven:

- (1) a professional duty owed to the patient.
- (2) breach of such duty.
- (3) injury caused by the breach; and
- (4) resulting damages.

Money damages, if awarded, typically consider both actual economic loss and noneconomic loss, such as pain and suffering⁷⁵. Doctors need scientific knowledge, technical skill, and understanding and those who use these with courage, humility, and wisdom and by medical ethics provide a unique service to their fellow men and women and build an enduring edifice of character within themselves⁷⁶.

It is, therefore, a noble profession where the family doctor was considered to be a friend, philosopher, and guide for the sick. The relationship between the patient and the doctor is considered very sacred; it is based on mutual trust and faith, and it is not necessary to promote these categories of offenses.

e) **Contractual Liability**

Contractual liability is the main aspect of civil law. Since the inception of medical science, the human beings professing it have been abiding by the principles with fidelity and sincerity. As the physician or surgeon is a skilled person, a patient has to repose confidence and faith in him. The relationship of fidelity and confidence occurs at the time when a doctor undertakes or assents to provide medical service⁷⁷. A doctor is not under obligation to render service to anyone and could not be held liable for the consequence of such failure to treat a person except as a government servant⁷⁸. Therefore, the nexus between physician and patient is normally the result of an implied contract between them which usually amounts to surrender of a patient before the physician to get the treatment for consideration. The obligation of a physician or surgeon arises when a physician agrees to provide medical

⁷² It may be pointed out that the Consumer Protection Act 1986 was enacted by the Parliament of India to safeguard consumer interest, in compliance with the United Nations guidelines adopted on 09-04-1985. Consumer Courts were established for the settlement of consumers' disputes and related matters.

⁷³ (1995) 6 SCC 651.

⁷⁴ They are the terms complainant, complaint, consumer, deficiency, and service, definitions under Act 1986.

⁷⁵ Supra note 73

⁷⁶ The relevant parts of the Code of Medical Ethics“, as propounded by the Medical Council of India, have been given in Appendix –I of the Code.

⁷⁷ Clause 12 Code of Medical Ethics.

⁷⁸ Ibid.

service to a patient. In a contract, liability depends upon the expressed or implied terms of the contract and is based on what the medical man in question contracts to do. The duty in the contract is only binding to the parties in the contract. A medical man could not examine, treat, or operate a patient without the patient's consent except for committing a trespass or assault. Where however the medical practitioner is privately engaged, he owes a contractual duty to attend and treat the patient and to exercise reasonable skill and care in doing so⁷⁹. The terms of the implied contract can be gathered from the circumstances reflected in the custom of the profession and the conduct of the parties⁸⁰.

The House of Lords was reluctant to allow implied contracts to be used as a device to extend professional duties beyond general liability. Liability in a contract depends on the express or implied terms agreed upon by the patient and the medical man. Consent for treatment on payment of fees on the part of a patient can be treated as an implied contract with the doctor who by undertaking treatment on acceptance of fees, impliedly promises to exercise proper care and skill⁸¹.

f) Liability of Retainer

Professionals often act as agents and contractual relationships may be established through agency. In *Everelt v. Griffiths*,⁸² a doctor retained by a poor law infirmary was held to have impliedly contracted with a patient who submitted to the treatment in return for the doctor's implied undertaking to use reasonable care. The implied contract has been explained below:

I. Implied Contract

The patient–doctor relationship is well defined by the Code of Medical Ethics, issued by the Medical Council of the respective countries or based on guidelines and recommendations issued by the International Medical Organization and the Commonwealth Medical Association, the World Medical Association, and the World Health Organization. The relationship of fidelity and confidence takes place when a doctor undertakes or assents to provide medical services. Therefore, the nexus between the doctor and the patient is normally an implied contract between them. Seldom, may formal agreements exist between them.

II. Legal contract

The relationship between the doctor and the patient is also legally recognized as a contractual nature because its foundation lies in consent and contract emerges there. Consent by a patient may either be given by himself or any

⁷⁹ Clerk and Lindsell, *Law of Tort*, Sweet and Maxwell Publication, London, 1986 p. 778.

⁸⁰ Cheshire, Fifoot and Furmston's *Law of Contract*.

⁸¹ The contractual duties are generally more onerous than those imposed by tort. Tortious duties in the professional context are limited to taking reasonable care. They do not impose any continuing duty requiring advice or action to be reviewed, as may be the case with a contractual duty.

⁸² [1920] 3 K B 89,163.

person on his behalf. A contractual patient–doctor relationship is established when the patient makes a request for medical examination, diagnosis, opinion, advice, or treatment and the doctor undertakes to provide these. The patient has every right to terminate the relationship with his doctor at any time and seek the help of another. A reciprocal right rests with the doctor who at any time, takes the help of a colleague or specialist in the best interest of his patient. The patient is obliged to follow reasonable instructions of the doctor and participate and co-operate in the treatment and its further evaluation. Failure to do so may not allow him to hold that the doctor is responsible for any resultant damage⁸³.

At the same time, the doctor, too must not make any promises which he cannot keep, nor should he guarantee any cure which leads to a breach of contract. The doctor himself can terminate the relationship when he feels that his knowledge and skills are limited concerning the treatment of a patient when he feels the patient could be better treated elsewhere. Non-payment of fees does not form the ground for termination of such relationship as the contract between the doctor and the patient exists, irrespective of the payment of fees. The remedy, in such a situation, lies in a suit, for recovery of the fees rather than the termination of services⁸⁴.

Thus, if a doctor fails to fulfil his obligation, he is guilty of breach of trust and the law of contract, and the patient is entitled to claim damages for loss suffered by him due to breach of contract, under Section 75 of the Indian Contract Act, 1872, breach of contractual fiduciary duty also results in negligence on the part of the doctor under Law of Torts.

III. Fiduciary relationship

This principle originated in Roman Law and the fiduciary concept applies to a relationship in which one person entrusts the management of his property to a second person, wherein the second person is expected to work for the benefit of the first person without making a profit unfairly. The fiduciary concept has been applied to the patient–doctor relationship as patient care resembles managing a valuable trust. It refers to the doctor's commitment to promote the patient's vital medical interest which includes prolonging life, relieving symptoms, and restoring normal functions of the body⁸⁵.

The patients request help and doctors offer to give it to initiate the patient–doctor relationship. The doctor thereby becomes a fiduciary or trustee for the patient. Contractual liability subsequently evolved as tortious liability. Tortious liability has created a new dimension to medical negligence offences.

⁸³ Pandya & Sunil k, Doctor-patient Relationship and Medical Ethics , Journal of Indian Law Institute, 1993, Vol.3, April (April-June), p.23.

⁸⁴ Ahmed S. A , The Fiduciary Concept: A Basis for an Ethics of Patient Care , Souvenir Medimeet, 2000.

⁸⁵ Grant v. Australian Knitting Mills Ltd. (1936) A.C 85,103.

IV. Tortious Liability

Tortious liability may be the result of ‘centra legem artis’(Negligence). Actionable negligence occurs when the injury is caused by a breach of the duty to take care. The duty to take care is the very essence of negligence. The theoretical principle of tortious liability was involved in classic decisions. In *Heaven v. Pender*, M.R. Brett laid down the rule, that the existence of duty to care must be to avoid danger. But the scope of this rule was narrowed down by Lord Esher after a decade in the case of *Le Liever v. Golud* where it is said that man is entitled to be as negligent as he pleases towards the whole world if he does not owe a duty to them. Subsequently, the principle ‘neighbour’ was enunciated by the House of Lord in *Donoghue v Stevenson*⁸⁶, Lord Atkin observed that one must love his neighbour so that no injury is caused to him. Reasonable care must be taken to avoid acts or omissions, which may injure the neighbour. The person who is so closely and directly affected by your act that contemplates that you can injure them by your acts or omissions are your neighbors. The statement as to the principle for determining the duty appears to be very sound and is well well-accepted criterion⁸⁷. Medical men must take care of patients, which arises out of the assumption of responsibility by the doctor to treat the patient with due care and diligence. It is immaterial whether the medical practitioner is qualified or unqualified. Once the patient is accepted for treatment practitioner must diagnose properly and give treatment according to accepted practice. It is judicially settled that mere error in judgment or mistake in opinion does not render the practitioner liable⁸⁸.

V. Accepted Practice

Accepted practice is the most important factor of tortious liability. A physician or surgeon acting in conformity with recognized or accepted practice is also not guilty of negligence. It was Lord Clyde who brought the concept of accepted medical practice in a *Scottish Case, Hunter v. Hanley*⁸⁹ wherein, he stated that a doctor adopted, a practice that no professional man of ordinary skill would have taken, had he been acting with ordinary care. Accepted practice or custom is relevant in determining, what a man of normal prudence would have done in like circumstance and whether or not, in the case before it, reasonable care had been, exercised.

In *Clark v. MacLennan*, the surgeon deviated from the accepted practice of profession and the operation was unsuccessful. As a result, the patient became disabled, but the court held that departure from the orthodox course of treatment

⁸⁶ (1932) A.C 562.

⁸⁷ Goh, Y., & Yip, M. (2017). Concurrent liability in tort and contract. *Torts Law Journal*, 24, 148.

⁸⁸ *White House v. Jordan* (1980) BMLR 14.(1881)1 All ER.

⁸⁹ (1955) S.L.T.2.Q.B.

was a breach of duty⁹⁰. Custom gives us information on what is feasible, it warns of the possibility of far-reaching consequences if a higher standard is required, but custom can never be conclusive⁹¹. The true test for establishing negligence in diagnosing or treatment on the part of a doctor is to be proved. A doctor charged with negligence may be relieved of liability if he proves that he had acted by the prevailing professional practice. *M C. Nair J*⁹² has laid down that a doctor is not negligent if he is acting by a practice accepted by a responsible body of medical men skilled in that particular art, merely because other doctors adopt a different practice. This has been accepted by the House of Lords as applicable not only in diagnosis and treatment but also in advice and warning⁹³.

The law in this regard is well-settled by the House of Lords that a judge's preference for one body of distinguished professional opinion to another, also professionally distinguished, is not sufficient to establish the negligence of a practitioner whose action has received the seal of approval of those whose opinion, truthfully expressed honestly held, were preferred⁹⁴. The principle of law propounded by the House of Lords in a subsequent decision is that the court is not bound to hold that a defendant doctor escapes from liability for negligent treatment or diagnosis just because he received evidence from several experts who are genuinely of opinion that doctor's treatment or diagnosis was according to sound medical practice. A judge has the right to conclude that the views of a medical expert are unreasonable when he is satisfied that the body of expert opinion cannot be logically supported at all, and that such opinion will not provide the benchmark by reference to which the defendant doctors conduct is to be assessed. In *Joyce v. Sutton and Wands Worth Health Authority*⁹⁵, the court of appeal observed that the defendant doctor was guilty of negligence, even if his acts or omissions were accepted. To establish negligence, it must be proved that (i) there is normal practice that applies to the case (ii) that the defendant has not adopted it, and (iii) that the course taken by the defendants is one, which no professional man of ordinary skill would have taken, had he been lacking ordinary care⁹⁶.

In the *Sideway case* the surgeon did not disclose the risk of damages to the

⁹⁰ The customary practice, employed by practitioners is not necessarily a good medical practice as it is subject to variation according to the development of science. The usual or accepted practice of today may become useless or worse tomorrow. It is, therefore, the duty of the court to see that the practitioner's good medical practice instead of usual practice, Custom is relevant in determining followed the standard of care.

⁹¹ *Darling v. Charles Community Memorial Hospital*, A.L.R 3d 860 (1986).

⁹² *Supra*.

⁹³ Lord Denning points out that a doctor is not liable for taking one choice out of two or four favoring one school rather than another. He is only liable when he falls below the standard of a reasonably competent practitioner in his field.

⁹⁴ *Bolitho v. City and Hucksney Health Authority* 13 BMLR 111 affirmed by House of Lords [1972] All ER.

⁹⁵ [1996] Mod .L.R.

⁹⁶ *Hunter v. Hanley* 1955 SC 2000.

spinal cord of the patient, which was less than 1%, but if materialized resulting injury could range from mild to very severe. The surgeon's non-disclosure of the risk of damage to the plaintiff's spinal cord accorded with a practice accepted as proper by a reasonable body or neuron-surgical opinion. Since the plaintiff failed to prove that the surgeon had been on duty to warn of the risk. Hence doctor was held not negligent. That the individual professional person will be at fault in failing to adopt the new techniques has been proved and accepted as an invariable part of the accepted practice in the profession. *Streat Field*.⁹⁷ opined that a doctor was entitled to use his common sense and experience and judgment in the treatment of each case, and a slight departure from the textbook would not of itself establish negligence. The defence of accepted professional practice may not protect the professional, because the court is the final authority to determine what is reasonable. The judiciary has retained the power to declare any recognized practice of the professional as negligent. Lord Browne Wilson lays down the criteria for evaluation of accepted professional practice as follows. A doctor could be liable for negligence in respect of diagnosis and treatment. If a body of professional opinion examine his conduct has not been demonstrated to the Judge's satisfaction that body of opinion relied on was reasonable or responsible. In a vast majority of cases, the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding legal analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible⁹⁸.

VI. Res ipsa loquitur

This is the concept of evidentiary value relating to medical negligence as a rule of evidence. Initially, in the USA the court applied what was called the locality rule in deciding the standard of care of a doctor. This rule as applied was that a physician's care would be judged only by the skill and care generally possessed by similar practitioners in the same or similar locality. The rationale for the rule was essentially to protect the doctor practicing in a small, rural area from being evaluated and compared to his other more sophisticated and scientifically advanced city colleagues⁹⁹.

In India, the locality rule is not applied¹⁰⁰. Res Ipsa is a rule of evidence, which purports to enable the judge to arrive at the right verdict so that justice may not be miscarried. The rule was first applied in *Byrne v. Boudle*¹⁰¹, where it was

⁹⁷ *Holland v. Devitt and Moore* [1996] 3 All ER.

⁹⁸ *Bolitho v. City and Hackney Health Authority* 13 BMLR 111 affirmed by House of Lords [1972] All ER.

⁹⁹ Soni, R. K. (2021). An Analysis of Res Ipsa Loquitur as Proof of Negligence in Law of Torts. *Indian JL & Legal Rsch.*, 3, 1.

¹⁰⁰ Rayamane, A. P., & Chandrashekhar, T. N. (2015). Doctrine of Res Ipsa Loquitur—Application in medical negligence cases. *J S India Medicoleg Assoc*, 7, 15-9.

¹⁰¹ (1863) 159 E.R. p. 299-30.

remarked that a presumption of negligence arises from the occurrence of the accident itself. Chief Justice Earl with Pollock C.B, Barnwell B. Channel B, and Pigott B. said :

...there must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or thing does not happen, if those who have the management, use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care¹⁰².

In the application of *res Ipsa loquitur*, the plaintiff has to prove the mere happening of the accident which speaks of negligence. The maxim comes into operation:

(1) when the occurrence would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff and (2) the circumstances point to the question of negligence of the defendant rather than that of any other person.

The *res* speaks because the facts stand explained, and therefore, the natural and reasonable, not conjectural, inference from the fact shows that what happened may be reasonably attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances. It means that the circumstances are so to speak, eloquent of negligence of somebody who brought about the state of things, which is, complained of. This rule is applicable in cases where the occurrence of injury is such that most probably it appears to be the result of negligence to somebody and the defendant is the person who is responsible¹⁰³. Though there are conflicting views on the application of the maxim to cases where several persons are involved the rule in *Hillyer's case* which was approved in *Gold v. Esses County Council and Cassidy v. Ministry of Health*¹⁰⁴, still holds good.

Res ipsa loquitur has relieved the plaintiff from the unnecessary burden of proving which was impossible to prove for him. The other fact that contributed to the application of the doctrine, is that when an act contains medical and surgical procedures that are common the layman knows that if the procedures are properly conducted, untoward results could not occur. And in others, medical men (when it was possible to get them to admit it) from their specialized knowledge knew that without negligence the result would have been a good one¹⁰⁵.

In various jurisdictions, the rule has been opposed for the reason that it lays an unnecessary burden on the operating surgeon or medical practitioner to explain the accident or injury caused by their conduct. But if we compare the problem

¹⁰² *Scott v. London and St. Katherine Docks Co* 1865) 159 E.R. 655, 667.

¹⁰³ Khatter, V. P. (2022). *Res Ipsa Loquitur-Facts Are Sufficient to Prove It as an Offence. Issue 2 Indian JL & Legal Rsch.*, 4, 1.

¹⁰⁴ (1978) All ER Vol.3.

¹⁰⁵ *Salgo v. Leland Stanford Jr. Universal Board of Trustees* (1957) 134 Cal App.2d 560.

of the plaintiff with that of a doctor, the rule is more beneficial to the patient, who being ignorant of the medicine has to prove the negligence of the defendant's medical practitioner to win the case. The classic elements of a *res ipsa loquitur* claim include:

- (1) a type of injury that does not ordinarily occur in the absence of negligence
- (2) an injury that was caused by an agency or instrumentality under the exclusive control of the defendants and
- (3) an injury that was not caused by any voluntary action or contribution on the part of the plaintiff¹⁰⁶.

VI. Conclusion

The above are the main theoretical concepts of tortious liability. Negligence is the breach of duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. The essential components of Negligence are three Duty, Breach, and Resulting damage. Under the tort law, the burden to prove medical negligence beyond the preponderance of probabilities is on the suitor and the suitor often finds it difficult to discharge the burden before a civil court. Inaccessibility of medical records for the victims is one of the most important causes of the suitor's failure in establishing negligence. The theoretical aspect of the tortious liability of negligence is complicated, more often the victims of medical negligence find it difficult to pursue their suit against doctors or hospital authorities, hence it is desirable that in all such cases, victims shall resort to the remedy under the Consumer Protection Act, as the same is found to be more efficacious remedy than a tort suit.

¹⁰⁶ Harl R. Arkes, *Clindy v Chipani, Medical Malpractice v. the Business Judgement Rule: Difference in Hindsight Bias*, Oregon Law Review, Vol. 8, 2001, p. 203.

