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THE IMPACT OF FORENSIC MEDICAL CORROBORATION IN SEXUAL OFFENCES IN NIGERIA

Dr. Ejiro Tessy Kore-Okiti*

INTRODUCTION

Sexual assault, including rape, is a criminal act that has a profound impact on both the psychological and physical well-being of the victim. Anyone can become a victim of rape, and perpetrators of the crime can be people of any gender. In Nigeria, corroboration in securing a conviction in rape cases is not a statutory requirement, however, most times, corroboration is required by the court and most times when not retrieved leaves the courts at liberty to discharge and acquit an accused person.

The way crimes are resolved around the world has been greatly changed by scientific advancement and technical innovation. However, such advancement requires/includes factors like; Forensic Laboratories, Forensic Expert, Trained Staff and the provision of funds and supplies to facilitate such process[1]. As sexual offences are on the increase, there is the importance of timely medical help among victims in ensuring justice is done to them. This article examines the significance of having access to forensic evidence as a means of enhancing criminal investigations as well as ensuring that persons accused of sexual offences are adequately prosecuted in Nigeria.

WHAT ARE SEXUAL OFFENCES

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[1] Yashaswi Srivastava, 'Medical Evidence in Sexual Offences' (*iPleaders*6 August 2021) available at <https://blog.ipleaders.in/medical-evidence-sexual-offences/> (last visited on March 14, 2022).

Sexual offences are offences committed against the dignity of the human body, any crime that involves sexual intercourse or any other sexual acts[2]. A wide range of illegal behaviours is covered by the different types of sexual offences, including rape, sexual assault by penetration, sexual assault, child sexual abuse, extreme pornography, revealing private sexual images without permission (revenge pornography), and indecent clothing of minors[3].

This article focuses on the sexual offence of rape.

RAPE

The act of aggressively inserting one's penis into another person's vagina during non-consensual sexual contact is known as rape, it is a highly egregious criminal offence[4]. Rape is defined in the Criminal Code Act under Section 357 as "any person who had unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or using threat or intimidation of any kind, or by fear of harm, or using false and fraudulent representation as to the nature of the act, or in the case of a married woman, by impersonating her husband, is guilty of an offence which is called Rape"[5].

The law states that rape is limited to males against women and only covers the virginal and penis, the Nigerian Criminal Code does not recognise male rape victims or anal sex as a component of rape[6].

The crime of rape has been redefined by the Violence Against Persons (Prohibition) Act[7]. According to Section 1, a person commits the crime of rape if:

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[2] < http://Oxford reference.org.html > (last visited on April 12, 2022).

[3] Public Prosecution Service, 'Types of Sexual Offences' (*Public Prosecution Service Northern Ireland*23 July 2019) available at <https://www.ppsni.gov.uk/types-sexual-offences> (last visited on March 14,2022).

[4] Ibid.

[5] Nigerian Criminal Code Act Cap C38 LFN 2004, s. 357.

[6] O.A Olatunji, 'Penetration, Corroboration and Non-Consent: Examining the Nigerian Law of Rape and Addressing Its Shortcomings', 8 UILJ. 79 (2012).

[7] The Nigerian Violence Against Persons (Prohibition) Act 2015, s.1.

a. “He or she intentionally penetrated the Virginia anus or mouth of another person with any part of his or her body or anything else;
b. The other person does not consent to the penetration;
c. The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or using false and fraudulent representation as to the nature of the act or the use of a substance or additive capsule of taking away the will of such person or in the case of a married person by impersonating his or her spouse”.

This represents an improvement over the definition outlined in the Criminal Code Act[8]. Rape is considered by International Human Rights Law as one of the many types of sexual violence committed against women[9]. The incidence of rape in our culture, especially in Nigeria, is of utmost significance. During a news conference held on June 15, 2020, at the State House in Abuja, the Nigerian Inspector General of Police revealed that a total of 717 incidents of rape were officially reported between January and May of the same year. Additionally, he declared that a total of 799 individuals have been apprehended thus far, with 63 instances having been thoroughly examined and brought to court, while 52 cases are still undergoing investigation. It is widely acknowledged that boys and men can also be victims of rape, although the majority of cases involve women and girls[10].

[8] Supra note 5
[9] According to Article 1 of the United Nations Declaration on the Elimination of Violence Against Women, "violence against women" refers to any form of violence that is based on gender and causes or is likely to cause physical, sexual, or psychological harm or suffering to women. This includes acts such as threats, coercion, or unjust denial of freedom, whether they occur in public or private settings.
[10] National Bureau of Statistics, STATISTICAL REPORT on WOMEN and MEN in NIGERIA NATIONAL BUREAU of STATISTICS (2016) available at <http://www.nigerianstat.gov.ng/download/491> (last visited on March 14, 2022).

CORROBORATION

Corroboration refers to the act of providing additional evidence or support to confirm or verify a statement, claim, or testimony. The act of verifying or validating an existing truth or fact is referred to as corroboration in the context of the law. An incriminating testimony is one that not only establishes the occurrence of a crime but also implicates the defendant as the perpetrator of the claimed act[11].

The court stated in *Bello v State*[12], that corroboration is the independent testimony confirming a witness' testimony. According to the court's ruling in *Gabriel v. State*[13], corroboration refers to testimony that supports the evidence of a crime having been committed by the accused in some important ways as well. In *Mgang v State*[14], the court stated that the act of corroboration involves the act of bolstering a witness' testimony with new evidence from a different witness; it must be a separate testimony that has an impact on the defendant by associating and connecting the defendant to the alleged crime.

Giving the prosecution's claim more weight or support is the main purpose of corroboration. For this reason, the courts are reluctant to find someone guilty based only on uncorroborated evidence[15].

Corroboration is a fundamental aspect of providing evidence in a criminal case. It asserts that, among the different types of evidence offered, the presence of corroboration or supporting evidence is crucial in confirming or refuting the final verdict[16].

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[11] B.M.F Jamabo, Law of Evidence: Text & Cases. 196 (Rhamat Printing Press, Port Harcourt, 2020).
[12] (2020) 3 NWLR Pt 1710 72.
[13] (2010) 6 NWLR Pt 1190 280.
[14] (2011) All FWLR Pt 526 1766.
[15] Supra note 11 at 197.

Corroboration in Rape Cases

The court in *Boniface Adenike v. The State*[17] ruled that 'it is trite that in a charge of rape cases or unlawful carnal knowledge of female without her consent, the prosecution has a bounded duty to prove the following ingredient':

a. "That the accused had sexual intercourse with the prosecutrix;
b. That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or Impersonation;
c. That the prosecutrix was not the wife of the accused;
d. That the accused had the '*Mens Rea'*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not;
e. That there was a penetration."

According to the definition of rape provided above, corroboration is not legally necessary for the crime of rape.

The Supreme Court ruled in *Afor Lucky v. The State*[18], that while corroboration is not a requirement for the crime of rape, it has evolved into a crucial procedural requirement in proving the crime. As a result, the court determined that it is risky to convict someone based solely on the prosecutor's uncorroborated testimony. Although the court stated in *Insp Dantalle Mohammed v. Kano State*[19], that it may condemn the accused even after giving

[16] Sakshi Shankar, 'Corroboration Apropos Forensic Evidence: Implications and Precautions' available at SSRN http://ssrn.com/abstact=4025567 (last visited on Nov 25,2021) Electronic Journal.
[17] (2015) LPELR SC 168/2013.

[18] (2016) LPELR-40541(SC).
[19] (2018) 13 NWLR Pt.1635.

full consideration to the corroboration warning if it is satisfied with the veracity of her evidence. Despite this, the courts constantly search for additional evidence that could be used to support the rape claim.

In *State v Akingbade Gabriel*[20], the court determined that the accused committed the alleged rape offence but ultimately released and acquitted him. The court observed that even though the Act does not call for corroboration, Nigerian courts have a practice that has almost become law: the demand for corroboration before the accused's conviction. The court held in *Upahar &Anor v State*[21], that it is customary to confirm the complainant's testimony in rape proceedings in both England and India. The Supreme Court ruled in *Sambo v The State,*[22] that it is required by law that the prosecutrix's testimony must be verified in certain significant specifics to show that sexual activity did indeed occur and that it was done without her consent before the prosecution may get a conviction for the crime of rape.

In *Oludotun Ogunbayo v. The State*[23], it was further held that it need not consist of direct evidence, nor need it amount to a confirmation of the entire account given by the witness, provided that it corroborates the evidence in some respects material to the charge. The State held that corroboration is not a technical term or art but simply means evidence tendered to confirm, support, and strengthen other evidence sought to be corroborated. According to the definition given in the case of *Igbire v. State*[24], corroboration refers to the confirmation, ratification, verification, or validation of already present evidence by one or more independent witnesses.

[20] (1971) ALL NLR 508.
[21] (2002) LPELR-5937 CA.
[22] (1993) 6 NWLR Pt. 300 399.
[23] (2007) 8 NWLR Pt. 1035 157.
[24] (1997) 9 NWLR Pt. 519 101.

The "rule of corroboration" was created in British India, where judges required that other, more trustworthy evidence must be presented in addition to the rape complainant's statement to successfully convict a man of the crime[25].

What corroboration proof is required for the crime of rape? is a question that begs to have a practical response when the crime is always perpetrated in private. Therefore, finding corroborated evidence in rape cases is extremely unlikely. Looking for recent semen in the victim's vagina, which can be connected to the defendant directly, is one way to find medical evidence supporting a rape accusation. Additionally, collecting DNA samples from the defendant and comparing them to the semen obtained from the victim can serve as further evidence of the alleged rape, if a match is found. Typically, medical evidence is afforded greater weight in terms of its evidential value compared to the testimony of the complainant, and it can even be utilised to challenge or refute the testimony[26].

MEANING AND NATURE OF MEDICAL FORENSIC SCIENCE

The term 'Forensic' is related to or associated with the field of law, while "science" refers to the scientific study of the natural and physical world, based on careful facts and principles obtained via experiments. When combined, these phrases create a field of study that focuses on addressing legal issues by applying facts and principles and conducting thorough experiments[27].

[25] Elizabeth Kolsky, "The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860-1947' (Gender History 2010: 22 (1) 109-130. [cross ref] [Google Scholar].

[26] Taqbir Huda, '"No Signs of Rape: Corroboration, Resistance and the Science of Disbelief in the Medico-Legal Jurisprudence of Banglades" Sexual and Reproductive Health Matters. 29 (2022).