Freedom of Speech and Right to Internet Access: *An Analysis*

Abrar ul Haq Fazili*

Abstract

Freedom of speech and expression is not a recent development in the history of civilizations. Ever since human beings started living in different civilizations around the globe, they have been used to expressing their thoughts, views, and opinions. With time, people around the globe began to claim the freedom of speech and expression as one of their fundamental rights, and in turn, they got written assurances from their rulers about exercising this right, in the form of various Codes, Conventions, etc. Nevertheless, this much was certain that at least some sort of recognition was given to this essential freedom during earlier times as well. Similarly, with the growth of modern science and technology, the freedom of speech and expression also changed its medium of expression from the traditional modes of communication like books, magazines, press, etc. to the modern means of communication. In this regard, the internet is the most significant means of communication through which people began to exercise their freedom of speech and expression. Further, at the international level, various treaties and conventions were framed wherein the right to internet access was recognized as a fundamental human right throughout the world by which people from all walks of life could effectively use this medium to express themselves. This paper will attempt to analyze the status of the right to speech and expression in the present-day digital world with inputs from the judicial intervention in India.

Keywords: *Internet Access, Freedom of Speech, Constitutional Backing, Digital Era, Judicial Approach.*

1. Introduction

Article 19 of the Universal Declaration of Human Rights contains freedom of expression as an epitome of a free person¹. Freedom of the Press and Freedom of speech are covered by the freedom of expression under the Indian constitution

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¹ Hannum, H. (1998). The UDHR in national and international law. *Health and Human rights*, 144-158.

as a Fundamental Right². A free Press helps to inform the public. A democratic society hinges on the people being able to hold informed opinions and express them. People must be able to ask tough questions to the people in power and find out about decisions that affect them and their fellow citizens.³

Freedom of speech and expression leads to free and fair elections which ultimately lead to better democracies. Digital technologies have created many new challenges for media development. In particular, the range of possibilities provided by social media, mobile phones, and online services is unprecedented in media history. Technically, people can have global access to information. The amount of information available to the masses is incomprehensible⁴.

In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.⁵ At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life is higher than that posed by the traditional press⁶.

2. Evolution of the Right

Before the dawn of the American Revolution which specifically referred to "freedom of speech", the only reference to "freedom of speech" in any colony was the rights of legislators during its session. The evolution and development of parliamentary privilege reflects the relationship in early America between any speech and political process and consequently, the importance of the procedures for enforcing limits on speech to safeguard its freedom⁷. The year 1215 was of paramount importance when the Barons (advisors) of the king went beyond their ordinary power of advising the king and took assurance from King John in the shape of the Magna Carta that contained a promise of the king not to levy certain taxes upon Barons without their general consent.⁸ Gradually, with the change in the socio-economic structure of the society, more people gave support to the demand for the concession of taxes, and in 1295, representatives from the numerous districts within the country got themselves

² Dabhade, L. D. (2021). AN OVERVIEW OF HUMAN RIGHTS AND CONSTITUTION OF INDIA. *Battling the Prejudice: Unfurling the Menace to Human Rights*, 149.

³ Murray Dry, "Free Speech in Political Philosophy and its Relation to American Constitutional Law: A consideration of Mill, Meiklejohn and Plato" available at HeinOnline 93 – 98 (1994 – 1995).

⁴ Mathew, M. (2020). Freedom of information, right to expression, and social media in India. *Interactive Entertainment Law Review*, 3(2), 94-104.

⁵ Soli, J. Sorabjee, "Freedom of Expression in India", 47 Law and Justice P. 3 (1996).

⁶ Kumar, A. (2022). Freedom of Speech in India and Outside: Internet's Unyielding Influence. *Jus Corpus LJ*, 3, 258.

⁷ Stone, G. R. (1987). Reflections on the First Amendment: The Evolution of the American Jurisprudence of Free Expression. *Proceedings of the American Philosophical Society*, 131(3), 251-260.

⁸ David S. Bogen, "The Origins of Freedom of Speech and Press" 42, Maryland Law Review 430 (1983).

included in the list of Lords Temporal and Spiritual.”⁹ The Articles of Confederation maintained that “freedom of speech and debate in Congress shall not be impeached or questioned in any Court or place out of Congress.”¹⁰ The notion of freedom of speech as a parliamentary privilege is paradoxical. The privilege of freedom of speech in parliament was misused or abused on certain occasions as a tool to avoid popular dissatisfaction against the members of Parliament. In the guise of protection of this right against the authority of the crown, it was also misused to silence general masses against their grievances towards parliament. This principle was frequently used to justify the punishment of a private citizen who tried to criticize any legislator.¹¹

Therefore, popular sovereignty was the base of parliamentary privilege in America and freedom of speech in legislature influenced the overall right of free speech in the society. The freedom of speech therefore made a broader step forward from legislature to the common individual in the society. The right to free speech is interrelated with self-government which happens to be the background of First Amendment discussion,¹² and was incorporated in a principle that followed about the parliamentary privilege of debate.

3. Evolution of this Right at the International Level

In the history of civilization, freedom of speech is one of the oldest and most respected rights, one that is often referred to as the “first freedom.”¹³ In Athens and the writings of Plato and Euripides, the concept of a right to freedom of speech has its origins.¹⁴ In the seventeenth-century documents such as the 1688 English Bill of Rights, which provided freedom of speech for legislators within the confines of Parliament, the concept of this right can be found.¹⁵ Accordingly, anything that was said during a Parliamentary debate, it was unlikely that Legislators would be impeached.¹⁶ In Scandinavia, in the Eighteenth Century, the general legal guarantee of freedom of speech appeared.¹⁷ In France, in 1789, and the United States Constitution in 1791, freedom of

⁹ F. Maitland, *The Constitutional History of England* 64 (1963).

¹⁰ ARTICLES OF CONFEDERATION, art. 5, cl.5. Article One, Section Six of the Constitution of the US incorporated it as a fundamental law; ‘for any speech or debate in either House, they (Senators and Representatives) shall not be questioned in any other place.’

¹¹ David S. Bogen, “The Origins of Freedom of Speech and Press” 42, *Maryland Law Review* 434(1983).

¹² A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

¹³ ROBERT HARGREAVES, *THE FIRST FREEDOM: A HISTORY OF FREE SPEECH* 1-22 (2002).

¹⁴ See *id.* at 4-9; see also William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 *VAND. J. TRANSNAT’L L.* 255, 276 (2010).

¹⁵ See RHONA K.M. SMITH, *TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS* 267 (2007).

¹⁶ See *id.*

¹⁷ See *id.*

speech was established.¹⁸ In almost every country, the right to freedom of speech is recognized today.¹⁹ In promoting and protecting human rights worldwide, the United Nations has had a vital role to play. One of the principal purposes of the United Nations according to Article 1(3) of the UN Charter is “to achieve International cooperation ... promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”²⁰

The International Human Rights protected by the United Nations also covers freedom of speech.²¹ At the UN Conference on International Organisation in 1945, after World War II, the International community tried to adopt an International Bill of Rights.²² The International Bill of Human Rights which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and two optional Protocols annexed thereto, and the International Covenant on Economic, Social and Cultural Rights was later agreed to be adopted by the countries.²³ The list of basic Human Rights guaranteed by the International Bill of Human Rights included the freedom of speech.²⁴ The obligations with which states are bound to comply or respect are generated by International Human Rights Law like the general International Law.²⁵

The states are under the “obligation to fulfill the required international imperative to take positive action to facilitate the enjoyment of basic human

¹⁸ Magnuson, *supra* note 102, at 277.

¹⁹ Katharine Gammon, Freedom of Speech, LIVESCIENCE (June 28, 2012, 3:44 PM), <http://www.livescience.com/21260-freedom-of-speech.html> (“Around the world, the right to free speech is preserved in the United Nations Universal Declaration of Human Rights and is granted formal recognition by the laws of most nations.”).

²⁰ U.N. Charter art. I (“The Purposes of the United Nations are: [1] To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; [2] To develop -friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; [3] To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promotion and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and [4] To be a centre for harmonizing the actions of nations in the attainment of these common ends.”).

²¹ See, e.g., The Universal Declaration of Human Rights, G.A. Res. 217 (111) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

²² See John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 527 (1976).

²³ See *id.* at 528.

²⁴ See UDHR, *supra* note 109 (incorporating the Universal Declaration of Human Rights into the International Bill of Human Rights, including its provision guaranteeing freedom of speech).

²⁵ The Foundation of International Human Rights Law, UN.ORG, <http://www.un.org/en/documents/udhr/hr-law.shtml> (last visited Oct. 21, 2013) [hereinafter Foundation].

rights.”²⁶ The domestic measures and legislation compatible with their treaty obligations and duties are sought by the states to put into place.²⁷ Thus, the principal legal protection of freedom of speech guaranteed under International law is provided by the domestic legal system.²⁸ The right to freedom of speech, for example, which originates in International Human Rights law has been incorporated by many countries into their own Constitutions.²⁹

4. Right to speech and expression as a Human Right

In a series of fundamental Agreements including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, the international community has stated its commitment to the right to free expression. Under the United Nations regime, the right to free expression was first proclaimed as an International norm in the 1948 Universal Declaration of Human Rights (“Universal Declaration”). A blueprint for the protection of free expression on the Internet is constituted by Articles 19, 12, and 27 of the Universal Declaration taken together. It is proclaimed by Article 19 of the Universal Declaration:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any medium regardless of frontiers.

Article 12 of the Universal Declaration states that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”.³⁰

Article 27, upholds the right of each individual “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”³¹ It is provided under Article 29 (2) that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and to meet the just requirements of morality, public order, and the general welfare in a democratic society.

Several “common standards of decency can and should be accepted by people of all nations and cultures”, is the basic idea upon which the Universal Declaration of Human Rights is based. The Universal Declaration of Human

²⁶ Id.

²⁷ See What are Human Rights?, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Oct. 21, 2013).

²⁸ See id

²⁹ See Magnuson, *supra* note 102, at 278.

³⁰ To encompass all communications directed to an individual or group of individuals, the language of this provision is broad enough, including electronic mail, chat, and other forms of person-to-person communications.

³¹ Article 27 seems particularly apt to the protection of communications on the Internet given that the Internet’s roots are in the exchange of scientific information.

Rights was adopted by the UN General Assembly in 1948 as a set of principles that all member states could pledge to implement. “Over the years, the commitment has been translated into law” through “treaties, customary International Law, general principles, Regional Agreements and domestic law, through which human rights are expressed and guaranteed.”

5. Right to speech and expression: Constitutional Perspective

The constitution of India is one of the fundamental documents and contains the basic law of the land in India to which all the other laws are subservient and their existence is completely dependent upon it. The categorization of the freedom of speech and expression as a fundamental right under Part III of the Constitution itself speaks volumes about its significance and recognition in India as one of the basic human rights necessary for the existence of modern democracies all over the world³². The Constitution of India embodies a detailed scheme of “ordered liberty,” with a full-fledged parliamentary democracy and a system of judicial control to preserve individual rights even against a popular majority³³. The Supreme Court and various High Courts in India have consistently strengthened this principle of free speech and expression by its wide judicial interpretation of the free speech principles in India.³⁴

The strength and importance of media in a democracy is well recognized. Article 19(1)(a) of the Indian Constitution, which gives freedom of speech and expression includes within its ambit, freedom of the press. The existence of a free, independent, and powerful media is the cornerstone of a democracy, especially in a highly mixed society like India. Media is not only a medium to express feelings, opinions, and views, but it is also responsible and instrumental for building opinions and views on various topics of regional, national, and international agenda. The pivotal role of the media is its ability to mobilize the thinking process of millions³⁵. Blackstonian concept of freedom of the press expressed in 1769 contained four basic points that still form the crux of the concept of press freedom. They are as follows:

6. Internet as a Right

The right to internet access, though not expressly mentioned in the Indian

³² Burns, Y. M. (1997). Freedom of expression under the new constitution. *Comparative and International Law Journal of Southern Africa*, 30(3), 264-286.

³³ Raza, A. (2016). ‘Freedom of Speech and Expression’ as a Fundamental Right in India and the Test of Constitutional Regulations: The Constitutional Perspective. *Indian Bar Review*, 43(2), 87-110.

³⁴ Verma, R. (2022). Emerging Trends in Right to Freedom of Speech and Expression in India. *Journal of Legal Studies & Research*, 8(1), 116-123.

³⁵ Blackstonian concept of freedom of the press expressed in 1769 contained four basic points that still form the crux of the concept of press freedom. They are as follows:

1. The liberty of the press is essential to the state.
2. No previous restraints should be placed on the publications.
3. That does not mean there is press freedom for doing what is prohibited by law.
4. Every freeman has the undoubted right to lay what sentiment he places before the public, but if he publishes what is improper, mischievous, or illegal he must take the consequence of his temerity.

Constitution does certainly come within the ambit of freedom of speech and expression in India. The judicial interpretation of the freedom of speech and expression has over the period stated that in consonance with the international treaty obligations imposed upon India, the right to internet access is certainly a part of Article 19 (1) (a) of the Constitution as right to internet access acts as a facilitator in the exercising of freedom of speech and expression. International Human Rights Law often seemed to be living in the past until recently, concerning online expression. The Internet was not mentioned even in passing by the Human Rights Committee – the UN body charged with receiving reports about States’ compliance with the ICCPR (“ICCPR Committee”) in its 2009 – 2010 report. It discussed freedom of expression only concerning the rights of Journalists, Non – non-governmental organizations, Human Rights Defenders, and Media Professionals while commenting on State Reports.³⁶

There are often very serious violations across a range of issues that require its attention as the ICCPR Committee faces difficult choices about what to address. It is striking that there is no mention in this report of the Internet or online expression, much fewer blogs, user-generated content, crowdsourcing, or Social Media,³⁷ at the same time for a right that is frequently the core of the Covenant on Civil and Political Rights and the touchstone for all other rights guaranteed therein.³⁸

With a series of reports by the Special Rapporteur on the promotion and the protection of the Right to freedom of opinion and expression, Frank La Rue,³⁹ the United Nations has been recently changing all of that, building on the work of his two predecessors namely Abid Hussain and Ambeyi Ligabo,⁴⁰ two recent resolutions by the Human Rights Council⁴¹ as well as a redrafting

³⁶ Human Rights Comm., Rep. of the Human Rights Comm., Aug. 1, 2009–Jul. 31, 2010, 65(26), 68(24), 68(28), 70(20), 72(24), 75(9), U.N. Doc. A/65/40 (Vol. 1); GAOR, 65th Sess., Supp. No. 40 (2010) (responding to reports from Moldova, the Russian Federation, Mexico, Uzbekistan, and Israel).

³⁷ In its 2008–2009 report, the ICCPR Committee does mention concern about retaliation against “users of nonconventional media,” Human Rights Comm., Rep. of the Human Rights Comm., Aug. 1, 2008–Jul. 31, 2009, 94(15) U.N. Doc. A/64/40 (Vol. 1); GAOR, 64th Sess., Supp. No. 40 (2009) (report on Azerbaijan),

³⁸ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 336 (1993).

³⁹ See Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Promotion and Protection of the Right to Freedom of Opinion and Expression, transmitted by Note of the Secretary-General, U.N. Doc. A/66/290 (Aug. 10, 2011) (by Frank La Rue) [hereinafter August 2011 La Rue Report];

⁴⁰ See, e.g., Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, The Right to Freedom of Opinion and Expression: Rep. of the Special Rapporteur, Ambeyi Ligabo, 29–43, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/55 (Dec. 30, 2005);

⁴¹ Human Rights Council Res. 20, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., June 18–July 6, 2012, 67th Sess., Supp. No. 53, A/HRC/20/L13, 3 (June 29, 2012) [hereinafter H.R.C. Res. 20]

of the ICCPR Committee's General Comment on Article 19⁴² of the ICCPR. Addressing Internet filtering, graduated response laws and Internet blackouts in his May 2011 Report, the Special Rapporteur La Rue asserted that in the light of the importance of the Internet for human rights, "facilitating access to the Internet for all Individuals, with as little restriction to online content as possible, should be a priority for all states."⁴³ Taking a close look at online media, similarly, the new and revised General Comment No. 34 notes that "States parties should take all necessary steps to foster the independence of these new media and to ensure access of Individuals thereto."⁴⁴ The Human Rights Council Resolution of June 2012 calls on states "to promote and facilitate access to the Internet and International cooperation aimed at the development of media and information and communications facilities in all countries."⁴⁵ The importance of access to the Internet for both freedom of expression and other Human Rights laws has been emphasized by La Rue's Reports and certain practices have been condemned that "cut off access to the Internet entirely" as "disproportionate" and thus violations of Article 19 of ICCPR.⁴⁶ It was observed by a Joint declaration by a group of special Rapporteurs on freedom of expression that "freedom of expression applies to the Internet as it does to all means of communication."⁴⁷

7. Right of Speech: Judicial Approach

The nature of fundamental rights under Part III of the Constitution is well settled. The fundamental rights are prescribed as a negative list, so that "no person could be denied such right until the Constitution itself prescribes such limitations". The only exception to the aforesaid formulation is Article 21A of the Constitution, which is a positive right that requires an active effort by the concerned government to ensure that the right to education is provided to all children up to the age of 16 years.⁴⁸

⁴² Human Rights Comm., General Comment No. 34 on Article 19: Freedoms of Opinion and Expression, 15, U. N. Doc. CCPR/C/GC/34 (Sep. 12, 2011 [hereinafter General Comment No. 34].

⁴³ Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue) [hereinafter *May 2011 La Rue Report*].

⁴⁴ General Comment No. 34, *supra* note 127.

⁴⁵ Human Rights Council Res. 20, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., June 18 – July 6, 2012, 67th Sess., Supp. No. 53, A/HRC/20/L13, 3 (June 29, 2012) [hereinafter H. R. C. Res. 20].

⁴⁶ *May 2011 La Rue Report*, *supra* note 128.

⁴⁷ U.N. Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression & ACHPR Special Rapporteur on Freedom of Expression and Access to Information, International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression, and the Internet 1a (June 1, 2011), available at <http://www.osce.org/fom/78309> [hereinafter Joint Declaration].