[27] National Institute of Standards and Technology, 'Forensic Science' (*National Institute of Standards and Technology* 20 August 2013) available at<https://www.nist.gov/forensic-science#:~:text=Forensic%20science%20is%20the%20use> (last visited on March 14, 2022).

The progress of science and technology has had a significant impact on the resolution of crimes worldwide. The significance of prompt medical aid and support has become exceedingly critical due to the impact of sexual offences. Medical evidence refers to the application of medical knowledge and skills to gather evidence related to a committed crime. When discussing medical evidence, two commonly used terminology are Forensic and Medio-legal[28].

According to Google, forensic refers to the application of scientific tests or techniques in the context of crime investigation. It gathers, analyses, and safeguards scientific evidence during an investigation. Medio-legal refers to a legal case involving offences that necessitate the involvement of medical experts for inspection, as requested by the police. It entails conducting tests and diagnoses on both physical documents and human subjects. Examples of such tests include DNA analysis, analysis of trace evidence, examination of body injuries, and detection of trace substances[29].

The field of forensic biology employs biological analysis methods, particularly serological tests, to examine bodily fluids found at crime scenes, including blood, semen, and saliva. Different types of bodily fluids that can be analysed and used to identify and incriminate a perpetrator can be found on a victim or at a crime scene[30].

Forensic science is a valuable tool for apprehending, detaining, and investigating criminals, ultimately resulting in the successful conviction of offenders. Forensic science laboratories primarily focus on analysing evidence

[28] Yashaswi Srivastava, 'Medical Evidence in Sexual Offences' (*iPleaders*6 August 2021) available at <https://blog.ipleaders.in/medical-evidence-sexual-offences/> (last visited on March 24,2023).

[29] Ibid.

[30] B. R Sharma, Forensic Science in Criminal Investigations and Trials. 31 (India Universal Law Publishing Ltd, India., 2005).

materials related to criminal offences. Furthermore, the laboratories facilitate the analysis of crime scenes[31].

What is Forensic Evidence?

A comprehensive crime scene investigation yields forensic evidence. The evidence is brought to a forensic lab to be examined in order to determine whether materials collected from a suspect and evidence recovered from the crime scene are corroborated. Forensic Evidence also helps in the verification of what is known as associative evidence[32]. This is the evidence that links two separate entities, be they people or objects. This type of trace evidence potentially tends to persons or suspects who were at the crime scene, as well as aiding in the garnering of potential witnesses associated with the scene of a crime[33].

What are the Types and Utilisations of Forensic Evidence?

This question aims to explore the types of materials commonly discovered at a crime scene that, when closely examined by forensic scientists, can provide valuable information leading to the arrest and successful prosecution of the perpetrator. Additionally, it is equally important to consider how such an examination can help eliminate or exclude potential suspects[34].

In answering this question, the following represent types of physical evidence or data sourced by forensic scientists and the type of investigation made on them. The thick materials introduced in court are made up of data that are the result of forensic inquiry; these include:[35]

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[31] Ibid.

[32] Andrew RW Jackson and Julie M Jackson, Forensic Science. 8 (Pearson Education Limited, London 4th edn. 2017).

[33] Ibid.

[34] Terrence F Kiely, Forensic Evidence: Science and the Criminal Law 44 (Crc Press/Taylor & Francis, London 2006).

a. Blood, semen and saliva (DNA matching and types, blood …… analysis)
b. Non-human DNA (goat, cat, dog)
c. Drugs (dry identification, forensic pathology)
d. Explosives (bomb and arson identification and source trace)
e. Fibers (fiber types, source identification match)
f. Hair (hair types and match)
g. Fingerprint (finger match, AFIS, etc.)
h. Bones (gender and age types; identification of remains, weapons identification)
i. Wound analysis (weapons typing, physical movement pattern)
j. Firearms and ammunition (ballistics and tools mark identification)
k. Powder residues (shooting and suicides)
l. Glam (glam types and matching)
m. Foot, tyre and fabric impression
n. Paint (paint types
o. Petroleum product (product typing and matching)
p. Plastic bags (typing and matching, garbage bags as suffocation devices or used in transport)
q. Soils and minerals (minerals types and matching, forensic geology)
r. Tools marks (tool identification and matching, homicides, burglary, home invasion, etc.)
s. Wood and vegetative matter (plant types and matching)

[35] Ibid.

t. Insects, larvae, maggots (forensic entomology, time of death)
u. Dentition and bite marks (identification of victims, matching bite marks to defendant)
v. Tobacco and related smoking methods
w. Document (typewriter, printer and handwriting analysis)

Scientific and medical evidence establishes connections between the offender and the crime based on trace materials. The offender at the crime scene either takes these pieces of evidence from the victim or other items that are there at the scene, or purposefully leaves them behind. Provided that the clue materials are gathered, stored, and transported to the laboratory for assessment in an appropriate manner, and their integrity and authenticity remain beyond doubt, they can serve as compelling evidence to incriminate the perpetrator[36]. Forensic Science is crucial as it assists in establishing the culpability or innocence of the prospective suspects.

Fashola asserts that our over-dependence on frequently unreliable confessional statements is a prominent factor contributing to the failure of the Nigerian Criminal Justice System. Forensic Science utilises scientific theory and laboratory techniques from several natural sciences to investigate and prosecute crimes[37]. The intent behind utilising forensic techniques is to produce conclusive forensic evidence. Forensic scientists gather, safeguard, and examine scientific evidence throughout an investigation. While certain forensic scientists personally visit the crime site to gather evidence, others work in a laboratory, doing analysis on objects delivered to them by third parties. Forensic scientists, apart from their laboratory duties, serve as expert witnesses in civil and criminal trials, representing either the prosecution or the defence[38].

[36] Supra note 33 at 46.
[37] Terrence F Kiely, Forensic Evidence: Science and the Criminal Law 44 (CRC Press LLC, United States, 2001).

Victims of rape typically have the entitlement to undergo a medical forensic examination, during which evidence is taken and stored in a DNA Bank, in the majority of legal jurisdictions[39]. This is accomplished by utilising an evidence-gathering kit, such as a Rape Kit[40].

By utilising innovative techniques for comprehensive data gathering and analysis, investing in the acquisition of evidence collection kits offers the advantage of generating more thorough reports that go beyond the mere evaluation of basic medical examinations. Furthermore, the evidence contained within a Rape Kit can serve as a highly potent instrument for ensuring that perpetrators are held accountable in a court of law.

In Nigeria, there is a single Forensic Science Laboratory Unit operated by the Federal Government, located in force (iii) Annex Lagos. It is headed by a Commissioner of Police Forensic and consists of eighteen (18) more personnel. The Abuja Head Office is led by a Commissioner of Police Forensic, who is the head of the office. Additionally, there are twenty-nine (29) other officers working in the office. The Section comprises the following units, primarily operating in Lagos with some functional units in Abuja.

1. Document unit
2. Ballistics unit
3. Crime scene management unit
4. Chemistry Toxicology unit
5. Serology/DNA unit
6. Digital Forensic unit[41]

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[38] Ibid.

[39] For example, the United States of America, United Kingdom, India, etc.

[40] A rape kit is a container which includes a checklist materials and Instructions, as well as envelopes and containers for packaging specimens obtained during a rape incidence for forensic examination.

[41]< http://npf.gov.ng> (last visited on April 22, 2022).

The argument put forth is that, given Nigeria's population increase, this is egregiously insufficient. To enhance the use of DNA analysis in state criminal investigations, the Lagos State Government founded the Lagos State DNA Forensic Centre (LSDFC) in 2017[42]. This is highly commendable and it is suggested that other states should follow suit.

IMPLICATION OF FORENSIC INVESTIGATION ON RAPE CASES

The incessant rape cases in recent times in different parts of the nation are really sad and worrisome. Efforts should be made towards ensuring that victims get justice, while the offender gets punished. An effective method for achieving this is by presenting forensic evidence during court proceedings. This can be done by the Nigerian Police Force (NPF) by establishing more forensic investigation laboratories across the Nation and Police Divisions. But before we get to such massive forensic distribution of knowledge and applicability, the Lagos State model to sexual offences is advisable to be adopted by all States.

In Lagos State, they have a Sexual Assault Centre[43]. The facility functions as a comprehensive service centre, staffed by highly skilled medical professionals and trained counsellors, dedicated to providing rapid emergency medical care, forensic medical examinations, and crisis reports to victims of sexual abuse. Proving sexual offences in court will be made much easier with the valuable medical data gathered throughout the forensic investigation.

In 2020, Bangladesh amended their Violence Against Women and Children Act 2000 (VAW Act). Specifically, they amended section 32 (1) to include not only rape survivors but also individuals accused of committing such crimes. The amendment mandates the DNA testing of both the survivor and the accused for

[42] The centre is located at 48 Broad Street Lagos Island 102273, Lagos available at <http//lagosstate.gov.ng> (last visited on April 20, 2022).
[43] Also known as Mirabel Centre.

rape crimes, as outlined in the DNA Act 2014, regardless of their consent. Hence, if the survivor or the accused declines to undergo a DNA test, they can still be legally obliged to do so[44].

The surge in sexual assault and violence will, in this writer's opinion, be significantly reduced when forensic medical evidence is available to support reports of sexual assault in Nigeria. This is because more perpetrators will undoubtedly be found guilty of such crimes and punished accordingly, and where "where would be" perpetrators are aware that they are more likely than not, they will ultimately be successfully prosecuted and punished for their crimes. It will act as a disincentive to them.

Forensic science plays an essential role in building a compelling case for the prosecution of sexual offences or assaults. The majority of sexual assault perpetrators escape conviction due to a lack of evidence from forensic investigations that may have corroborated their sexual offences. If more perpetrators are convicted with the aid of forensic medical evidence the menace of rape in Nigerian society will drastically reduce. The procurement of DNA evidence from the victim of rape/sexual assault during the medical examination can create irrefutable evidence that the offence was, indeed committed by a defendant where the DNA obtained from the victim is found to match that of the defendant.

Impact of Forensic Science in Criminal Justice Administration

In contrast to not using science, there are more benefits to using it in criminal cases., certainly in establishing that an offence occurred and that a particular defendant is culpable or with the verification of physical evidence allows for speedy and effective administration of justice inter-alia.