⁴⁸ *Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

The positive prescription of freedom of expression will result in different consequences that our own Constitution has not entered into. Having different social and economic backgrounds and existing on a different scale of development, the human rights enshrined therein have taken on a different role and purpose. The framers of the Indian Constitution were aware of the situation of India, including the socioeconomic costs of such proactive duty, and thereafter took an informed decision to restrict the application of fundamental rights negatively. This crucial formulation is required to be respected by the Supreme Court, which has to uphold the constitutional morality behind the utilization of such negative prescriptions.⁴⁹

Now, we will focus on the freedom of expression over the medium of the internet. In the landmark judgment delivered by the Supreme Court last year namely *Anuradha Bhasin v Union of India*, the court maintained that the right to freedom of speech and expression exercised through the medium of Internet stands constitutionally protected in India. It further maintained that there is no gainsaying that in today's world, the internet stands as the most utilized and accessible medium for the exchange of information. The revolution within cyberspace has been phenomenal in the past decade, wherein the limitation of storage space and accessibility of print media has been remedied by the usage of the internet.⁵⁰

The court in the same case further maintained that law and technology seldom mix like oil and water. There is a consistent criticism that the development of technology is not met by equivalent movement in the law. In this context, we need to note that the law should imbibe technological development and accordingly mould its rules to cater to the needs of society. Nonrecognition of technology within the sphere of law is only a disservice to the inevitable. In this light, the importance of the internet cannot be underestimated, as from morning to night we are encapsulated within cyberspace and our most basic activities are enabled by the use of the internet.⁵¹

We need to distinguish between the internet as a tool and the freedom of expression through the internet. There is no dispute that freedom of speech and expression includes the right to disseminate information to as wide a section of the population as possible. The wider range of circulation of information or its greater impact cannot restrict the content of the right, nor can it justify its denial.⁵²

The development of the jurisprudence in protecting the medium for expression can be traced to the case of *Indian Express v. Union of India*, (1985) 1 SCC 641, wherein the Supreme Court had declared that the freedom of print medium is covered under the freedom of speech and expression. In *Odyssey*

⁴⁹ Id., Para No. 21.

⁵⁰ Id., Para No. 22.

⁵¹ Id., Para No. 24.

⁵² Id., Para No. 25.

Communications Pvt. Ltd. v. Lokvidayan Sanghatana, (1988) 3 SCC 410, it was held that the right of citizens to exhibit films on Doordarshan, subject to the terms and conditions to be imposed by the Doordarshan, is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a), which can be curtailed only under circumstances set out under Article 19(2). Further, the Supreme Court expanded this protection to the use of airwaves in the case of the Secretary, Ministry of Information & Broadcasting, Government of India.⁵³

In this context, we may note that the Supreme Court of India, in a catena of judgments, has recognized free speech as a fundamental right, and, as technology has evolved, has recognized the freedom of speech and expression over different media of expression. Expression through the internet has gained contemporary relevance and is one of the major means of information diffusion. Therefore, the freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a), and accordingly, any restriction on the same must be by Article 19(2) of the Constitution.⁵⁴

In this context, we need to note that the Internet is also a very important tool for trade and commerce. The globalization of the Indian economy and the rapid advances in information and technology have opened up vast business avenues and transformed India into a global IT hub. There is no doubt that there are certain trades that are completely dependent on the Internet. Such a right of trade through the Internet also fosters consumerism and availability of choice. Therefore, the freedom of trade and commerce through the medium of the Internet is also constitutionally protected under Article 19(1)(g), subject to the restrictions provided under Article 19(6).⁵⁵

8. Conclusion

The prior censorship was abolished in England almost a century before the drafting of the First Amendment to the US Constitution signified the understanding of the phrase “freedom of the press” in the Eighteenth century and it also contributed to the recognition of the fact that the freedom of expression should not be limited to legislators. Even though some perceived freedom of the press only in the narrower sense of absence of prior restraint the First Amendment to the US Constitution envisioned a much broader concept.⁵⁶ It further protected freedom of speech as an independent related right. The abolition of prior censorship in England was frequently referred to in the debates

⁵³ *Secretary, Ministry of Information & Broadcasting Government of India v. Cricket Association of Bengal*, (1995) 2 SCC 161; *Shreya Singhal v. Union of India*, (2015) 5 SCC 1].

⁵⁴ *Ibid.*

⁵⁵ *Id.*, Para No. 27.

⁵⁶ Blackstone’s definition is impossible to square with several statements by others involved in the ratification process. It applies easily to freedom of the press, but insistence on a clause protecting freedom of speech makes little sense in the context of a definition limited to prior restraint.

over the ratification of the Constitution which signifies its importance of the understanding of the people of the First Amendment to the US Constitution. The major consequence of the abolition of the prior censorship was extending the participation of the public in the political debate from among the few privileged to the general masses.

The Internet is at once a worldwide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location. The Internet represents one of the most successful examples of the benefits of sustained investment and commitment to research and development of information infrastructure. Beginning with the early research in packet switching, the government, industry, and academia have been partners in evolving and deploying this exciting new technology.

CORPORATE GOVERNANCE AND INDEPENDENT DIRECTORS

ABSTRACT

The Companies Act 2013 not only replaced the erstwhile Act 1956 but also made certain vital changes in management, direction, regulation, and accountability of the corporate institutions. It examines the role of the Independent Director in Corporate Governance and the impact on Company Performance thereon. We shall look at Companies Registered in India, how the role of Independent Directors brings about better corporate governance, and whether this improves company performance. Given the experience of the European countries regarding independent directors, We are sure that Independent Directors (IDs) play a critical role in implementing sound corporate governance practices in India. This paper is an attempt to analyze the scenario emerging post-amendment of the Companies Act and the resultant effects thereof.

Keywords: *Independent Directors, SEBI, Corporate Governance, Articles of association, Interest, Share Holders, Disclosure Power.*

1. INTRODUCTION

The different regulatory regimes concerning corporate governance in India, exist to streamline the corporate sector in the post-liberalization and globalization era. Besides other changes, creating independent directors under the current Companies Act seems to be a vital change in corporate governance. Beginning with a short background of how corporate governance is regulated and how it has developed in recent times, the article then specifically discusses the evolution of the requirement of independent directors. Following this, it discusses the various legal issues associated with independent directors, including their role, duties, and most importantly, their potential liabilities. It demonstrates how Indian laws have developed the role of independent directors over time and have reached broadly similar conclusions albeit following different routes.¹

2. CORPORATE GOVERNANCE IN INDIA

Until recently, corporate governance principles for Indian corporations were

¹ Batth, V., Nayak, B., & Sarangi, D. P. (2016). Role of independent directors in the changing business scenario in India. *International Journal of Scientific Research and Management*, 4(2), 3878-3882.

embodied within the Companies Act², the Article of Association of Companies (“AOA”), the listing agreement prescribed by stock exchanges and internal “good corporate governance policies” adopted by companies beyond their AoA³. After the passing of the Companies 2013 Act, stringent regulatory requirements have been introduced within Indian corporate law, aimed at ensuring an elevated level of corporate governance for Indian companies⁴.

The 2013 Act was passed on 8th August 2013 with the intent to completely reform Indian Corporate law, to ensure heightened transparency and increased accountability of corporations⁵. The Act has endeavoured to both modernize and simplify corporate law by deleting redundant provisions, regrouping related provisions, and modifying various provisions set out under the 1956 Act, to enable easy interpretation, de-link procedural aspects from substantive law and provide greater flexibility in rulemaking.⁶ The 2013 Act, once completely notified, will replace the 1956 Act, and shall prescribe the complete regulatory regime for Indian companies.⁷

One of the key attributes of the 2013 Act is that it has sought to introduce enhanced corporate governance standards for corporate India, particularly regarding independent directors, audits, corporate social responsibility, mandatory valuation, and class action suits⁸. It will be relevant to highlight and discuss the key provisions introduced⁹, under the most recent Indian Corporate law reforms, concerning independent directors.¹⁰

3. Independent Directors under Changing Scenario

The role of the ordinary directors, who had no pecuniary interest or relationship with a company’s promoters or its management, has been evolving and has

² Sarkar, J., Sarkar, S., & Sen, K. (2012). A corporate governance index for large, listed companies in India. *Pace University Accounting Research Paper*, (2012/08).

³ Chakrabarti, R., & Megginson, W. I. (2009). Corporate governance in India. In *Global Corporate Governance* (pp. 151-176). Columbia University Press.

⁴ Juman, B. M., & Irshad, M. K. (2015). An Overview of India Capital Markets. *Bonfring International Journal of Industrial Engineering and Management Science*, 5(2), 17.

⁵ Avtar Singh, *Company Law*, Eastern Book Company, 2016.

⁶ Thapar, M., & Sharma, A. (2017). Corporate governance in India: An analysis. *Economic and Social Development: Book of Proceedings*, 312.

⁷ Most of the provisions of the New Act are subject to subordinate legislation, wherein the Central Government has been empowered to prescribe necessary rules. The regulator, while notifying the various sections has also notified the corresponding rules which in turn have had a significant consequence on the interpretation and application of various provisions of the 2013 Act. This article discusses both the relevant sections along with the corresponding rules that have been notified.

⁸ The Act was brought into force in stages. From a total of 470 sections of the 2013 Act, 282 have already been notified and the remaining are expected to be brought into force shortly.

⁹ Choudhary, T. (2021). The Genesis and Development of Company Law in India. *Indian JL & Legal Rsch.*, 2, 1.

¹⁰ Varottil, U. (2016). The evolution of corporate law in post-colonial India: from transplant to Autochthony. *Am. U. Int’l L. Rev.*, 31, 253.

transformed over the last decade in India¹¹. It was always in the interest of better governance to a mechanism of impartiality and neutrality to safeguard the interest of the stakeholders¹².

The first movement for requiring the appointment of independent directors was initiated by the Securities & Exchange Board of India (“SEBI”), India’s capital markets regulator, under the listing agreement prescribed under the provision of the Securities Contract (Regulation) Rules, 1957 read with the SEBI Act, 1992 (“Listing Agreement”)¹³. Companies proposing to list their securities on a stock exchange in India are required to execute this agreement with such exchange and are therefore bound to comply with the provisions contained therein, which include a detailed section on corporate governance¹⁴. Clause 49 of the Listing Agreement formally introduced and continues to regulate the concept of independent directors and prescribes, inter alia, the need for the appointment of independent directors along with the qualifications for such appointment and their role in listed companies.¹⁵ While the Listing Agreement introduced the requirement for the appointment of independent directors, its scope and applicability are limited to only those companies that have their securities listed on stock exchanges in India¹⁶, and unlisted companies were therefore not required by law to comply with this requirement.

While the Parliamentary Standing Committee on Finance (the “Standing Committee”) was examining, the draft of the new Companies Act (now, the 2013 Act) which was then proposed to be introduced in the Houses of Parliament to replace the 1956 Act¹⁷, the Ministry of Corporate Affairs, to establish better corporate governance standards for corporate India, proposed to evolve a code of conduct for the functioning of companies (both listed and unlisted), and promulgated, in the year 2009, the Corporate Governance Voluntary Guidelines¹⁸.

While these Guidelines are voluntary, companies that have adopted them are “expected” to convey the reasons to their shareholders about the reasons for

¹¹ 7 Pearce II, J.A, and Zahra S.A. (1991), The relative power of CEOs and Boards of directors, Associations with Corporate Performance Strategic Management Journal 12

¹² Samal, D., & Yadav, I. S. (2023). Agency conflicts, corporate governance, and capital structure decisions of Indian companies: evidence from new governance laws. *Journal of Advances in Management Research*.

¹³ www.uslaw.com/law_blogs/?item=34204.

¹⁴ www.vccircle.com/500/news/the-legalimplications-rajus-confessionN

¹⁵ Effective Corporate Governance—A need of today, by Dr S.K.S. Yadav, College and 5. Priyanka Saroha, Readers Shelf, Vol 2, Issue no.3, December 2005.

¹⁶ “Corporate Governance—Global Concepts and Practices”, by Dr. S. Singh, First Edition, 2005, p.185, New Delhi, India.

¹⁷ Corporate Governance—Critical Issues, by C.V. Baxi, First Edition: New Delhi, 2007, Excel Books, p.119-20.

¹⁸ Forbes, D. & Milliken, F. (1999). Cognition and corporate governance: Understanding boards of directors as strategic decision-making groups. *Academy of Management Review*, 24, 489-505.

doing so. At the time when the Standing Committee was examining the proposed new law, a major corporate misconduct came to light concerning Satyam Computers Limited (a leading IT company with shares listed on stock exchanges in both India along the New York Stock Exchange), when the role of the independent directors in approving a proposed acquisition of promoters held companies (Maytas Properties Limited and Maytas Infra Limited) was sharply criticized and then reversed.¹⁹ This eventually led to the discovery of fiscal mismanagement of Satyam Computers Limited which encouraged the government to swing into action and appoint an administrator board whose role was to report to the Company Law Board to control the affairs of the listed company and its ultimate disposal and change in management.²⁰ The role of auditors also came into sharp focus as there appeared to be laxity in the audit function.²¹

It was whilst reviewing this corporate scandal that the Standing Committee perhaps felt it necessary to strengthen the institution of independent directors (along with the role of auditors), and thus the Companies Bill of 2012 (which ultimately resulted in the 2013 Act), reflects these major shifts in the definition, role, and duties of independent and other directors.²²

The position of independent directors is now poised to become the cornerstone of the entire doctrine of corporate governance in India, as independent directors have now been entrusted with the role of a watchdog for stakeholders (in addition to the statutory and internal auditors of the company)²³.

3.1. Statutory Requirement for Appointment

SEBI requires listed companies to have independent directors occupy at least one-third of their boards.²⁴ With the passing of the 2013 Act, this requirement no longer remains limited to listed companies and has been extended to notified classes of unlisted companies as well. By the 2013 Act, public companies (both listed and unlisted) with paid-up share capital over INR 100 million, or turnover over INR 1 billion, or with aggregate outstanding loans, debentures, and deposits exceeding INR 500 million are required to appoint at least 2 independent directors.

3.2. Eligibility Criteria for Independent Directors

Before the enactment of the 2013 Act, the requirement for the appointment

¹⁹ For further information, see, for example, Manpreet Kaur, "Corporate Governance in India: a case study of Satyam" (November 2013) 2(11) Paripex – Indian Journal of Research 29.

²⁰ Indian Corporate Governance and Board Structure, by Hitesh J Shukla, The Accounting World, July 2005, p.13, Emerging Issues.

²¹ The Indian arm of PwC was fined \$6 million by the SEC (US Securities and Exchange Commission) for not following the code of conduct and auditing standards in the performance of its duties related to the auditing of the accounts of Satyam Computer Services.

²² Gupta, K. (2022). Role of Independent Director in Corporate Governance. *Issue 2 Indian JL & Legal Rsch.*, 4, 1.

²³ Tanushree Jaiswal, (2023) Satyam Scam, Indian Stock Market, 28 June 2023, available at: <https://www.5paisa.com/author/tanashree-jaiswal>

of independent directors was only prescribed under the listing Agreement, clause 49 which set out the sole definition for this board position. With the notification of section 149 of the 2013 Act, the definition prescribed therein has also come into force. The 2013 Act has not only defined independent directors, but it has also broadened the definition that was prescribed under the Listing Agreement. SEBI too has amended Clause 49 to introduce, inter alia, a revised definition of independent directors to reconcile the 2 definitions.²⁵

One of the key variations prescribed under the 2013 Act is that directors nominated by a financial institution or the Government, or any other person, to represent its interests, are disqualified from being treated as “independent”. The listing Agreement previously deemed nominee directors appointed by institutions to be independent directors. As expected, this dispensation has now been done away with, and such nominee directors are no longer eligible to be categorized as independent directors.

3.3. Selection Process

The appointment of independent directors is required to be approved by the company in a general meeting and a justification for choosing the appointee as an independent director is required to be given in the explanatory statement to the shareholders attached to the notice calling for the meeting²⁶.

The Nominations and Remuneration Committee, which the company is required to constitute by the 2013 Act, also has a role in the selection and appointment process²⁷. This committee (with independent directors constituting at least half the members) is required to formulate the criteria for determining qualifications, positive attributes, and independence of a director and recommend to the board a policy relating to the remuneration of directors, key management personnel, and other employees²⁸.

Furthermore, the 2013 Act prescribes the maintenance of a databank of persons eligible and willing to act as independent directors, from which companies may select their independent directors. The databank is proposed to contain names, addresses, and qualifications of such persons and is expected to be

²⁴ One-half in cases where the regular non-executive chairman of the company is a promoter or is related to any promoter or person occupying management positions at the board level or one level below the board.

²⁵ The compliance with clause 49 of the Listing Agreement is not mandatory, for the time being, in respect in respect of the following class of companies (i) companies having paid up equity share capital not exceeding INR 100 million and net worth not exceeding INR 250 MILLION (as on the last day of the previous financial year); (ii) companies whose equity share capital is listed exclusively on the “Small & Medium Enterprises (SME) and Small & Medium Enterprises Institutional Trading Platforms (SME-ITP)”.

²⁶ The Companies Act, 2013.

²⁷ Annual Reports of Listed Companies provided in the NSE / BSE Portals, and the companies respective websites.

²⁸ The Rise of Independent Directors in the United States, 1950-2005: of Shareholder Value and Stock Market Prices. Working Paper N° 74/2006 January 2008 Jeffrey N. Gordon.

created as and when such associations are identified or empowered by the Central Government and have expertise in the creation and maintenance of such a databank along with a website for this purpose²⁹.

3.4. **Term**

The appointment of independent directors is now a term office, and an independent director can be appointed for five consecutive years and such a director or position would not be taken into consideration whilst determining the one-third rotationally retiring directors for board re-composition on a rotational basis³⁰. An independent director cannot enjoy the office of an independent director for more than two consecutive terms and may be reappointed on the board after a minimum three-year cooling period.

3.5. **Remuneration**

To maintain the independent status, no independent director can be offered any stock options. Having said this, an independent director can receive remuneration by way of sitting fees, reimbursement of expenses, and fees for other purposes that the company requires him or her to conduct, in addition to profit-related commission³¹. The provision allowing such payments also prescribes the Government with the right to place a cap on the amount of such fees that may be paid. While under the rules published by the Government, a cap of INR 100,000 has been placed *vis-a-vis* sitting fees, the fees payable for other purposes and services provided by the independent directors remain uncapped. The cap on the profit-related commission for all independent directors continues to be 1% of the net profits of the company.

3.6. **Role and Duties**

Peter Loose, in the book “The Company Directors: Powers, Duties and Liabilities”, described ordinary directors as “flower vase directors”, indicating their ornamental purpose on the board³². The 1956 Act set out the procedural requirements for directors, it remained silent as regards the quantitative from the board. The 2013 Act has not only introduced the concept and the requirement of appointment of independent directors but has also included detailed requirements *vis-a-vis* their role and function. In addition, the 2013 Act has specifically bestowed responsibilities, both subjective and objective, on independent directors with a clear mandate for the protection of the stakeholder interests.

The 2013 Act sets out the duties of directors and it reiterates the general principle that a director is required to act by the articles of the company.³³ In addition,

²⁹Gupta, Pooja, A Study of Impact of Corporate Governance Practices on Firm Performance in Indian, Japanese and South Korean Companies (April 17, 2012).

³⁰ OECD (2017), OECD Corporate Governance Factbook 2017.

³¹ SSRN: <https://ssrn.com/abstract=2219848> or <http://dx.doi.org/10.2139/ssrn.2219848>.

³² MCA websites.

³³ Companies Act, 2013, section 166.

section 166 of the 2013 Act also enunciates four additional duties (not originally contained in the 1956 Act) which are universal duties applicable to all directors³⁴; namely:

- (i) A director is required to act in good faith to promote the objects of the company for the benefit of its members as a whole and in the best interest of the company, its employees, the shareholders, the community, and for the protection of the environment.
- (ii) A director is required to exercise his duties with due and reasonable care, skill, and diligence and shall exercise independent judgment.
- (iii) A director is not to be involved in situations in which he/she may have a direct or indirect conflict of interest that conflicts with the interest of the company³⁵.
- (iv) A director is not to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates, and if such director is found guilty of making any such undue gain, he is liable to pay an amount equal to that gain to the company.³⁶

Section 166 of the 2013 Act also states that a director's office is not assignable and that the contravention of any of the provisions contained therein is punishable with a fine which shall not be less than INR 100,000 but which may extend to INR 500,000.

4. A Corporate Social Responsibility Committee

A significant new concept introduced under the 2013 Act is the requirement of the setting up A Corporate Social Responsibility Committee, under section 135 of the 2013 Act. Every company having a net worth of INR 5 billion or more or turnover of INR 10 billion or more or a net profit of INR 50 million during a fiscal year is required to constitute a corporate social responsibility committee constituted of not less than three directors, of which at least one director must be independent³⁷. The duties and functions of the corporate social responsibility committee have been enunciated in section 135(3) and the performance of the company's corporate social responsibility duty must be modelled like any project undertaken by the company.

In the initial years of the 2013 Act, though it is expected that companies spend 2% of the average net profits of the company made during the three immediately

³⁴ FINANCIAL REPORTING COUNCIL, COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, REPORT, 1992, available at <http://www.ecgi.org/codes/documents/cadbury.pdf> [hereinafter Cadbury Report].

³⁵ Secondary Market Department. Securities and Exchange Board of India. Circular No. SMDRP/POLICY/CIR-10/2000 (Feb. 21, 2000). available at <http://www.sebi.gov.in/circulars/2000/CIRI02000.html>.

³⁶ For the full version of the 2013 Act (setting out the code for Independent Directors) , see <<http://mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>>.

³⁷ See Bernard Black & Reinier Kraakman, A Self-Enforcing Model of Corporate Law, 109 HARV. L. REV. 1912 (1996); Bernard S. Black, The Legal and Institutional Preconditions for Strong Securities Markets 48 UCLA L. REV. 781 (2001).

preceding years in pursuance of corporate social responsibility activities, it is not presently mandatory to make a spend as companies must come to terms with what is most appropriate for corporate social responsibility in the vicinity of their work premises or factories. However, failure to spend this amount on CSR activities requires a mandatory report being made by the board to the shareholders specifying the reasons for not spending the money³⁸. As per corresponding rules issued by the Ministry of Corporate Affairs, the board of a company may decide to undertake its CSR activities through a registered trust, a registered society, or a not-for-profit company established by the company or its holdings or subsidiary or associate company or otherwise.

Both the subjective and objective responsibilities have been bestowed upon the independent directors under the 2013 Act and it remains to be seen how the regulator seeks to ensure compliance with such requirements³⁹.

5. Liability

The previous legal position on the liability of non-executable directors was enunciated in the decision of the Bombay High Court in the case of *Mr. Homi Phiroz Ranina v. The State of Maharashtra*,⁴⁰ wherein the court, inter alia, held that “.....it would be a travesty of justice to prosecute them (non-executive directors) and ask them to prove that the offense is committed without their knowledge”.

This position stands overruled under the 2013 Act wherein under section 149(12) an independent director and a non-executive director not being promoter or key managerial personnel is liable in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through board processes and with his consent or connivance or where he had not acted diligently. This therefore places the burden of diligence on even ordinary directors who are independent.

6. CONCLUSION

Considering these huge shifts in the law, there has been a sea change in the way companies regulate their affairs through the mechanism of the board of directors. The 2013 Act has made a significant advance of the law and has sought to raise the duties and functions of independent directors to the same gold standard as is prevailing in European and British companies currently.

³⁸ Indian Companies Act, §§ 397-98, provides remedies to minority shareholders when affairs of the company are conducted in a manner prejudicial to the interests of the company, the shareholders or public interest, or if it is oppressive to the shareholders. The Indian Companies Act, No. I of 1956; India Code (1993). This is known as the remedy of “oppression and mismanagement.” Apart from a rich body of precedents having been established in this area of law, there is also a special tribunal in the form of the Company Law Board to deal with cases on this count. *Armour & Lele*, supra note 37 at 3 1.

³⁹ There are indeed several listed companies that are government-owned, where either the central government or a state government owns the (often substantial) majority interest in the company. Such companies are also referred to as Public Sector Undertakings (“PSU”).

⁴⁰ [2003] Comp Cas 218 (Bom).

The aim and object of enhancing the standards of corporate governance and introducing the rules, functions, duties, and responsibilities of independent directors is to facilitate clean governance and encourage higher investments in the Indian economy. The transformation of corporate India as a torch bearer of governance standards across Asia is a leap of faith and will require careful encouragement and monitoring so that it fructifies and does not fall into the swamp of contrived devices to avoid the law.

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Resilience of Legal Profession Against Pandemics Like COVID-19 In India: A Study of its Impact on *Junior Advocates In Jammu and Kashmir*

ABSTRACT

Law is universally described as a great profession par excellence. Its greatness lies not in the wealth it brings or the prospects of high political offices that it affords to its members but in its code of professional ethics. It may, however, be asked what a Lawyer gains by scrupulous observances of the etiquette of his vocation will. The value of conformity to ethical standards is not judged only in terms of money. There are also other considerations no less important. But in contemporary times the profession of law has been subjected to a serious setback due to the outbreak of the Covid-19 pandemic despite the judicial response to it. The primary goal of this response has been to ensure the continuity of essential judicial services while safeguarding the health and safety of those responsible for providing those services and other stakeholders such as lawyers and litigants. The sudden and unexpected onslaught of the Covid-19 or Coronavirus has thrown the world into turmoil. It has caused lockdowns in numerous nations around the world and has disrupted all facets of life for an uncertain period. The Indian legal landscape has also been disturbed and severely impacted by this pandemic. With the social distancing obligations and the nation under lockdown orders, law firms in India and the Indian judicial system have had to close their doors to the general public. Nevertheless, considering that a complete shutdown of the Indian justice system is unfavorable, the law firms have implemented work-from-home policies, whereas the judicial administrators have embraced technology by conducting hearings through video conferencing. The impact of Corona pandemic has been unprecedented and unimaginable, and on many counts, it has been the biggest human tragedy in recent history. Everyone is affected. The advocates are not an exemption to the Corona phenomenon. It created a vacuum among many advocates, especially the young. Several of them found it difficult to articulate and share their helplessness and susceptibility. This article concentrates on the regulatory framework governing the profession of Law in India and the resilience of the legal profession against pandemics like COVID-19 and its attendant impact

on legal regulations in India with special reference to the junior legal fraternity in J&K.

Key Words: *Bar Council of India, Covid-19, Ethics, Legal Education, Lawyer, Regulation.*

1. Introduction

Everything in the contemporary world is dynamic, whether it be the advancement in technology or the social condition, all the factors are constantly changing and evolving for good. It is, therefore, impossible that the way people work remains the same. Every profession in the world is diversifying and new professions are cropping up. Today new opportunities are opening up for youngsters. The Legal Profession is one of these professions which is the oldest profession known to mankind¹.

The Legal Profession, which has evolved into a more professional and advanced field, has played an important role in India and around the world. Historically, the Legal Profession has been acclaimed and has eventually emerged as the mechanism to build fairness and impartiality in the system of administration of justice². While the Legal Profession may have been articulated with innate characteristics and influences of respective societies these have been developed in, it is believed with no skepticism that the Legal Profession of each society follows some universally adhered principles³. These principles are regarded as “commandments” for Legal Professionals in all societies, irrespective of their cultural diversity and differences in standards regarding socio-economic development. The violation of any such universally adhered principle renders the work of a Lawyer unethical and thus unacceptable. The major role of professionalism is related to defending rights and protecting the liberty of persons, thereby preserving peace and order in society⁴.

In the 19th century, Lawyers in the UK and USA were treated as icons or role models of the emerging democratic societies. Lawyers exploiting their positive and elitist image had been able to register their strong presence in politics and state affairs. The Western model of the Legal Profession entered South Asia with Colonial rule. With it came the system of Legal education.⁵

2. An Overview of Legal Education in India

In India, Legal Education began as an ancillary to the English Legal System

¹ Liu, S. (2013). The legal profession as a social process: A theory on lawyers and globalization. *Law & Social Inquiry*, 38(3), 670-693.

² Baker, J. H. (2023). The English legal profession, 1450–1550. In *Lawyers in Early Modern Europe and America* (pp. 16-41). Routledge.

³ Yubaraj Sangroula, “Legal Ethics: A Critical Analysis of the Understanding of Legal Education and Professionalism in Developing Countries with Special Reference to South Asian Scenario”. Available at: <https://researchgate.net/>

⁴ Varkey, B. (2021). Principles of clinical ethics and their application to practice. *Medical Principles and Practice*, 30(1), 17-28.

⁵ Dezalay, Y., & Garth, B. G. (2019). *Asian legal revivals: Lawyers in the shadow of empire*. University of Chicago Press.

introduced by the British Government⁶. Formal Legal Education was introduced through universities in the year 1857⁷

For almost a century from 1857 to 1957 a stereotyped system of teaching compulsory subjects under a straight lecture method and the two-year course continued. The need for upgrading legal education has been felt for long.

There was a lack of standards and qualifications to get admission to Law courses run by universities, generally, those with a command of the English language got admission and studied Law. Thus, the primary aim and object of Legal education at that time was to bring about the lower armature of professional lawyers who were acquainted with the English Law and English language. The minimum qualification required was anyone who knew English well could study Law and be qualified to study Law. After the independence of India, there has been a mushroom growth of law colleges throughout the country without any quality Legal education.⁸

The Radhakrishnan Commission on University Education⁹ in its report lamented that “Our colleges of Law do not hold a place of high esteem either at home or abroad nor has Law become an area of profound scholarship and enlightened research.” The Law Commission of India stated:

...the main purpose of University Legal education seems hitherto to have been not the teaching of Law as a science or as a branch of Learning, but merely imparting to students a knowledge of certain principles and provisions of Law to enable them to enter the Legal profession...¹⁰

Thereafter, committees were constituted to assess the standards of Legal Education. Based on the recommendations, reforms in Legal education were also enacted and the Bar Council of India was constituted as a regulatory body to maintain the standards of legal education as well as to regulate the Bar.¹¹

3. Regulation of Legal Profession in India

Felix Frankfurter has observed rightly that the law is what the lawyers are, and

⁶ J.K. Bhavnani, “Legal Education in India”, *Journal of Indian Law Institute* 167(1962).

⁷ For almost a century from 1857 to 1957 a stereotyped system of teaching compulsory subjects under a straight lecture method and the two-year course continued. The need for upgrading legal education has been felt for long. Numerous committees were set up periodically to consider and propose reforms in legal education. The University Education Commission was set up in 1948-49, and in the year 1949 Bombay Legal Education was set up to promote Legal Education. The All-India Bar Committee made certain recommendations in 1951. In 1954, the XIV Report of the Law Commission (Setalvad Commission) of India discussed the status of Legal Education and recognized the need for reforms in the system of Legal education. It was only in 1958 that many Universities switched over to three-year Law degree courses.

⁸ Speech by N. N. Ghatate, “Seminar on Legal Education at Crossroads: Problems and Perspectives” *Indian Bar Review* 14 (1998).

⁹ University Education Commission 1948-49.

¹⁰ The 14th Law Commission of India Report on Reform of Judicial Administration (1958).

¹¹ Susmitha P. Mallaya, “Contouring Legal Education in India: An analysis of challenges posed by Covid-19, *ILI Law Review*, Special Issue 147 (2020).

the law and the lawyers are what the law schools make them.¹² The Law is not a homeless, wandering ghost. It is a phase of human life located in time and space.¹³ The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one. There must be rules. This may be stated as the requirement of generality. In recent history perhaps the notable failure to achieve general rules have been that of certain of our regulatory agencies, particularly those charged with allocative functions¹⁴.

The Bar Council of India has a special apportionment of regulation of the Legal profession. It is a statutory body created by the Advocates Act, 1961(25 of 1961) which places a special emphasis on adherence to ethical standards by Advocates. For this, the Bar Council of India has enacted the Rules under Chapter II, Part VI of The Bar Council of India Rules, 1975. These Rules are framed under Section 49(1) (c) of the Advocates Act, 1961(25 of 1961). The preamble to these Rules provides:

An Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligation, an Advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides, yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned¹⁵.

Section I to Section IV of the aforementioned Part contains the duties of Advocates towards the court, the client, the opponent, and the colleagues. BCI amends these Rules from time to time to improve standards of professional conduct and etiquette for Advocates. These ethical standards of the Legal profession have a crucial role to play in upholding and keeping intact the tradition of the hoary past, associated with this profession. An Advocate's duty is as important as that of a Judge. The Bar Council embraces within itself the function of upholding the Rule of Law. India ranks 68th out of 126 countries in 2020 in the "Rule of Law Index."¹⁶

Sevastik, P. (2023). Rule of Law and Human Rights: at the National and

¹² Available at: <https://theguardian.com/legal-education-in-india-will-covid-19-act-as-a-catalyst-for-reforms/>, Retrieved on 3rd December 2021.

¹³ Morris Raphael Cohen, "Reason and Law, The Free Press, Glencoe, Illinois, p.4 ¹⁰Lon L. Fuller (Revised Edition), The Morality of Law, Yale University Press, 46(1995) ¹¹ Economic Survey 2020-2021, Vol.1, p.194 (World Justice Project, 2020).

¹⁴ Bar Council of India Rules, 1975, Chapter II, Part VI.

¹⁵ Abel, R. L. (2017). Lawyer self-regulation and the public interest: a reflection. *Legal Ethics*, 20(1), 115-124.

¹⁶ Sevastik, P. (2023). Rule of Law and Human Rights: at the National and International Levels. *Max Planck Yearbook of United Nations Law Online*, 26(1), 631-683.

International Levels.

This index measures how the Rule of Law is experienced and perceived by the general public. The Indian Legal profession has a direct bearing on the subsistence of the Rule of Law. As a result of this, regulation of the profession is of utmost necessity¹⁷.

4. Concerns about Trends in the Legal Profession

Today, concerns about the increasing trend of the Legal profession being transformed into a business are

mounting. The emergence of corporate Law firms is phenomenal all across the world. Corporate law firms take law practice as a business and opine that anything acceptable in the business is acceptable in the Law practice too. This trend is making the Legal Profession most lucrative in terms of earning and it in turn makes legal education most expensive as joining Law schools is considered an investment in the business career itself¹⁸.

The decline in “professional courtesy”, the lack of commitment to one’s professional duties, and the way “Lawyers” manipulate the legal system without any concern for right and wrong is also a serious concern facing the legal profession. The human side of the profession is worse affected by the growth of business notions. It means that the virtue aspect of the profession has become vulnerable. The mounting trend that the practice of law is a business and thus all those practices accepted by the fair business is seemingly destroying the traditionally associated notions of benevolence and human side duty of the profession¹⁹.

As already stated, there are domestic regulations as framed by the Bar Council of India to uphold the virtues of the Legal Profession but these domestic regulations have to adhere to changes in International Legal Regulations, such as the canons of conduct by the American Bar Association and Resolutions of the General Council of Bar in England and Wales which form the basis of Rules framed by the Bar Council of India for governing the standards and ethics of the Legal Profession in India²⁰.

5. International Developments Affecting Domestic Regulations

Another concern is the international developments that affect the domestic regulators of the legal profession like the Bar Council of India and Bar Association. These developments at the international level also have contributed

¹⁷ Basalalli, A. (2021). International Rule of Law and Domestic Courts: A Few Concerns. *CMR Univ. J. Contemp. Legal Aff.*, 3, 122.

¹⁸ Varottil, U. (2018). 14. The stakeholder approach to corporate law: a historical perspective from India. *Research Handbook on the History of Corporate and Company Law*, 253(325), 381.

¹⁹ Singh, S. (2022). Legal Transplant to Decolonization in the Evolution of India’s Corporate Legislation. *Indon. JLS*, 3, 49.

²⁰ Flood, J. (2012). Professionals organizing professionals: Comparing the logic of the United States and United Kingdom law practice. In *Restructuring the professional organization* (pp. 154-182). Routledge.

to and likely will sustain, the use of comparative and global legal ethics perspectives²¹.

Similar to academics and practicing Lawyers, regulators, and Bar Associations have been affected by regulatory developments such as the EU Directives, Trade Agreements (including GATS and NAFTA), money laundering initiatives, and interest in Lawyer regulation by anti-trust authorities. Domestic regulators and Bar Associations, like practicing Lawyers and academics, now operate in a world in which these international developments may affect their own domestic rules regarding Lawyers. And even if these developments do not directly displace their regulation of Lawyers, they increasingly face situations in which rules from a foreign jurisdiction are cited in policy debates about their own rules²².

An additional factor contributing to the greater sensitivity on the part of regulators and Bar Associations is their increasing awareness that Lawyers and Law firms are subject to multiple sets of ethics rules, which are likely to have spillover effects on a jurisdiction's own rules. Regulators are aware that the spillover may occur in a de-facto fashion, in which lawyers, subject to multiple rules, use the other jurisdiction's rule²³.