[44]S. 32 (1) of the Bangladesh Violence Against Women and Children Act 2020.

Forensic science in criminal trials has been a breakthrough in the management of misconduct and criminality. DNA profiling is one of the most known forensic techniques and an increasing number of investigations rely on DNA evidence. Mabel[45] observed that the utilization of DNA technology in England and Wales by Christopher H. Aspen J.D has had a significant influence on the communities in England and Wales, in the following ways:

(i) Solves 0.8% of other crimes for each crime solved with DNA

(ii) Prevents 7.8% of other crimes for each custodial sentencing resulting from a DNA-based conviction

(iii) Increases the suspect identification rate for domestic burglary from 14% to 44% when DNA is available at the crime scene

(iv) Maintain a 40% chance of obtaining a match between a crime scene profile and a criminal justice (suspects) profile loaded into the database.

Also, according to a report from Denver, United States of America, upon a study funded by the National Institute for Justice alongside four other cities, the study was to determine the effectiveness of DNA as a crime reduction tool by focusing on high-volume crimes such as burglary, auto-theft, and theft from motor vehicle case. According to a joint news statement published on June 10, 2007, by the Denver District Attorney and Denver Police Department, Denver had the highest number of matches in the integrated DNA system (DNA database) cases that were submitted to the District Attorney's office and

[45] Mabel O Oniha, 'Impacts of the Use of Forensic Evidence in Nigerian Criminal Justice Administration' 11 A.B.U.LJ. 13 (2018).

subsequently prosecuted. Several particular outcomes were observed, including:

(i) Identified over 49 prolific burglars since the project started on November 1 2005
(ii) A prolific burglar commits an average of 243 cases per year
(iii) Of burglary cases where DNA is recovered, the prosecution's case is five times higher than cases with no DNA
(iv) The average sentence for burglars linked to DNA is over 12 years in prison (compared to six months without DNA evidence)
(v) In a case, after police arrested a man "(who later admitted to over 1000 burglaries) the burglary rate in the West Washington Park neighbourhood dropped about 40%[46].

Crime rates surely rise in nations that do not make enough use of forensic evidence in their efforts to combat crime. A 2017 study named "Countries with the Highest Crime Rate 2016 list" found a number of the most criminalised nations, thereby placing them in this group. These nations—Nigeria, Venezuela, Kenya, Trinidad and Tobago, and Venezuela—don't employ forensic science in their criminal justice systems to fight crime.

Mabel[47] stated that there may be a connection between the startling increase in crime rates and the underutilisation of forensic science, whilst countries that have seen a decrease in crime rates have credited the use of forensic science and increased technology. The effectiveness of forensic science in facilitating the administration of justice and mitigating criminal activity is contingent only

[46] Howard Safir, 'DNA Technology as an Effective Tool in Reducing Crime' (2007) 4 Forensic Magazine available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/dna-technology-effective-tool-reducing-crime> (last visited on March 21, 2023).
[47] Supra note 45.

on the ability of law enforcement authorities, including the police, to utilize it effectively within the parameters established by the legal system[48].

Kojelo emphasised the crucial role of forensic science in the criminal justice system. In Nigeria and other developing countries, the prevalence of fearless impunity is attributed to the severe deficiency in understanding and access to forensic science and equipment. This hinders the ability to solve numerous crimes and provide sufficient forensic evidence to establish criminal cases. Additionally, he observed that in Nigeria, investigations into significant financial and criminal offences are often impeded by regular investigators. Despite investing significant time into these investigations, the outcome is that the cases eventually fade away, allowing criminals to roam freely. This is due to investigating police officers becoming perplexed and disinterested as a result of lacking specialised skills, expertise, and qualifications in forensic science[49].

Because forensic science greatly increases the reliability of the evidence gathered, it is essential to the administration of criminal justice, forensic evidence, in contrast to confessional statements, eyewitness testimony, and other traditional methods of presenting evidence in court is characterised by a higher degree of certainty, directness, and verifiability. This form of evidence indicates the factual details of the crime and allows one to draw certain logical inferences about the true perpetrator. Thus, eliminating any uncertainties regarding the perpetration of crimes facilitates a more efficient and expeditious processing of suspects within the criminal justice system.

Whether through physical or biological methods, the use of forensic sciences usually lends significant support to the main piece of evidence in criminal proceedings[50].

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[48] Ibid.

[49] Michael I Koyelo, "Legal Framework of Forensic Evidence in Nigeria: A Myth or Reality" 2 No 1 OAULJ. 197 (2018).

[50] *Boniface Adenike v. The State* Supra. note 16.

CONCLUSION

Acts of criminality occur regularly, with the bulk of the offenders evading legal consequences for their actions. This is because our law enforcement agencies heavily rely on criminal investigation tactics, neglecting to apply forensic investigation methods to apprehend the perpetrators. It is most disturbing to know that perpetuators especially in rape cases walk freely for lack of forensic evidence corroborating where the victim of sexual assault reports a rape case, the investigating body must carry out biological analysis methods on both the victim and the alleged perpetuators to eliminate any doubt.