6. Concern of setback to Legal Profession due to COVID-19

The eminent jurist V.R. Krishna Iyer remarked, "A study of the law becomes imperative if societies with their members, high and low, are to be civilized, stable, and humanist. The profound significance of jurisprudence, which is but the science of law, finds its foundation in the excellence of legal education"²⁴. This statement becomes imperative today when we revisit the contouring of legal education when the nation unexpectedly is facing the pandemic which brought all the sectors to a standstill including the legal education and legal sector. After the virus surge, the Central Government announced a nationwide lockdown at very short notice without adequate plans for implementation, adversely affecting the livelihood of junior advocates. Noting the seriousness of Covid-19, Lockdown was ordered in India under the provisions of the Epidemics Diseases Act, of 1897 and the Disaster Management Act, of 2005. Of course, the privileged class of society and institutions within a few days of national lockdown suddenly responded to the calamity positively by organizing and circulating links to "webinars" being hosted on various legal topics, various workshops on legal education, national and international seminars through

²¹ Laurel Terry, U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives, 4 *Wash.U. Global Studies Law Review* 463,528 (2005).

²² Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 *Harv. L. Rev.*, 702 (1977).

²³ Ted Schneyer, From Self-Regulation to Bar Corporatism: What the S & L Crisis Means for the Regulation of Lawyers, 35 *S. Tex.L.Rev.*,639 (1994).

²⁴ G. Mohan Gopal (ed), Professor N.R. Madhava Menon's Reflections on Legal and Judicial Education (Universal Law Publishing Co. Pvt. Ltd. 2009).

webinars, not even the online internship programmes were offered by legal firms. The practicing lawyers, especially in the lower courts started facing problems in dealing with the emergent lockdown, this forced the judiciary to introspect its technical infrastructure and recommend the scheme of digitization of courts which largely remained on paper. On the other side, it is also felt that there is a need for law teachers and legal professionals to make an introspection of the existing legal education in our country.²⁵

7. COVID-19: A Great Disparity in the Legal Profession

Over the period various diseases came and shook the world. It is also a human fact that every hundred years the world suffered a pandemic. The COVID-19 pandemic is an unprecedented situation whose impact continues to grow each day. The COVID-19 global pandemic has forced the Indian judiciary to adopt digital processes at an unprecedented speed and scale. With a countrywide first lockdown being imposed in March 2020 and the enforcing of physical distancing courts across India started using video conferencing to hear cases. The COVID-19 pandemic has had a profound impact on work at all levels, and the legal profession is no exception. The near-universal transition to remote work was unprecedented. It created daunting technological and logistical challenges for legal employers. Lawyers, staff, and employers devised new ways to keep teams connected, engaged, and productive. Covid-19 has affected the Indian Legal System like never before. It has cast a harsh light on the outdated way justice is dispensed, law is taught, and legal services are delivered²⁶.

Coronavirus has harnessed the potential of under-utilized tools and alternative work models long resisted by the Indian legal fraternity.²⁷ Traditional ways of working have been altered and accepted at an astounding speed and with ease. The impact of the pandemic has been majorly seen in the Indian courtrooms. To adhere to social distancing norms and to curb the spread of the second wave of this infectious virus, the Indian Courts have again resorted to Virtual courtrooms to ensure that the administration of justice remains uninterrupted²⁸. It must be noted that the concept of Virtual Courts is not novel in India. In 2003, the Supreme Court of India in *State of Maharashtra v. Prafulla Desai*²⁹ held that recording of evidence by a Court through video conferencing shall be considered to be “as per the procedure established by law”.³⁰ Since then, several subordinate Courts in India have already framed guidelines in this respect and have held judicial proceedings through video conferencing.

The nationwide lockdown has brought to the fore the great disparity in the

²⁵ Susmitha P. Mallaya, Contouring Legal Education in India: An Analysis of Challenges Posed by COVID-19, ILI Law Review, Special Issue 2020.

²⁶ Mark A. Cohen, 'Covid-19 and the Reformation of Legal Culture' (Forbes, 14 April, 2020).

²⁷ Ibid

²⁸ In Re: Guidelines for Court Functioning through Video Conferencing during COVID-19 Pandemic, 2020 SCC Online SC 355

²⁹ (2003) 4 SCC 601

³⁰ Ibid

Legal profession and lockdown has serious financial implications for lawyers. Lawyers in India are one of the most neglected and overlooked lot during COVID-19 in comparison to other professionals. 70% of Lawyers are almost daily wage workers who earn on a case-to-case basis per appearance hearing. Covid-19 has impacted deeply and triggered many social, mental, and psychological issues as well³¹

Among Lawyers, there exists a stark contrast between the paltry remuneration of the juniors with no steady flow of income and the huge amount of professional fees charged by well-established senior counsel. The earnings of a lawyer wholly and solely depend on their practice in a court of law but due to the virtual mode of hearing in courts the virtual appearance is confined only to a particular class of lawyers. However, this section of rich lawyers is a small fraction and the majority of Lawyers, especially in the lower courts function on a case-to-case basis, and when the courts do not function, their economic condition, becomes precarious. The Covid-19 pandemic has opened a Pandora's Box for Legal professionals concerned with earning their livelihood³².

8. Minimum Subsistence Allowance for Advocates during COVID-19 Pandemic

Many State Bar Councils came up with circulars for Conditional Financial Assistance to Advocates³³. The Bar Council of India appealed to the Prime Minister of India to provide Rs.20000 as a minimum subsistence allowance per month to lawyers who are not financially well off so that they can support their families following the lockdown due to the COVID-19 pandemic. In a letter to the Prime Minister and the Chief Ministers of all the States, the BCI Chairman requested them to make a provision for providing the allowance from the Centre and State Government funds, either directly or through the Advocate Welfare Fund of the State Bar Councils. The Apex Bar body said in the above-mentioned letter that all professions except those providing essential services have virtually gone into lockdown mode as the only way to stop further outbreak and spread of the virus. The letter said that Lawyers have no social security and only a handful of 10% can be stated to be in a position to survive and subsist without any earnings during this time of crisis when "the work and earning opportunities have ceased."

9. Financial Assistance in favour of Advocates in Jammu and Kashmir

On 29th June 2021, in the case of *M. Abubakar Pandit v. Union Territory of JK*

³¹ Raj Kumar, C., & Sreejith, S. G. (2022). Recording the new Renaissance: Legal Education and legal profession during and after COVID-19. In *Legal Education and Legal Profession During and After COVID-19* (pp. 3-24). Singapore: Springer Nature Singapore.

³² Suarez, C. A. (2020). Disruptive legal technology, COVID-19, and resilience in the profession. *SCL Rev.*, 72, 393.

³³ *The Hindu*, Subsistence Allowance for Junior Advocates Sought by V. Raghavendra, 30 March 2020.

& Ors.³⁴, the Jammu and Kashmir High Court took notice of the adverse effects on the legal profession due to restriction in the functioning of the courts. In this regard, the Lieutenant Governor of Jammu and Kashmir has announced financial assistance of Rs. 1 crore in favour of advocates who work in different courts of Jammu and Kashmir. The amount was kept at the disposal of the High Court of Jammu & Kashmir and Ladakh. An amount of Rs.3000 was given to each eligible Lawyer in the Union Territory of Jammu and Kashmir from the government. The development came because of the prolonged closure of the Courts due to the Covid-19 lockdown. The J&K Bar Association also collected contributions from various senior Lawyers and the amount was paid to some Lawyers.³⁵ Can this practice of assistance to deserving advocates continue is seriously doubtful as the courts have opened but the litigation has fallen quite considerably.

10. Conclusion

A robust system of legal education is a prerequisite for the “noble” legal profession. It would be worth to end by quoting the Law Commission of India that “Legal Education in India should be structured in a manner where the BCI, along with legal academics may endeavor to innovate, experiment, and compete globally. A balance should be maintained to change the entire fabric of the legal education system in India, keeping in mind the necessity of globalization.” Sometimes, odd problems pose greater challenges before the Regulatory body like BCI which have a great bearing on the ethics of the Legal profession. Presently it seems employment opportunities are as bleak as they can get. No office is ready to take on recruits because most are already downsizing. Some magnanimous offices do offer an opportunity, but it is in the form of an unpaid internship rather than actual employment. This is because there has been no mobility in the legal market. However, in the post-COVID-19 scenario although normalcy is returning the indelible impact it had seems to remain there. This experience has in default led to newer ways to approach the portals of justice through the now frequent use of live streaming and e-courts but the problems for junior advocates remain there.

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³⁴ *M. Abubakar Pandit v. Union Territory of JK & Ors.*, WP(C) No. 941/2021 CM No. 3018/2021 Dated. 26.06.2021.

³⁵ *Outlook*, 16 May 2020, <https://www.outlookindia.com/website/story/india-news-lawyers-in-jk-to-get-rs-3000-covid-19-assistance-from-govt/352938>, Accessed on 03.12.2021.

DOCTRINE OF LEGITIMATE EXPECTATION: *IT'S SCOPE AND SPHERE*

ABSTRACT

The “doctrine of legitimate expectation” is a public law doctrine that has immensely influenced the administration of justice and administrative processes. Its origin, scope, and sphere of influence have been slowly but steadily growing. Through this write up the author would like to throw light on how this doctrine of the fundamental principle of public law envisages a grant of relief to a person when he is not able to justify his claim based on law although he may have suffered a civil consequence. It is based on the *audi alteram partem* principle of natural justice. In a way, it acts as a check on administrative power and facilitates fair behavior on the part of the authorities in the exercise of administrative power. This article examines the spirit of this doctrine being manifestly applied in the public interest and therefore assumes importance in public law.

Keywords: *legitimate expectation, administrative power, Administration, judicial review*

1. INTRODUCTION:

The doctrine of legitimate expectation being a public law doctrine arises because of a representation, promise, practice, or policy that is announced or adopted by a public authority or government. This doctrine extends the benefit to an individual that he has received and expects its continuity. As a doctrine, it takes its place beside such principles as rules of natural justice, rule of law, reasonableness, fairness, non-arbitrariness, promissory estoppel, fiduciary duty, and proportionality to check the abuse of exercise of administrative power.¹ Therefore when a public authority induces a person to rely upon its representations or conduct it is under facie duty to act in such a way that the reliance will not be detrimental to the representee.¹ The authority must honour the expectations created by such representation or, at least, compensate the person affected for his resultant loss. The expectation so created is called

¹ Brown, A. (2017). A theory of legitimate expectations. *Journal of Political Philosophy*, 25(4), 435-460.

“Legitimate expectation”².

2. Origin Of “Legitimate Expectation

The doctrine of legitimate expectation is a concept fashioned by the courts for judicial review of administrative action³. The doctrine of legitimate expectation was first developed in English Law with the object of protecting procedural or substantive interest created by public authority by a promise or a representation.⁴ A recollection of recorded events would show that “legitimate expectation”, owes its origin to the judicial pronouncement, handed down by Lord Denning in 1969, and from that time it has received a significant position in all jurisdictions. In *Schmidt v. Secretary of State for Home Affairs*⁵, wherein a student had sought an extension for his stay in the U.K. but was denied, he was faced with a warrant for his exit from the U.K. which evoked the attention of Lord Denning. Dealing with the adverse administrative action, the student was subjected to; Lord Denning held that the student expected his continuation legitimately unless permission granted to him to stay in the U.K. by the public authority, was withdrawn after hearing him. Precisely that is the “*legitimate expectation*”. In the words of Lord Denning MR:

Some of the judgments in [prior] cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge v. Baldwin*⁶ show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity to make representations. It all depends on whether he has some **right or interest, or, I would add, some legitimate expectation**, of which it would not be fair to deprive him without hearing what he has to say.⁷

Reverting to the case, admitted fact was that request of the student for his continuation was rejected without hearing him and without communicating reasons to him, much less reasonable ones, which prompted the authority to pass an order of denial of continuation to the student, therefore, it was ruled that “*legitimate expectation*” was observed in the breach by the administration, resultantly, the order of refusal of the student’s continuation was set at naught

² Barak-Erez, D. (2005). The doctrine of legitimate expectations and the distinction between the reliance and expectation interests. *Eur. Pub. L.*, 11, 583.

³ Ahmed, F., & Perry, A. (2014). The coherence of the doctrine of legitimate expectations. *The Cambridge Law Journal*, 73(1), 61-85.

⁴ Høiback, H. (2011). What is doctrine? *Journal of Strategic Studies*, 34(6), 879-900.

⁵ [1969] 2 Ch 149

⁶ [1964] A.C. 40

⁷ Lord Denning remarked: “If [the foreign alien’s] permit is revoked before the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a *legitimate expectation* of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right – and, I would add, no legitimate expectation – of being allowed to stay”: p. 171.

by Lord Denning. It is this judicial decision that obligated the U.K. administration to follow the dictum of “*legitimate expectation*”, non-adherence whereof became amenable to the judicial review by giving recognition to the “*legitimate expectation*” in the U.K. in essence is the seedbed of the doctrine of “*legitimate expectation*”. Thus, it is Lord Denning who is the first-time deviser and the author of “*legitimate expectation*”.⁸

The “*legitimate expectation*” didn’t restrict to the only contours identified by Lord Denning’s judgment but came to be enlarged by subsequent judicial Pronouncements, one being *R v. Liverpool Corporation Ex P. Liverpool Tax Fleet Operators’ Association*⁹ which dealt with the increase in the number of taxi licenses. Its facts revealed that the number of taxi licenses was increased without granting an opportunity of hearing to the Association of Taxi Operators and upon consideration of the matter, it was held that the expectation of the beneficiaries that they would be heard by the authority before the number of taxi licenses was increased, was within the ambit of “*legitimate expectation*” and the order increasing the number of taxis licenses without hearing the Taxi Operators Association was held to be a tenable cause for a judicial review.¹⁰

Thereafter, a series of judicial decisions were pronounced including the one by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*¹¹, wherein the aggrieved person was given an assurance by the authority that the benefit would flow to him unless withdrawn after hearing him and that the beneficiary had been permitted to avail of the benefit in the past. In all these situations it was held that the beneficiaries had reasonable or legitimate expectation of being heard before passing the orders, consequently, denial of hearing thereof was held to be amenable to judicial review.¹²

3. Response to “*legitimate expectation*” “in Countries other than the U.K.

The “doctrine of legitimate expectation” after it originates from the U.K., witnessed positive responses in France, India, Singapore, New Zealand, Canada, Australia, South Africa, and Hong Kong. The “doctrine of legitimate expectation” appears to have stemmed from the French Legal system, known as ‘*droit administratif*’, in a cause called “*Fortune Case*”¹³ wherein the petitioner had registered his grievance against the denial of permission to appear in the

⁸ Undoubtedly Lord Denning is from U.K. and decision was passed by him in a case that had arisen in U.K., obviously, dictum of “*legitimate expectation*” owes its origin to U.K.

⁹ [1972] 2 Q.B. 299

¹⁰ So long as performance of an undertaking is compatible with statutory duty, a corporation cannot depart “except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it” Lord Denning

¹¹ [1985]AC 374

¹² Varuhas, J. N. (2016). In search of a doctrine: mapping the law of legitimate expectations. *Legitimate Expectations in the Common Law World*, Hart.

¹³ (1986) U.S. 477

competitive examination which was sought to be justified by the Secretary to the Government, on the two-fold ground, one that he was denied permission because of adverse remarks, the other that it was an act of the State but the Judge in the exercise of the power of judicial review held the petitioner entitled to hearing before passing of an order of denial of permission to appear in the competitive examination, thus followed the doctrine of legitimate expectation.¹⁴

4. Response to “*legitimate expectation*” in India

Coming to the home country India I would like to begin by referring to Article 141 of the Constitution of India stipulates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Thus, the general principles laid down by the Supreme Court are binding on everyone including those who are not parties to its decisions, and that makes the individuals and the Courts bound by its decisions. What has the Hon’ble Supreme Court to say, regarding the “doctrine of legitimate expectation”, suffice it is to refer to one of its pronouncements in *Punjab Communications Ltd v. Union of India*¹⁵ where the Hon’ble Supreme Court of India cited British precedents, particularly ‘*Hargreaves*’¹⁶ while dealing with a legal proposition, as to whether legitimate expectation can be legally frustrated on public interest grounds which came to be answered with the observation by the Hon’ble Supreme Court, that the proposition can be judged by the very deferential standards laid down in ‘*Associated Provincial Picture Houses v. Wednesbury Corporation*’¹⁷, which reads:

...if the decision on a competent matter is so unreasonable that no reasonable authority could ever come to it, then the courts can interfere. It is not based on what the court considers unreasonable. Rather, it is measured as a decision that a reasonable man wouldn’t come to.

Apart from legitimate expectation, we in India have Article 14 of the Constitution of India, 1950, mandating that discretion must be exercised reasonably in furtherance of public policy, public good, and for the public cause. This article protects the citizens against an arbitrary and unreasonable exercise of discretion by the authorities. Inter alia Article 14 envisages restriction on arbitrary exercise of discretion. According to this Article, therefore “non-arbitrariness and unreasonableness” have been made necessary qualifiers to assess whether legitimate expectation was denied or not. In my understanding to that limited extent the ‘*doctrine of legitimate expectation*’ is akin to Article 14 of the Constitution, in as much as it restrains a public authority from exercising its powers arbitrarily. Thus, acceptance of the “*doctrine of legitimate expectation*” in India is obvious.

¹⁴ Sircar AR, Doctrine of Legitimate Expectation

¹⁵[1999] 2SCR 1033

¹⁶ [1948] 1 K.B.223, C.A

¹⁷ [1947] EWCA Civ 1

5. Scope And Sphere Of “*Doctrine of Legitimate Expectation*”

The “doctrine of legitimate expectation” is not a law made by legislature, but it is the law, made by judicial decisions, in other words, it is a “judge-made law”, envisaging judicial review of administrative action. The scope and sphere of the “doctrine of legitimate expectation” can be understood by the type it belongs to:

(a) Procedural Legitimate Expectation and

(b) Substantive Legitimate Expectation.

In the case of the former, it is the behavior of the public authority that gives rise to the legitimate expectation, and in the latter case, it is the promise expressly made by the public authority or the existence of a consistent previous practice or the past conduct of the public authority. The scope and sphere of “legitimate expectation” necessitates a relook at the judicial decisions because they have the last word and not the statute and on perusal of the judgments, it is crystal clear that interference by the court would be called for if the authority exercises its power arbitrarily, unreasonably, without hearing the affected person before passing the order, rather in violation of principles of natural justice and in my perception that is the crux of the judicial decisions, passed on the legal subject of legitimate expectation.

In **Food Corporation of India v. Kamdhenu Cattle Feed Industries Ltd**¹⁸, the Supreme Court has observed that the doctrine of legitimate expectation falls within the purview of the principle of non-arbitrariness as incorporated under **Article 14 of the Constitution**. It becomes an enforceable right when the Government instrumentality fails to give due weight to it.

However, as per the observations of the Supreme Court in **Assistant Excise Commissioner v. Issac Peter**¹⁹, the doctrine of legitimate expectation cannot be invoked to alter the terms of a contract of a statutory nature. Similarly, in **Howrah Municipal Corporation v. Ganges Road Company Ltd**,²⁰ it has been held that no right can be claimed based on legitimate expectation when it is contrary to statutory provisions that have been enforced in the public interest. In **Madras City Wine Merchants Association v. State of Tamil Nadu**²¹, the doctrine of legitimate expectation was held to become inoperative when there was a change in public policy or public interest as has been reaffirmed in some of the decisions.

In **Union of India v. Hindustan Development Corporation**,²² the Supreme Court has elaborately considered the reverence of this theory. In the estimation of the Apex Court, the doctrine does not contain any crystallized right. It gives

¹⁸ Civil Appeal No 4731 Of 1992 (SC)

¹⁹ Assistant Excise Commissioner V. Issac Peter [1994 (4) S.C.C. 104]. Bank of Patiala v. S.K. Sharma [1996 (3) S.C.C 364] and in. Krishan Lal v. State of Jammu & Kashmir.

²⁰ [2004] 1 SCC 663.

²¹ (1994) 5 SCC 509.

²² (1993)3 SCC 499 at 540

the applicant sufficient ground to seek judicial review and the principle is mostly confined to the right to a fair hearing before any decision is given.

It was held in **Navjyoti Co-op Group Housing Society v. Union of India**²³ that the doctrine of legitimate expectation imposes in essence a duty on the public authorities to act fairly by taking into consideration all the relevant factors bearing a nexus to such legitimate expectation. The concerned authority cannot act arbitrarily to defeat the expectation unless demanded by overriding reasons for the public policy.

Further, in another landmark judgment, **M.P. Oil Extraction Co. v. State of Madhya Pradesh**²⁴, the Supreme Court was dealing with the license renewal claims of certain industries. It was held in this case that extending an invitation, on behalf of the State, was not arbitrary and the selected industry had a legitimate expectation of renewal of the license under the renewal claims.

Lastly, in **National Building Constructions Corporation v. S Raghunathan**²⁵, it was held that legitimate expectation is a source of both, procedural and substantive rights. The person seeking to invoke the doctrine must be aggrieved and must have altered his position. The doctrine of legitimate expectation assures fair play in administrative action and can always be enforced as a substantive right. Whether or not an expectation is legitimate is a question of fact.

6. The limitations of the legitimate expectation

I have stated above that it is the judge-made-law that rules the roost, therefore, refer to one of the judicial pronouncements of the Hon'ble Supreme Court of India in *Punjab Communications Ltd v. Union of India*²⁶, to visualize the extent of limitations on the exercise of judicial review wherein the Hon'ble Supreme Court of India ruled:

...if the decision on a competent matter is so unreasonable that no reasonable authority could ever come to it, then the courts can interfere. It is not based on what the court considers unreasonable. Rather, it is measured as a decision that a reasonable man wouldn't come to.

Thus, on the strength of the judgments of the Hon'ble Supreme Court and the areas identified hereinabove, the indulgence by the medium of judicial review is inconceivable, unless the decision of the public authority is found unreasonable by the Court or is gross abuse of its power or is in violation of principles of natural justice or is contrary to the public interest. But a public authority cannot bring into being an irrational or perverse policy that no reasonable person could opt for. Deliberating on the limitations, a question craves for an answer as to who can invoke the doctrine of legitimate expectation.

²³ (1992) 4 SCC 477)

²⁴ (1997) 7 SCC 592

²⁵ (1998) 7 SCC 66

²⁶ [1999] 2SCR 1033

This area is no more *res integra* given the judicial decisions rendered so far. The doctrine of legitimate expectation, based on established practice, can be invoked only by someone who has dealings transactions, or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognized legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly.²⁷

7. CONCLUSION

It is thus clear that with an individual's entitlement to fairness and natural justice, this doctrine envisages the duty of public bodies to act fairly and reasonably. It's because of this element of fairness that made way for the courts to acknowledge legitimate expectations. It is not free for all and the one who has had dealings with the authority, be it through transactions or negotiations, can only claim relief on the ground of legitimate expectation and certainly not an unconnected person. Nevertheless, the connected person is within his rights to invoke the judicial review, of course, subject to limitations. The "*doctrine of legitimate expectation*" has emerged as an important concept of fundamental importance. It has been designed by the courts to review an administrative action. An expectation so created should be based on representation or express promise or settled conduct. This doctrine gives the applicant sufficient locus standi for judicial review of administrative action. It's therefore clear that the doctrine of legitimate expectation in essence imposes acting fairly and reasonably but the expectation so created should be logical, valid, or reasonable.

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²⁷ Ram Pravesh Singh and Ors. V. State of Bihar and Ors, (2006 (8) SCJ 721

CONTRIBUTORY FACTORS TO JUVENILE DELINQUENCY

ABSTRACT

Juvenile justice is a legal framework designed to address crimes committed by minors, typically under the age of 18. It aims to provide rehabilitation and intervention to young offenders rather than punishment. The goal is to prevent juveniles from reoffending and to help them become productive members of society. Juvenile justice systems differ from adult criminal justice systems. They are designed to provide more comprehensive support, including education, counseling, and family support, to help juveniles overcome the factors that led to their criminal behavior. Juvenile delinquency is a deep problem that not only affects the victims of the delinquents, but also affects the juvenile delinquents themselves, their families, and society. Juvenile delinquents are not able to predict the effect of their crimes by themselves, but they are badly affected by these crimes.

There are many reasons giving rise to juvenile delinquency or deviant behavior of youngsters which may be social, economic, psychological, sociological, or purely legalistic. The present paper is an attempt to focus on the contributory factors leading to the deviant behavior of children in conflict with the law.

Keywords: *juvenile, child in conflict, child in need and care, juvenile home, rehabilitation centers*

1. INTRODUCTION

Juvenile justice is an important part of the criminal justice system. It recognizes that young people are different from adults and require a different approach to justice. The goal of juvenile justice is to rehabilitate young offenders and prevent future criminal behavior. By providing education, counseling, and support, the system can help young offenders become productive members of society¹. Youth under the age of 18 who are accused of committing a delinquent or criminal act are typically processed through a juvenile justice system. While like that of the adult criminal justice system in many ways processes include arrest,

¹ Chassin, L. (2008). Juvenile justice and substance use. *The future of children*, 165-183.

detainment, petitions, hearings, adjudications, dispositions, placement, probation, and re-entry, the juvenile justice process operates according to the premise that youth are fundamentally different from adults, both in terms of level of responsibility and potential for rehabilitation.² Whereas sentencing for a serious crime following a guilty verdict in the criminal justice system often results in jail or prison time, the juvenile justice system seeks to avoid incarceration whenever possible.³

The primary goals of the juvenile justice system, in addition to maintaining public safety, are skill development, habitation, rehabilitation, addressing treatment needs, and successful reintegration of youth into the community. The juvenile justice system takes a significantly more restorative approach than the adult criminal justice system. A truly successful case for youth would result in the adolescent learning from the experience without exposure to the severity of adult prison, altering their decisions and life course moving forward, and having no future contact with the juvenile or criminal justice systems.⁴

2. Juvenile Justice: Need For a Differential Approach

Juveniles cannot be treated as adults and need to be treated differently. The criminal justice system is generally tailored to cover the situations or acts committed or omitted by adults who understand what they are doing. Often, youth who are involved with or at risk of being involved with the juvenile justice system have real-life difficulties or disabilities that lead them to cross paths involving the justice system at a particular moment which generally have a significant impact on their emotional, mental, physical, and behavioral well-being.⁵ The notion that children and youth are not innately violent or cruel is the driving force behind the juvenile justice system. There exists a firm belief that youth can and will lead healthy and constructive lives if allowed to grow instead of being presumed irredeemable and segregated from their communities⁶.

2.1. Family Background

Every child is a product of their home and the society they live in. It is essential to understand why a minor commits a crime to prevent future crimes from happening. Addressing the issues that led children to fall for crime can

² Mears, D. P., Pickett, J. T., & Mancini, C. (2015). Support for balanced juvenile justice: Assessing views about youth, rehabilitation, and punishment. *Journal of Quantitative Criminology*, 31, 459-479.

³ Simpson, A. L. (1976). Rehabilitation as the justification of a separate juvenile justice system. *Calif. L. Rev.*, 64, 984.

⁴ Monahan, K., Steinberg, L., & Piquero, A. R. (2015). Juvenile justice policy and practice: A developmental perspective. *Crime and justice*, 44(1), 577-619.

⁵ Elsea, K. K. (1995). The juvenile crime debate: Rehabilitation, punishment, or prevention. *Kan. JL & Pub. Pol'y*, 5, 135.

⁶ Chamberlin, C. (2000). Not kids anymore: A need for punishment and deterrence in the juvenile justice system. *BCL Rev.*, 42, 391.

help them change their actions in the future. The role of the family and parents cannot be discounted in the causes of juvenile delinquency. With parents holding more than one job, they have little or no time for their children. The result is that the children do as they please because they have no one to discipline them. According to Kulla, parenting practices have a considerable impact on children. Accordingly, delinquent parents often bring up delinquent children.⁷ For instance, an alcoholic abusive father has a very high chance of bringing up children who may be just like him. The other aspect of parenting that may contribute to delinquency is the single-parent family resulting from divorce, abandonment, or even separation. The mother is all alone and the duty of bringing up the children and disciplining them rests squarely on her. She might fail. In a large family, the same is true because then all the children do not get the attention they deserve. This then brings into close focus the environment that the child lives in and other people who live in this environment too. One of the most widespread and leading reasons for juvenile crime is violence at home. A home is where the child learns what kind of a person to grow into. If violence is all they have encountered, they turn into violent people themselves. In many cases, the child has no idea why they experience violence and how to protect themselves from it. This may result in petty criminal activities that include shoplifting or violating traffic laws.⁸

2.2. Association and environment

Peer pressure is a cause of juvenile delinquency. Children get involved in certain activities because everyone else in their families and communities seems to be involved. They may also get involved just to fit in with their friends. This is the reason they might engage themselves in drug or substance abuse and violent crimes⁹. Other causes include early childbearing and maternal substance abuse when pregnant. The result is that the mother is less likely to become an effective parent while the child may be born already an addict which makes them more likely to become delinquents. Another reason has to do with socioeconomic status. Children born to poor households may become delinquents as they engage in criminality to supplement their incomes. There are also situational influences where the child may be seeking an activity for the thrill of it.¹⁰

2.3. Economic Adversity

While crime exists in all neighborhoods, there are more cases of delinquent

⁷ Heilbrun, K., Goldstein, S. E. & Redding, R. E. (2005). *Juvenile delinquency: Prevention assessment and intervention*. New York: Oxford University Press.

⁸ Wilson, H. W., Stover, C. S., & Berkowitz, S. J. (2009). Research Review: The relationship between childhood violence exposure and juvenile antisocial behavior: a meta analytic review. *Journal of Child Psychology and Psychiatry*, 50(7), 769-779.

⁹ Kulla, C. (2006). The causes of juvenile delinquency. *Associated content*. 2008. Web.

¹⁰ Office of Juvenile Justice and Delinquency Prevention. (2008). *Juvenile offenders and victims report, 2006*. Web.

activities in poorer areas. The children residing in these areas commit crimes like stealing or getting involved in bloody fights only because they feel they must do so to survive. If children in such areas are provided with the right kind of schooling and the necessities to live, they might not resort to committing crimes to get through. Others may cause greater harm and commit bigger crimes that reflect their rage within. Children may lash out at others around them for what they experience at home. These delinquents are more likely to possess an “I don’t care” attitude. There is a difference between abuse and violence. Abuse can be of many types, such as mental, physical, and emotional, and often leads to juvenile delinquency.¹¹

2.4. Lack Of Parental Care

A consistent absence of a guardian or a parent is another leading factor for why juvenile crimes are on the rise. Most juvenile crime cases have parents who themselves have many issues which cause them to neglect their child. Nurturing takes place at home, where the child is taught the difference between right and wrong. If the role model is not in the picture, the child will most likely turn to wrong decisions.¹² Moreover, the media also plays a significant part in increasing juvenile crimes. Lack of supervision leads to the exposure of all sorts of content on television, making the child want to model it. Since the ability to tell wrong from right isn’t present, they go for what is exciting without foreseeing the consequences.¹³

3. Juvenile Delinquency – A Societal Norm

Juvenile delinquency is one form of deviance that is a deviation from societal norms and values. As many institutions establish and enforce these norms (family, school, juvenile justice systems...), juvenile delinquency is affected (as a behavior) by many factors. Today, juvenile justice systems vary from state to state, but they all share the same basic principles. Juvenile courts are responsible for adjudicating cases involving minors, and the focus is on rehabilitation rather than punishment¹⁴. The system seeks to provide young offenders with the tools they need to become responsible and productive citizens. Juvenile justice systems use a variety of programs and interventions to help young offenders. These may include counseling, therapy, educational programs, and community service. Juvenile probation officers work with young offenders

¹¹ Wade Jr, R., Shea, J. A., Rubin, D., & Wood, J. (2014). Adverse childhood experiences of low-income urban youth. *Pediatrics*, 134(1), e13-e20.

¹² Poltava, K. O., Dubovych, O. V., Serebrennikova, A. V., Sozansky, T. I., & Krasnytskyi, I. V. (2020). Juvenile offenders: Reasons and characteristics of criminal behavior. *International Journal of Criminology and Sociology*, 9, 1573-1578.

¹³ Bugarski, T., Ristivojević, B., & Pisarić, M. (2016). Factors of juvenile crime: Significant external factors and their practical implications in the court proceedings. *Sociološki pregled*, 50(1), 59-89.

¹⁴ Heilbrun, K., Goldstein, N. E. S., & Redding, R. E. (Eds.). (2005). *Juvenile delinquency: Prevention, assessment, and intervention*. Oxford University Press.

and their families to develop individualized treatment plans that address the underlying factors that lead to criminal behavior.¹⁵

In ancient times there was a presumption that juveniles should be dealt with leniently because there exists a system of thought that says that young people have a habit of reacting impulsively which is known to be an aggressive approach. In the last few years, it has been observed that the crime rate has increased mostly, which is done by children under the age of 15-17. The psychology behind the commitment to crimes is upbringing, lack of education, aggressive nature, dominant masculinity, etc.¹⁶

4. The Children Act 1960

In the late 1960's the government passed an Act in the parliament called the Children Act of 1960 that aimed to provide care, protection, maintenance, welfare, training, education, and rehabilitation and development of neglected or delinquent children. The act was created with a certain set of goals. Its primary purpose was to give boundaries and help for local authorities and/or other entities to better regulate official intervention in the interests of children. But in the light of recent crime events in our country, the Indian law maker's hands are forced to make some compelling laws about juveniles as well. As a result, they made the Juvenile Justice Act of 1986¹⁷, the Juvenile Justice Act of 2000¹⁸ then the Juvenile Justice Act of 2015, and recently the Juvenile Justice Act 2021 which was passed by both Lok Sabha as well as Rajya Sabha. The bill contains provisions related to children in conflict with law and children in need of care and protection¹⁹.

Once former Chief Justice of India, Justice V.K. Krishna Iyer stated:²⁰

We need a penal code because the child is the father of a man if we're neglecting the underdevelopment in children, then we would be guilty of many faults and errors related to abandoning our children.

5. Current Juvenile Justice System

The *Nirbhaya* Delhi Gang Rape Case happened on December 16, 2012, which left the whole nation in shock. Many questions arose at that time and the reason

¹⁵ Kornhauser, R. R. (2017). Theoretical issues in the sociological study of juvenile delinquency. In *Challenging Criminological Theory* (pp. 59-86). Routledge.

¹⁶ Song, F., Li, R., Wang, W., & Zhang, S. (2022). Psychological characteristics and health behavior for juvenile delinquency groups. *Occupational therapy international*, 2022.

¹⁷ Juvenile Justice Act, 1986 53 of 1986 An Act **to provide for the care, protection, treatment, development, and rehabilitation of neglected or delinquent...**

¹⁸ Juvenile Justice (Care and Protection of Children) Act, 2000 (This law, brought in compliance with the 1989 UN Convention on the Rights of the Child (UNCRC), repealed the earlier Juvenile Justice Act of 1986 after India signed and ratified the UNCRC in 1992.)

¹⁹ Bajpai, A. (2018). The juvenile justice (care and protection of children) act 2015: An analysis. *Indian Law Review*, 2(2), 191-203.

²⁰ Gupta, S. (1995). Rights of Child and Child Labour: A Critical Study. *Journal of the Indian Law Institute*, 37(4), 531-542.

for the debate was the involvement of the accused who was about to be 18. The involvement of minors in such heinous crimes forced the lawmakers to introduce a new law and thus the Indian Parliament came up with a new law which is Juvenile Justice (Care and Protection) Act 2015. The law replaced the old juvenile laws and has introduced some remarkable changes one of the changes was that the age group of 16-18 years should be tried as an adult if the person has done some heinous and unpardonable crimes²¹.

The current juvenile justice system, which follows the bill passed in 2015, that is Juvenile Justice (Care and Protection of Children) Act, 2015 has been passed by the Parliament of India after a lot of protest, argument, and controversy. It replaces the Juvenile Justice (Care and Protection) Act, of 2000 and allows that juveniles age group of 16-18 who has committed a heinous crime to be tried as adults. It was passed on 7 May 2015 by Lok Sabha and 22 December 2015 by Rajya Sabha.²² The Act will allow the Juvenile Justice Board and Child Welfare Committees to decide whether the juvenile accused should be treated as an adult or not²³.

Recently, the Lok Sabha passed the Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021 which strengthens the provisions for protecting and adopting children.²⁴

Some experts and statistics say that there was a need for the amendment as the National Commission for Protection of Child Rights (NCPCR) audit of childcare institutions (CCIs) in 2020, 90% of which are run by NGOs, found that 39% of CCIs were not registered, even after 2015 amendment was brought in²⁵.