Throughout the decades, individuals who report incidents of rape have consistently faced scepticism, not only from society as a whole but also from the court system, which is supposed to serve as an unbiased platform for achieving justice. This prevailing assumption leads to the harmful principle of corroboration, which requires that the testimony of a rape complainant alone is typically insufficient to convict a man of rape. Therefore, there must be additional trustworthy evidence to support her allegation[51]. What alternative strategy, besides forensic evidence, can be more effective in substantiating a rape case?

The Nigerian Criminal Justice System has shortcomings in two areas: the use of forensic investigation and the police's presentation of forensic evidence in our courts. The lack of provisions for forensic-based criminal procedures under the Evidence Act[52], the Criminal Procedure Act[53], and the Administration of Criminal Justice Act[54] has resulted in a shortage of forensic science

[51] Taqbir Huda, '"No Signs of Rape": Corroboration, Resistance and the Science of Disbelief in the Medico-Legal Jurisprudence of Bangladesh" Sexual and Reproductive Health Matters. 29 (2022).
[52] The Nigerian Evidence Act (No. 2) 2011.
[53] The Nigerian Criminal Procedure Act, Cap C 38 LFN 2004.
[54] Nigerian Administration of Criminal Justice Act 2015.

practitioners and the use of forensic science to solve crimes. Forensic analysis ought to be employed in criminal investigations, particularly in instances of sexual assault such as rape, where Deoxyribonucleic Acid (DNA) tests may be utilised. Forensic evidence possesses the advantageous quality of being employable in legal proceedings to support either the prosecution or the defence in criminal situations. Forensic science and procedures are commonly employed in the United States for the investigation and resolution of criminal actions. These forensic science methods are now generally regarded as indispensable to the criminal investigator.[55] It is therefore pertinent that the use of forensic medical evidence should be incorporated into the Nigerian Criminal Justice System as it pertains to sexual offences especially rape. Also, there is an urgent need for the establishment of functional and modern forensic laboratories in the country that would yield in deterring criminal activities. Law enforcement organisations, prosecutors, court personnel, and medical personnel should all get ongoing training on the use of forensic evidence.

[55] Andrew R.W Jackson and Julie M Jackson, Forensic Science. 26 (Pearson Prentice Hall, United States, 3rd edn, 2011).

THE OUTER SPACE REGIMES ON THE SUSTAINABLE DEVELOPMENT OF SPACE ENVIRONMENT

Dr. Khafayat Olatinwo & Musa Dolapo Omiwole*

ABSTRACT

Outer Space is a common term used for the areas between celestial bodies and outside of their atmospheres. Further, described as the area beyond the Earth's atmosphere even where there is no definite partition between the two regions. Efforts in identifying the lines have continued to increase, for example, the Karman Line suggests an altitude of 100 kilometres (62 miles) to be the variance between aeronautics and astronautics. The United States has an alternate determination of the line between air space and outer space, defining it as 80 kilometres (50 miles) above the Earth's surface. Therefore, anyone who travels at an altitude of above 50 miles is considered by the US to be an astronaut. All these are speculations as to the exact line. The technological advantages derived from space exploitation cannot be over-emphasised. it ranges from communication; TV signals, the transmission of wireless radio, the use of GPS systems in our cars and listening to weather forecasts derived from remote sensing satellites. However, the resources of outer space are finite and the continuous abuse facing the environment of space as a result of human exploration and exploitation, save, to some extent, for some countries like the United Kingdom, is damaging and causing serious degradation. The intention of this article is to analyze the regimes regulating the environment of space for its sustainability, and their effectiveness and proffer recommendations

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where necessary to sustain the environment and resources of outer space. This article intends to focus on one of Man's most important environments/natures, that is Outer Space; its exploration, exploitation, abuse/degradation, and the effectiveness of the regimes available for its protection. How adequate are these laws to safeguard its finite resources?

Keywords: *Environment, Outer space, regimes, sustainable development, Debris*

Introduction

The Zero Debris Charter of November 2023[1] marked another significant effort, of the International community, at combating the increase in debris creation ravaging the environment of outer space as a result of space exploitation. The inquisition of man to be inventive and productive has brought out the exploitative nature of man. The developmental efforts in all spheres which include manufacturing, processing, industrialization, housing, construction, agriculture, rural and urban growth, and commercialisation have all brought about environmental changes experienced now. The adverse impact has also caused problems resulting from a lack of concern, control, effective regulations and of course negligence.[2]

[1]Editorial, 'World-first Zero Debris Charter goes live'<https://www.esa.int/space_safety/clean_space/World-first_Zero_Debris_Charter_goes_live> accessed 20 November 2023

[2]Rachel Emas, 'The Concept of Sustainable Development: Definition and Defining Principles Rachel Emas, Florida International University

It is trite that the typical nature of man includes being opportunistic i.e. using or tapping from nature's gift without concern for the negative consequences that may occur where adequate care is not taken to protect such nature for continuous use. It is highly important to keep our environment safe for continuous and future use. This can be done by putting in place policies by which the environment can be rid of degradation. One of the most effective means of protecting the environment is by making laws and putting in place guidelines for the protection of the environment. It is pertinent to point out that the environment is not limited to the earth, water, and air, it includes the Celestial bodies as well (Moon, Sky, Outer Space, etc.)