6. Rights Of Juvenile Offenders

The mere reading of juvenile justice enactments reveals that the children in conflict with the law or children in need of care and protection are entitled to all those benefits available to adult offenders with some special additions and alterations. The emphasis here is on rehabilitation, resocialization, treatment, care, and protection rather than punishment.²⁶ Long ago, somewhere, sometime

²¹ Agarwal, D. (2018). Juvenile delinquency in India—Latest trends and entailing amendments in Juvenile Justice Act. *People: International Journal of Social Sciences*, 3(3), 1365-1383.

²² JJ Act Contemplates Social Reintegration Of Children In Conflict With Law: Calcutta HC Chief Justice Sivagnanam Stresses On Rehabilitation, Srinjoy Das, 28th August 2023. Available at: <https://www.livelaw.in/news-updates/calcutta-high-court-justice-ts-sivagnanam-wbnujs-conference-child-in-conflict-with-law-juvenile-justice-236364>

²³ The bill adds the adoption procedures for orphan and abandoned children.

²⁴ There is a catena of cases where the SC has adopted a unique course of action concerning juveniles under different Juvenile Justice Acts, for example, *Shabnam Hashmi v. Union of India* (2014), *Salil Bali v. Union of India* (2013), *Parag Bhati (Juvenile) through legal guardian v. State of Uttar Pradesh* (2016), *Sampurna Behura v. Union of India* (2018), *In Re Contagion of COVID-19 virus in Children's Protection Homes* (2020) etc.

²⁵ The Act provides that any crime or offense that is unpardonable with imprisonment between 3 to 7 years is cognizable and non-bailable.

²⁶ Lambie, I., & Randell, I. (2013). The impact of incarceration on juvenile offenders. *Clinical psychology review*, 33(3), 448-459.

in history the voice of the great Abraham Lincoln echoed:

A child is a person who is going to carry on what you have started. He is going to sit where you are sitting, and when you are gone, attend to those things you think are important. You may adopt all the policies you please, but how they are carried out depends on him. He is going to move in and take over your churches, schools, universities, and corporations. The fate of humanity is in his hands²⁷.

The juvenile offender or child in conflict with the law is generally entitled to the following rights:

- I. Right to a lawyer
- II. Right to cross-examine witnesses.
- III. Right to provide evidence to support one's case.
- IV. Right to remain silent.
- V. Right to an appeal.
- VI. Right to a transcript of a trial (written copy of the trial).
- VII. Right to have fair and speedy trials.
- VIII. Right to have no juries in juvenile cases.
- IX. Right to have parents and guardians present at the hearing.

7. Juvenile Justice Courts

Every child has an inherent potential to grow up and achieve his or her full potential and contribute towards the growth of our country.²⁸

The Juvenile Justice Act takes a holistic approach to protecting the rights of children, with proper care, development, treatment, and social reintegration of children in difficult situations, by adopting a child-friendly approach. The major role of courts is to protect citizens and the community from crimes committed by young people²⁹. To hold youth who commit crimes accountable for their actions. To provide individualized assessments to rehabilitate and prevent further delinquent behavior through the development of educational, vocational, social, emotional, and basic life skills that enable youth to grow and mature³⁰. To provide youth and all other interested parties fair hearings at which legal rights are recognized and enforced³¹. Even though India was a British colony at that time, the juvenile courts established thereunder followed the paternal model

²⁷ Wroblewski, M., Henry (2000) An introduction to law enforcement and criminal justice, Thomson learning, USA, pp540-541.

²⁸ Available at: <https://www.livelaw.in/news-updates/calcutta-high-court-justice-ts-sivagnanam-wbnujs-conference-child-in-conflict-with-law-juvenile-justice-236364>

²⁹ Roberts, C. H. (2008). Juvenile delinquency: Causes and effects. *Yale-New Haven Teachers Institute*. Web. Edinburgh: The University of Edinburgh Centre for Law and Society.

³⁰ Washington, DC: US Department of Justice, Office of Justice Programs, Office of Juvenile Justice, and Delinquency Prevention.

³¹ Turner, M., J. Hartman, and D. Bishop. 2007. "The Effects of Prenatal Problems, Family Functioning, and Neighborhood Disadvantage in Predicting Life-Course- Persistent Offending". *Criminal Justice and Behavior*, 34: 1241-1261.

of the US and did not permit the presence of a lawyer as an adjunct to the adversarial system of justice.³²

Children's courts in India followed not long after the segregation of children from adult offenders during adjudication. These courts came into their own and severed their ties with the criminal justice system with the passing of the first uniform legislation for the whole of India to provide for the care, protection, reformation, and rehabilitation of delinquent and neglected children and to prohibit the sending of children to prison or the use of jails and police stations under any circumstances³³.

8. CONCLUSION

Children are valued assets they need to be tended to and protected. We all know that juvenile offenders are increasing rapidly, and that can be because of a lack of education, an aggressive nature, etc. The children need to have some basic rights which can help them to have a better future. There are a lot of juveniles who are unable to afford a lawyer and these acts help them to enjoy legal remedies. In our Indian Constitution, every individual is equal before the eyes of the law thus everyone has a right to defend or protect themselves with the help of law whether it is a plaintiff or a defendant, adult or minor, girl or boy the law never discriminates. The justice system established juvenile courts for the trial and sentencing of these minors. However, there is a need for a more proactive approach aimed at preventing the causes of delinquency in addition to offering solutions.

These prevention and intervention strategies require the use of the media for the effective sharing of information about juvenile delinquency. Besides, partnership with other individuals, community groups, and agencies who are stakeholders serves to strengthen the intervention strategies. The future, however, lies in the improvement of these strategies and strengthening those that have currently been the most successful.

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³² Kumari, V. (2015). Juvenile justice in India. *Juvenile justice in global perspective*, 145-197.

³³ Ibid

SEXUAL HARASSMENT AGAINST WOMEN AT WORKPLACE: AN ANALYSIS

ABSTRACT

Sexual harassment in the workplace is an age-old problem that women are left alone to deal with. The effect of Sexual harassment on victims varies from one to another. Sexual harassment is exploitative and unprofessional behavior. It promotes an intimidating, hostile, or offensive work environment and can hurt the reputation of both the accused and the victim. It is not only a violation of the fundamental right to equality under Article 14 but is also against the fundamental right guaranteed under Article 19(1) (g) of the constitution of India “to practice any profession or to carry out any occupation, trade or business”. In other words, sexual harassment in the workplace not only puts the mark on equality but also puts the psychological and physical well-being of the female worker at risk. Effects of Sexual harassment at workplaces are likely to have a wide variety of ramifications, both on the individuals involved and, on the organizations, as well. It reflects a power relationship, male over female. With the immense increase in the employment of women in workplaces in India, sexual harassment against women in India has reached greater heights and dimensions. Until the Vishaka judgment was given out, there was no law to govern the matter. The guidelines that came out of the judgment were derived from the Convention on the Elimination of all Forms of Discrimination Against Women. After the Vishaka judgment, India did not have any legislation regarding sexual harassment till the Bill for the Protection of Women from Sexual Harassment 2005 was moved in the parliament. In the year 2010 changes were brought in the old bill. The new bill defined sexual harassment and provided for the redressal mechanism at various levels. In this paper, an analysis of law and practice against sexual harassment in the workplace shall be made to carve out future courses of action in the Indian context.

KEYWORDS: *Sexual harassment, CEDAW Convention, protected Discrimination, Me Too Movement, Vishaka guidelines*

1. INTRODUCTION

Sexual harassment is defined as an unwelcome behavior of a sexual nature¹. It is an age-old problem that the women were left alone to deal with. Almost sixty percent of women have faced sexual harassment in their working lives at a

¹ The term sexual harassment was coined by Lin Farley in the mid-70s justifying that sexual harassment against women is centuries old. See Farley, *Sexual Shakedown: The Sexual Harassment of Women On The Job*, McGraw-Hill 1978

certain point in time but in most cases, women do not report the matter to the concerned authorities due to fear of reprisal, losing livelihood, losing professional standing, losing reputation, and being stigmatized².

The more women go outside for work the more risk of sexual harassment increases. For years sexual harassment in the workplace was a part of working women's lives but day by day awareness has increased. Sexual harassment is considered a violation of women's fundamental right to equality and such an act done at the workplace is worse as it becomes the major hurdle in the empowerment of women. Harassment at the workplace makes the environment insecure for women and thereby discourages them from working and adversely affects their social and economic growth. Physically women are weak, they cannot retaliate the way a man can and this has become the reason for the discrimination and crimes against women everywhere, be it in their domestic household or at the workplace³.

2. HISTORICAL PERSPECTIVE:

Sexual harassment amounts to the gross violation of the fundamental right of women's right to equality and to live with dignity. Sexual harassment has its roots in the patriarchy and in the perception that men are superior and their violence against women is acceptable. Sexual harassment is not only a violation of the fundamental right to equality under Article 14 but is also against the fundamental right guaranteed under Article 19(1) (g) of the constitution of India "to practice any profession or to carry out any occupation, trade or business", in other words, sexual harassment at workplace not only puts the mark on equality but also puts the psychological and physical wellbeing of the female worker at risk⁴.

The practice of sexual harassment is centuries old. Sexual harassment was for the first time recognized in the women who lost their jobs because they rejected sexual advances from their employers.⁵ Sexual harassment in the workplace has been pervasive and this can be seen in advertisements and movie scenes. Even in the movies of James Bond and in mostly Bollywood movies of earlier times it was depicted either how women were subjected to sexual harassment by their superiors or how the women at the workplace were hungry for the attention of men and probably the sex. Reva B. Siegel in the article titled A Brief History of the battle against sexual harassment, pointed out that both

² Harned, M. S., Ormerod, A. J., Palmieri, P. A., Collinsworth, L. L., & Reed, M. (2002). Sexual assault and other types of sexual harassment by workplace personnel: a comparison of antecedents and consequences. *Journal of Occupational Health Psychology*, 7(2), 174.

³ See the observation of the apex court in *Mrs. Rupan Deol Bajaj V. Kanvar Pal Singh* 1, 996 SC 309;1996 Cri.LJ. 381

⁴ Mokta, M. (2014). Empowerment of women in India: A critical analysis. *Indian Journal of Public Administration*, 60(3), 473-488.

⁵ Grossman, J. L. (2015). Moving forward looking back: A retrospective on sexual harassment law. *BUL Rev.*, 95, 1029.

slaves and domestic servants in the antebellum period in America were repeatedly subjected to sexual assault.⁶ Moreover, they were blamed for their downfall as they were promiscuous by nature. Naina Kapur in the same article, observed that in the 1980s, most women repeatedly emerged from the criminal justice system more humiliated, less empowered, and with almost no sense of self left intact.⁷

In India, there is no uniformity in the status of women. On the one side, she is treated as a goddess and is considered patient and benevolent and on the other hand, she is considered an aggressor. The status of women has been different in Vedic, post-Vedic, medieval, British, and especially after the independence when the concept of working women came into existence. With the change in the society, the status of women has also changed. However, the change is not so easy.⁸

3. CONCEPTUAL FRAMEWORK

In India, sexual harassment of women in the workplace is a pressing problem. They face harassment by their colleagues and supervisors. They face molestation, eve-teasing, and sexual harassment at their workplace. According to a legal expert:

Sexual harassment is any sexually oriented practice that endangers an individual's continued employment, negatively affects his or her work performance, or undermines his or her sense of personal dignity".⁹

Thus, sexual harassment means any unwelcome sexual advances or conduct in the workplace or job that creates a hostile, intimidating, or offensive working environment. According to Lin Farley, Sexual harassment means unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker. It can be any or all of the following:

... staring at, commenting on, or touching a woman's body, requests for acquiescence in sexual behavior; repeated no reciprocated propositions for dates, demands for sexual intercourse, and rape. These forms of male behavior frequently rely on superior male status in the culture, sheer

⁶ A brief history of battle against sexual harassment by **Ramanuj**, February 19, 2014 accessed on <https://blog.ipleaders.in/a-brief-history-of-battle-against-sexual-harassment>

⁷ This is epitomized by the gang rape of a tribal girl within the precincts of a police station in 1983, known as the *Mathura case*. At the time of the incident, the girl's boyfriend and family members were standing outside the police station. In its judgment, the Supreme Court of India described the girl as a "vicious liar" and stated that she was "habituated to sexual intercourse". It further stated that the failure of the girl to 'resist' implied consent to the abuse."

⁷ Gupta, D., & Garg, J. (2020). Sexual harassment at the workplace. *International Journal of Legal Science and Innovation*.

⁸ Arjun P. Aggarwal, 2000, "Sexual Harassment at Workplace". Toronto: Butterworths

⁹ Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job*, 14-15 (New York: McGraw Hill, 1978)

numbers, or the threat of higher rank at work to exact compliance or levy penalties for refusal.¹⁰

The United States Equal Employment Opportunity Commission defines “sexual harassment as:

...unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal, or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual or such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a hostile, intimidating or offensive work environment.”¹¹

The European Parliament and Council of the European Union adopted a Directive¹² which defines the term “sexual harassment”¹³:

Where any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, particularly when creating an intimidating, degrading, hostile, humiliating, or offensive environment.

4. CEDAW Guidelines

The Committee of the Convention on the Elimination of All Forms of Discrimination against Women¹⁴ clarifies sexual harassment as “Sexual Harassment includes such unwelcome sexually determined behavior as, physical contact and advances, sexually colored remarks, showing pornography and sexual demands whether by words or action. Such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting, promotion, or when it creates a hostile working environment.”¹⁵

The number of international conventions that deal with sexual harassment at the workplace commencing from: the Convention Concerning Discrimination in Respect Of Employment And Occupation, 1958¹⁶; Convention On The

¹⁰ US Equal Employment Opportunity Commission (EEOC), Guidelines on Discrimination Because of Sex, 29 CFR1604, 11 (1985)

¹¹ 2002/73/EC, Article 2

¹² Ibid

¹³ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted by the United Nations General Assembly on 18 December 1979 and was subsequently ratified in July 1993.

¹⁴ CEDAW, at para 18

¹⁵ This convention was laid down at the Geneva Conference of the International Labour Organization to consider all humans irrespective of sex, race, or creed and provide equal opportunity and freedom to maintain their dignity and economic security.

¹⁶ The Convention on the Elimination of All Forms of Discrimination against Women 1979 was enacted to eliminate any kind of discrimination that exists between men and women.

Elimination Of All Forms Of Discrimination Against Women (Cedaw), 1979¹⁷; Indigenous And Tribal Peoples Convention 1989¹⁸; Declaration On The Elimination Of Violence Against Women 1993¹⁹. The Fourth World Conference on Women in Beijing not only raised the issue of sexual harassment of women in the workplace but also recommended, inter alia, to formulate and operationalizing a national policy on women, setting up a commission for women 's rights, and institutionalizing a national-level mechanism to monitor the implementation thereof. The International Covenant of Economic and Social Rights contains several provisions particularly important for women²⁰.

The Supreme Court of India in a landmark judgment *Vishaka v. State of Rajasthan* has defined the term sexual harassment for the first time in the year 1997. The Supreme Court relied on the International Convention, particularly General Recommendation No. 23 of the CEDAW Committee under Article 11, whereby it was defined comprehensively.²¹

Sexual Harassment includes such unwelcome sexually determined behavior, whether directly or by implication.

5. POSH Act 2013

In the beginning, the courts treated sexual harassment as either a criminal offense or a civil wrong. Before the *Vishaka* Case, there were no legal provisions to identify, recognize, and define this problem. Dr. A.S. Anand CJ. Once remarked:

...there is no gainsaying that each incident of sexual harassment at the workplace results in a violation of the fundamental rights to gender equality and the right to life and liberty, the two most precious fundamental rights, guaranteed by the Constitution of India.²²

In India, provisions for the betterment of women are made in different legislative enactments like the Criminal Procedure Code 1973, Indian Penal Code 1860,

¹⁷ Indigenous and tribal people's Convention is an international labor organization convention that deals with the tribal people in independent countries where their social, economic, and cultural situations are different from other states.

¹⁸ The preamble to the Declaration on the Elimination of Violence against Women states that violence against women constitutes a violation of the rights and fundamental freedoms of women.

¹⁹ Article 7 recognizes her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work that may vitiate the working environment.

²⁰ "Sexual Harassment includes such unwelcome sexually determined behavior, whether directly or by implication,

- a. Physical contact and advances.
- b. A demand or request for sexual favors.
- c. Showing pornography.
- d. Sexually coloured remarks.
- e. Any other unwelcome physical, verbal, or non-verbal conduct of a sexual nature.

²¹ *Apparel Export Promotion Council v. A.K. Chopra*, 1999 SC 625

²² These constitutionally protected fundamental rights support the elimination of sexual harassment at the workplace.

Indian Evidence Act 1872, Vishaka guidelines, and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and other special laws which are related to the protection of women. India has ratified various International Conventions, which have become a source of law. Indian Constitution guarantees all the basic human rights set out in the Universal Declaration of Human Rights, 1948 to its citizens and other persons. The fundamental rights include the right to equality, freedom from gender discrimination, the right to work, and the right to live in dignity²³.

The definition of Sexual Harassment in the Act 2013 is fully understood by reading sections 2(n) and 3(2) together.²⁴ Section 3(2) of the Act further provides that the circumstances, among other circumstances, if it occurs or is present about or connected with any act or behavior of Sexual Harassment may amount to sexual harassment²⁵.

Effects of Sexual harassment at workplaces are likely to have a wide variety of ramifications, both on the individuals involved and, on the organizations, as well²⁶. The effect of Sexual harassment on victims varies from one to another. Sexual harassment is exploitative and unprofessional behavior²⁷. Effects on victims as mentioned in the paper “Women Workers ‘Rights in India-Issues and Strategies” can be emotional, psychological, and physical. At the Emotional Level, it includes Revulsion, Anger, Disgust, Fear, Shame, Guilt, Confusion, and Powerlessness etc. At the Psychological Level, it includes Reactions due to stress, Anxiety, Depression, Feelings of low, self-esteem, etc. At the Physical Level Sleeplessness, Headaches, High blood pressure, Insomnia, Fatigue, etc.²⁸ While at work, victims are likely to be less productive and less motivated because they simply do not enjoy being at work. According to the Commission

²³ Similarly, “Sexual harassment includes any one or more of the following acts of behavior (whether directly or by implication) as reflected in the CEDAW Convention.

²⁴ Implied or explicit promise of preferential treatment in her employment; Implied or explicit threat of detrimental treatment in her employment; Humiliating treatment likely to affect her health and or safety. iv. Implied or explicit threat about her present or future employment status. v. Interferes with her work or creating an intimidating or offensive or hostile work environment for her.”

²⁵ An ‘employee’ under the terms of the POSH Act shall mean “a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether for remuneration or not, or working voluntarily or otherwise, whether the terms of employment are express or implied and include a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name and the scope of the definition is wide.”

²⁶ It promotes an intimidating, hostile, or offensive work environment and can hurt the reputation of both the accused and the victim.

²⁷ Gupta, D., & Garg, J. (2020). Sexual harassment at the workplace. *International Journal of Legal Science and Innovation*.

²⁸ All over the world, inappropriate behavior with women at her workplace is considered an infringement of privileges and the nobility of women is considered as sexual orientation-based brutality and is observed as a mirror image of male predominance over women.

of European Communities, therefore, in pure economic terms preventing sexual harassment will save more money than the cost of permitting sexual harassment to continue.²⁹

4. Sexual Harassment Against Women at Workplace: Legal Framework

After the Vishaka judgment, India did not have any legislation regarding sexual harassment till the Bill for the Protection of Women from Sexual Harassment 2005 was moved in the parliament. In the year 2010 changes were brought in the old bill.³⁰ The bill was placed before the Lok Sabha in the year 2012 and the Sexual Harassment of Women at Workplace (Prevention, Protection and Redressal) Bill, 2012 (“Amended Bill”) was passed by the Lok Sabha on September 03, 2012. The Amended Bill was further passed by the Rajya Sabha as on February 26, 2013³¹. The ambit of the Sexual Harassment Act is very wide and includes organized, as well as unorganized sectors, organizations, and departments such as domestic help. Under this Act, a workplace also covers within its scope places visited by employees during employment or for reasons arising out of employment including transportation provided by the employer to commute to and from the place of employment. This Act is not gender-neutral and provides protection only to women employees.³²

a. IMPORTANT PROVISIONS OF THE POSH ACT:

An ‘aggrieved woman’ about a workplace, “is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment.”³³ Pursuant to the definition, a woman doesn’t need to be an employee at the workplace, rather a woman who is a client or a customer, who would be sexually harassed at a particular workplace, shall be entitled to claim protection under the POSH Act. The aggrieved woman could either be working, visiting the workplace, or a student, and the woman working at the workplace could be a regular wage, a domestic help, for remuneration, either employed directly or through an agent or a probationer, trainee, apprentice, or a contractor. It is pertinent to note here that for a woman to seek protection under the POSH Act, the sexual harassment incident should have taken place at a workplace.

²⁹ The new bill defined sexual harassment and also provided for the redressal mechanism at various levels. Women who are employed or who enter the workplace as clients, customers, students, students, and scholars in universities were sought to be covered under the legislation, but domestic workers were not included.

³⁰ The Act received presidential assent and was published in the Official Gazette as on April 23, 2013. December 09, 2013, was notified as to the effective date for the Act and its rules by the Indian Ministry of Women and Child Development. This act is popularly known as the POSH Act, it protects all workers in the public and private sectors including health, sports, education, or government institutions, and any place visited by the employee during her employment, including transportation.

³¹ Post the Vishaka Judgment, in *Apparel Export Promotion Council vs. A.K. Chopra*, the definition of sexual harassment was elaborated.

³² Section 2 (a) of SH Act

The POSH Act provides protection only to women and not to men who would be subjected to sexual harassment. The Act applies to all sectors including organized and unorganized sectors.³⁴

Certain situations, such as preferential treatment, humiliation in a manner causing health issues, the threat of treatment in employment which would be detrimental to the woman, future employment status threat, creation of a hostile environment, or intimidating or offensive behavior and all the above being implied or explicit, would also fall within the purview of sexual harassment.³⁵

As opposed to Vishaka guidelines, the POSH Act defines 'workplace' as "an extended workplace by covering any place visited by an employee during his/her employment which would include transportation provided by an employer to travel to and from the place of work by the employee".³⁶

The POSH Act requires that any company with more than 10 employees set up an internal complaints committee including a senior woman employee, at least two other employees, and a member from a non-governmental organization familiar with issues of sexual harassment. Every district also ought to create a local complaints committee to receive complaints from companies with fewer than 10 employees and from informal workers, including domestic workers, street vendors, construction workers, home-based workers such as those involved in weaving, accredited social health activists (ASHAs) and community health workers. In the event of failure to constitute this committee, a fine would be imposed under the provisions of the POSH Act.

The ICC shall consist of the following:

1. A presiding officer who shall be a senior-level woman employee employed at the workplace.
2. There shall be 2 members who shall be preferably committed to such a cause and who have prior experience in relation to social work or have such legal knowledge.
3. One external member from an NGO or an association which would be committed to the cause of women.
4. It is pertinent to note here that not less than half of the members of the ICC shall be women and the term of the ICC shall be 3 years. In the event of any inquiry, 3 members of the ICC including the presiding officer shall be present to conduct the inquiry.

Under the law, any woman can file a written complaint either to the internal or local complaints committee within three to six months of the incident of sexual

³³ Under the provisions of the Act, "sexual harassment means and includes unwelcome sexually tinted behavior, whether directly or by implication, such as (i) physical contact and advances, (ii) demand or request for sexual favors, (iii) making sexually coloured remarks, (iv) showing pornography, or (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature." [sec.2(n) of SH Act]

³⁴ Section 2 (f) of the SH Act

³⁵ Section 2 (o) of the SH Act

³⁶ Section 11(3) of POSH Act

harassment. The issue could be resolved between the woman and the respondent “through conciliation” or complaints committees could initiate an inquiry and suggest appropriate action based on the findings.

The powers vested with the ICC and the Local Committee for investigation and inquiry into the complaints at a workplace about sexual harassment shall be the same as that of the powers vested in civil courts under the provisions of the Code of Civil Procedure, 1908, in the event of trying a particular suit.³⁷

When a complaint is to be filed by an aggrieved woman, 6 copies of the written complaint accompanied by supporting documents and details of the witnesses shall be filed within 3 months from the date of such incident with the ICC or the Local Committee. Such a timeline shall be extendable for 3 months. The prompt reporting of such events and filing of complaints play a vital role in the authenticity of the complaint and the quick redressal of the same. In the event of any delay in filing of a complaint with sufficient cause, the reasons for such delay shall be recorded in writing. However, it may be noted that the SH Act and the relevant rules, do not prescribe any specific format for the purpose of lodging of a complaint. The ICC may upon the request of an aggrieved woman, prior to the initiation of an inquiry in relation to the complaint, put in such efforts for the purpose of amicable settlement by way of conciliation.³⁸ Upon arriving at a settlement, the same shall be recorded by the ICC or the Local Committee and the copies of the settlement shall be provided to the aggrieved woman and the respondent. However, if the settlement has not been arrived at, the ICC or Local Committee shall continue to investigate and inquire into the complaint under the provisions of the SH Act³⁹.

Within 90 days from the date of receipt of the complaint by the ICC or Local Committee, the inquiry shall be completed. Within 10 days from the date of completion of the inquiry, an inquiry report shall be issued to the employer. Within 60 days of receipt of the inquiry report, the employer shall act on the recommendations made by the ICC or Local Committee⁴⁰.

Interim reliefs can be provided to the aggrieved woman at the request made to the ICC or Local Committee such as transfer of the aggrieved woman and 3 months leave in addition to her statutory leaves. “The employer shall be required to compensate the aggrieved woman based on:

- I. the mental trauma, pain, suffering, and emotional distress caused to the aggrieved employee.
- II. the loss of career opportunity due to the incident of sexual harassment.

³⁷ Section 10 of the POSH Act

³⁸ A copy of the complaint shall be sent to the respondent within 7 days from the date of receipt of the complaint. The respondent shall reply to the complaint within 10 days from the date of receipt of the complaint along with such supporting documents and details of witnesses if any.

³⁹ An appeal can be made against the decision of the committee within 90 days from the date of such recommendations to the court.

⁴⁰ Section 15 of the POSH Act

III. Medical expenses incurred by the victim for physical/ psychiatric treatment.

IV. the income and status of the alleged perpetrator; and v. feasibility of such payment in a lump sum or installments”.⁴¹

Where the breach of the provisions of the Act has been repeated by the employer, the employer shall be subject to twice the punishment or a higher punishment under any other such law as may be prescribed for the same offense, and the cancellation/withdrawal/non-renewal of registration/license required for carrying on business or activities.⁴²

Women can also file complaints through the Women and Child Development Ministry’s Sexual Harassment Electronic–Box (SHeBox), an online complaint platform for all women workers, launched in November 2017. Complaints filed through this platform are then passed on to either the internal or local complaints committee, which is writ large with inefficiency.⁴³

The guidelines and norms framed by the Hon’ble Supreme Court in the Vishaka judgment are the fountainhead of the Act. With time, it was felt that guidelines and norms were not sufficient to deal with the incidents of sexual harassment of women at workplaces and a strong piece of legislation is the need of the hour, and accordingly, the Act was enacted in 2013. The Act went one step further and included various issues that remained unaddressed in the past such as the extension of the definition of the workplace to include almost all types of establishments including private sector organizations, dwelling places or houses, the inclusion of the term domestic worker and unorganized sector to address the issue of sexual harassment of women at all levels.

5. CONCLUSION:

In today’s world, where globalization has changed the definition of work, the role of women in all aspects of life has undoubtedly been reconsidered. Women’s positions and status have shifted dramatically over time. Women all over the world have experienced a wide range of challenges. However, while one side of the coin depicts women’s ascension, the other depicts their struggle and wrongdoing. Women are subjected to a slew of heinous and shameful acts of violence, neglect, physical abuse, and verbal abuse. Regardless of how much it is denied, it is undeniable that sexual harassment occurs in the workplace. Sexual harassment is not a new issue. Indeed, generations of women have been subjected to unwanted sexual attention. However, this behavior has only

⁴¹ “A penalty of Rs. 50,000/- shall be levied on an employer who fails to comply with provisions of the SH Act.” The offenses under the SH Act are non-cognizable in nature.

⁴² Mehta, M. (2021). The Inefficacy of Internal Complaint Mechanisms in Resolving Sexual Harassment Claims-A Study in the Context of Sexual Harassment Law and# MeToo in India. *NUJS L. Rev.*, 14, 1.

⁴³ <https://www.hrw.org/report/2020/10/14/no-metoo-women-us/poor-enforcement-indias-sexual-harassment-law>

⁴⁴ Anand, H. (2021). 8 Years of PoSH Act: A Critical Analysis. *Jus Corpus LJ*, 2, 502.

been given a name in the last 20 years. This is a case of sex discrimination because a woman is being harassed because of her gender. According to the study, most women chose not to report sexual harassment to management because of stigma, fear of retaliation, humiliation, and a lack of awareness. It also found that most organizations still failed to comply with the law, or members of Internal Committees did not understand the process adequately. In India, no studies have been conducted to determine the extent to which sexual harassment in the workplace contributes to women leaving their jobs.

According to a 2018 study by the Martha Farrell Foundation and the Society for Participatory Research in Asia based on Right to Information requests to 655 districts in the country, many districts failed to establish or constitute committees by legal provisions. Even where they exist, it is difficult to find any information about them on websites or in public spaces that display their names. The study also discovered a lack of awareness among committee members regarding roles and responsibilities, indicating a lack of capacity to handle sexual harassment complaints. Committee members are not even paid travel fees in some cases. There is no money earmarked in the budget for the implementation of the POSH Act.”⁴⁴ An IndiaSpend review discovered that nearly 24 years after India received its first guidelines to prevent sexual harassment at work and eight years after the government enacted a law for it, there is little publicly available data on how effective these mechanisms are. The government keeps no centralized data on cases of workplace harassment of women, according to a report to Parliament. In the meanwhile, an independent study has discovered that general compliance is minimal⁴⁵. The federal or state governments do not publicly compile and release data on how many businesses and districts follow the guidelines and have committees, the number of complaints filed, and the outcome of these complaints. Data can be found in a variety of disparate and dispersed public sources on the subject. Despite the lack of data, the parliamentary panel concluded that all sexual harassment guidelines are “carefully implemented in police organizations.”

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Book Review

ARTIFICIAL INTELLIGENCE: LAW AND POLICY IMPLICATIONS

[1st ed.2020] by Purvi Pokhariyal, Amit K. Kashyap and Arun B. Prasad, Hardbound/eBook, Pages: 164 pages, Publisher: Eastern Book Company, English, ISBN: 9789389656954, price Rs. 1016

*Baseera Rafiqi **

1. Introduction

Artificial intelligence is a type of computer technology that is concerned with making machines work in an intelligent way, similar to the way that the human mind works. In American English AI refers to the capability of computers or programs to operate in ways believed to mimic human thought processes, such as reasoning and learning; the branch of computer science dealing with this phenomenon whereby the capacity of a computer to perform operations analogous to learning and decision-making in humans, as by an expert system, or a program for the perception and recognition of shapes in computer vision systems¹.

2. Law and Artificial Intelligence

The field of artificial intelligence (AI) and the law is on the cusp of a revolution that began with text analytic programs like IBM's Watson and Debater and the open-source information management architectures on which they are based. Artificial Intelligence is an important subdivision of Cyberlaw and is constantly developing in the country. This thoroughly researched handbook discusses the issues associated with Artificial Intelligence involvement at social, institutional, and government levels. The work is a blend of multiple disciplines like law, Policy, philosophy, social theory, and Technology. It brings together, under one roof contributions by scholars in the newly emerging field of artificial intelligence, policy, and Law²

AI has many potential benefits for society, such as improving healthcare, education, transportation, and entertainment. However, AI poses challenges and risks, such as ethical dilemmas, privacy violations, bias, discrimination,

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¹ Margarita Robles Carrillo, *Artificial Intelligence: From Ethics, Telecommunication Policy*, (2020) Elsevier, Issue 6, vol. 44

² AI has many potential benefits for society, such as improving healthcare, education, transportation, and entertainment. However, AI poses challenges and risks, such as ethical dilemmas, privacy violations, bias, discrimination, and security threats.

and security threats.

The work attempts to address all the unanswered questions that are popping up in the field of law, policy, and regulation due to the fast development of AI in India and globally. AI is the subject of a wide-ranging debate in which there is a growing concern about its ethical and legal aspects. Frequently, the two are mixed and confused despite being different issues and areas of knowledge. The ethical debate raises two main problems: the first, conceptual, relates to the idea and content of ethics; the second, functional, concerns its relationship with the law. Both establish models of behavior, but they are different in scope and nature³.

3. Over-Riding Impact of AI

The juridical analysis is based on a non-formalistic scientific methodology. This means that it is necessary to consider the nature and characteristics of AI as a preliminary step to the definition of its legal paradigm. In this regard, there are two main issues: the relationship between artificial and human intelligence and the question of the unitary or diverse nature of AI. From that theoretical and practical basis, the study of the legal system is carried out by examining its foundations, the governance model, and the regulatory bases. According to this analysis, the work in hand will provide an insight into robotics as the agents of human agency often independent but subject the input and ingenuity of human mind and can safely be identified as the principal legal framework for the regulation of AI. These legal applications will support conceptual legal information retrieval and allow cognitive computing, enabling a collaboration between humans and computers in which each does what it can do best. Anyone interested in how AI is changing the practice of law should read this illuminating work⁴.

This timely book provides an extensive overview and analysis of the law and regulation as it applies to the technology and uses of Artificial Intelligence (AI). It examines the human and technological interaction with attendant effects on law and its applications.⁵ Much has been written recently about artificial intelligence (AI) and law. 1 But what is AI, and what is its relation to the practice and administration of law is still a moot question.⁶

4. Supreme Court and AI

Since 2021, the Supreme Court has been using an AI-controlled tool designed

³ Lucia-Vesnic-Alujevic et al. Societal and ethical impacts of artificial intelligence: Critical notes on European policy frameworks, Elsevier issue 6 2020.

⁴ Hu, Teng, and Huafeng Lu. "Study on the influence of artificial intelligence on legal profession." *5th International conference on economics, management, law and education (EMLE 2019)*. Atlantis Press, 2020.

⁵ Kerrigan, C. (Ed.). (2022). *Artificial Intelligence: Law and Regulation*. Edward Elgar Publishing.

⁶ Surden, H. (2018). Artificial intelligence and law: An overview. *Ga. St. UL Rev.*, 35, 1305.

to process information and make it available to judges for decisions. It does not participate in the decision-making process. Another tool that is used by the Supreme Court of India is SUVAS (Supreme Court Vidhik Anuvaad Software) which translates legal papers from English into vernacular languages and vice versa. In the case of *Jaswinder Singh v. State of Punjab*, the Punjab & Haryana High Court rejected a bail petition due to allegations from the prosecution that the petitioner was involved in a brutal fatal assault. The presiding judge requested input from ChatGPT to gain a wider perspective on the granting of bail when cruelty is involved. However, it is important to note that this reference to ChatGPT does not express an opinion on the case's merits, and the trial court will not consider these comments. The reference was solely intended to provide a broader understanding of bail jurisprudence when cruelty is a factor.

⁷ The Niti Ayog has developed a set of seven responsible Ai principles, which include safety & dependability, equality, inclusivity and non-discrimination, privacy and security, transparency, accountability and the protection and reinforcement of positive human values. The Supreme Court and high courts have a constitutional mandate to enforce fundamental rights including the right to privacy. In India, the primary legislation for data protection is the Information Technology Act and its associated rules. Additionally, the Digital Personal Data Protection Bill has been introduced by MEITY, although it is still awaiting formal enactment. If this bill becomes law, individuals will have the ability to inquire about the data collected from them by both private and government entities, as well as the methods utilized to process and store it.⁸⁸ Artificial intelligence in the context of the Indian legal profession and judicial system

5. Conclusion

In nutshell, this book is a valuable addition to the techno-savvy era of digital superhighway affecting every branch of human activity including the legal profession. The future law and policy need to be attuned to technology so that the people at large are benefitted. It will be quite useful for students, practitioners, arbitrators, service providers and other professionals dealing with law in the digital world.

⁷ Currently, there are no specific laws in India about regulating AI. The Ministry of Electronics and Information Technology (MEITY) is the executive agency for AI-related strategies and has constituted committees to bring in a policy framework for AI.

⁸ Artificial intelligence in the context of the Indian legal profession and judicial system
The implications of errors made by AI systems shall have huge ramifications affecting the life and liberty of individuals. Bar and bench; Adithi Prabhu August 2023

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