The Exploration and Exploitation of Outer Space

Outer space can be described as the near emptiness in which all objects in the universe move. It is not a complete vacuum as it is often thought; it contains a low density of particles like hydrogen, plasma, electromagnetic radiation, magnetic fields, and nutritious.[3] The year 1957 can be said to be groundbreaking as it marks the origination and conception of the space age

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<https://sustainabledevelopment.un.org/content/documents/5839GSDR2015_SD_concept_definiton_rev.pdf(un.org)> Accessed on 15 December 2023; Obabori A.O, Ekpu O.O and Ojealaro: An Appraisal of the Concept of Sustainable Environment under Nigerian Law: Journal of Human Ecology: Vol 28, No 2 (tandfonline.com)<https://doi.org/10.1080/09709274.2009.11906229> accessed 16 July 2023. See also Convention on Civil liability for Damages Resulting from activities Dangerous to the environment, June 21 1993, Lugano 32, ILM 1228 (1993)Z

when the first unmanned artificial satellite was launched successfully into Space, ever since, different satellites have been launched into space for different purposes by developed States like the United States of America, United Kingdom, Germany and Russia. Developing countries like Nigeria have also exercised their interest (though not directly) in space exploitation[4].

Satellite launching has been on the increase since the first attempt, especially from the USA, Russia, Japan, Canada, Brazil, Israel, China and of course Nigeria. The functions of these satellites include Communication, Navigation, Weather forecasting, Intelligence gathering and Military reconnaissance. Space-based technology has become an essential part of our daily lives as we can use GPS systems in our houses and cars, fly in aircraft that rely mostly on Satellite navigation, the use phones: calling, messaging, Bluetooth, infrared and the Internet are all derived from space-based resources.

However, as important as this may sound in human existence, the activities of man in space have brought about environmental abuse. The continuous use of

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[3]Science Daily: Outer Space <https://www.sciencedaily.com/terms/outer_space'htm>Accessed on 16 July 2023

[4]Nigeria's first satellite was launched into orbit on 27 September, 2003 as an earth observation satellite called the NigeriaSat-1 with a five years life span and then communication Satellite code-named as NIGCOMSAT-1 in 2007 and recently Nigeriasat-2 and Nigeriasat-x in 2011 <www.globalsecurity.org/space/world/nigeria/nigeriasat-1.htm><https://africanews.space/replacing-nigerian-satellite-gone-past-design-life-the-journey-so-far/> accessed 29 July 2023

Space for military activities and the dumping of waste/debris[5] which though seldom causes collision on the surface of the earth call for serious attention now rather than wait till it becomes a usual occurrence.

Space debris has been and remains an expanding threat to the international space community. As a source of space pollution, orbiting debris greatly damages the space environment. There is an increasing risk of additional debris being generated by colliding space objects, and such fragments remaining in space permanently together with the debris that has been causing damage to the space community with the use of weapons in outer space. Every space object, be it State-sponsored, civilian or commercial, is affected by the space debris population. Human lives continued to be endangered as astronauts undertaking extra-vehicular activities or even the paying public enjoying commercial human spaceflights ran the risk of colliding with pieces of debris in space. The continuous growth of debris in heavily used orbital regions, like Low Earth Orbit (LEO) and Geostationary Earth Orbit (GEO), not merely causes minor or complete abruptions to space operations, but potentially could

[5]Space debris is defined as all man-made objects in Earth orbit, including their fragments and parts that are non-functional with no reasonable expectation of assuming or resuming their intended functions or all man-made objects including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional and which are detrimental to the carrying capacity of the outer space. Olatinwo Khafayat Yetunde, 'Space Debris Creation and Debris Fallout to Earth surface: the Inadequacies of the Legal regimes' (2013) *NIALS Journal of Air and Space Law*. (Maiden Edition): 1-26, Published by the Nigerian Institute of Advanced Legal Studies, Lagos State.

prevent launches of planned space vehicles; thus, denying future access to and use of Outer space.[6]

A NASA[7] scientist, Donald Kessler, pointed out that debris from one collision could go on to create more and eventually an entire orbit would be rendered useless for generations. Activities of the astronauts in space like the construction and repairs of damaged satellites, space stations, modules and spacecraft, leaving space, waste from such repairs, fragments of paint to entire dead satellites, defunct satellites, discarded rockets and even nuclear rocket cores and bits of old rockets and smashed space equipment orbit along with dropped items which include tools and odd gloves on the space can also result in the damage of spacecraft which eventually result in environmental damage both on the Space and on Earth surface.

Aside from the debris and hazards caused by human activities in Space, Space flight by aircraft most often causes debris to fall on the surface of the earth. This could occur from an Aircraft crash either when lifting, landing or re-entering the earth's atmosphere. An example of such a crash occurred in 2003 when a U.S. shuttle broke apart over the South Western United States as it re-entered the Earth’s atmosphere. The accident occurred about 16 Minutes before

[6]Chaddha.S, ‘Space Debris Mitigation’ University of Manchester. Social science research Network. Sept 29, 2011 <.http://www.papers.ssrn.com >accessed 17 August 2023
[7]National Aeronautics and Space Administration.

the shuttle was due to land, and all seven crew members died. After the disaster NASA halted shuttle flights and appointed an independent Commission to investigate the accident, the investigators collected thousands of pieces of shuttle debris that had fallen onto Earth's surface after the accident[8]

Just as human activities on the earth's surface generate lots of waste/debris, the increasing traffic of satellites in Outer space has created a growing amount of debris that is in constant danger of colliding and disrupting the services of Satellites. [9]For example, in 2009, the Soviet Union Communication satellite[10] collided with the United States satellite[11] creating a cloud of over 700 pieces of space debris that could threaten orbiting spacecraft for decades.

The Environment of Space has become more dangerous by old and defunct satellites with other debris that have stayed long in space, it also results in the threatening of astronauts, operating satellites and other spacecraft. According to a press release[12] a piece of metal space junk, the size of a tennis ball is as lethal as 25 sticks of dynamite. It is sad to think that almost sixty years into what has become known as a Space Age, the condition of the outer has become

[8]Oberg J. 'Space exploration' World book online Reference center 2004. <.http://www.worldbookonline/web/article?id=ar
[9]Gaziyev J. Space Debris: Orbiting Debris Threatens Sustainable Use of Outer Space. .http://www.oosa.unvienna.org/oosa/en/press-release>Accessed 01 August 2023
[10]COSMOS 2251
[11]Iridium 33
[12]United Nations Information Services. UNIS/OS/388. 1ST, OCT, 2009. <http://www.un.org/apps/pressrelease>Accessed 01 September 2023

dangerous as more than 50 Nations own satellites and Commercial operators even own more.[13] An author, Al Huebner,[14] observed that there are now nearly 1,000 active satellites orbiting the planet, carrying out critical roles in Telecommunications, Navigations, Banking, Science and other Civilian and Military operations and that despite the obvious importance of satellite operations, space above the Earth has come to resemble what space security expert, Laura Grega calls the Wild West as there are few restrictions on the behaviour of the satellites entering the region.

The activities of some technologically advanced countries like the United States, the United Kingdom, Russia and China in space debris creation are worth mentioning. In 2007, China used an anti-satellite (ASAT) weapon to destroy one of its old weather satellites, thereby contributing more than 100,000 pieces of space debris to the already existing objects/debris threatening Space. A year later, the U.S. also used a sea-level missile defence interception to destroy one of its failed satellites.[15] Similarly, Russia has also been responsible for some major incidents that have contributed to the problem of space debris, one such is the cosmos-iridium collision[16], which involved the Russian satellite and American satellite which created a significant amount of space debris

[13]Al Huebner. The politics of garbage in outer space. April 2010. <http://towardfreedom.com> Accessed 01 September 2023
[14]ibid
[15]ibid

because both were destroyed and more than 2300 trackable fragments were generated, some of which have scatted and orbiting space.[17] In addition to the Cosmos-Iridium collision, there are a few other notable incidents in which Russia has been involved and has contributed to the problem of space debris. In 1978, a Soviet satellite collided with an American satellite, creating a significant number of debris.[18] In 1987, a Soviet satellite was destroyed by a missile, creating more debris.[19] And in 1993, another Soviet satellite exploded in orbit, further contributing to the problem. While these incidents are less well-known than the 2007 collision, they still had a significant impact on the amount of space debris.

The United Kingdom's contribution to space debris has mostly been positive, it is essential to point out that they have launched quite a number of satellites into outer space but there has never been a report of collision of any of their satellites. It is pertinent to state that States parties to International Agreements in respect of Outer Space are allowed to test their weapons in outer space which

[16] European Space Agency, Space Safety; About Space Debris (November 2009), <http://www.esa.int/Space_Safety/Space_Debris/About_space_debris> Accessed on 21 October 2023
[17] ibid
[18]John L. Remo "Space Debris: A Comprehensive Handbook",<www.cambridge.org/core/books/space-debris/3D8B11DCBB002055EAE52D83ADC585B6> Accessed on 21 October 2023.
[19] ibid

could lead to chemical emissions and perhaps adverse effects to the environment of space.[20]

The International Laws Regulating the Environment of Outer Space

Different International treaties, Agreements, and Conventions are available for space regulation but how far they have gone in curbing space users from destroying the environment of space is the concern of this article.

The *Treaty Banning Nuclear Weapon Test in the Atmosphere, in Outer Space and Under Water*[21]was the first International Treaty that specifically and expressly involved the legal regulation of Man's Space activities. The Treaty was drafted at the beginning of both Space exploration and nuclear development. The reason behind the making of this Treaty include the fact that it is necessary to keep space free of nuclear force, nuclear pollution, nuclear explosions for both testing and non-testing purposes[22]and the need to stop excessive release of nuclear fall- out into the planet atmosphere. This became

[20]The Partial Test Ban Treaty, 1963, the Prevention of Arms Race in Outer Space, the United Nations Charter, 1945, the Moon Treaty, 1979. Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water 1963 (often called the partial test ban treaty or Nuclear Test Ban Treaty), Outer Space Treaty of 1967; Robert P.M and Glenn H.R, "Space Resources, 'Common Property and Collective Action Problem' Environmental LJ 107 (1997). S Rand, "Property Rights in Space" A Journal of Technology and Society, (2012) <www.thenewatlantis.com> accessed 20 November 2023

[21]Entered into force on 10th Oct, 1963. often called "Partial Test Ban Treaty (PTBT), Limited Test Ban Treaty (LTBT) OR Nuclear Test Ban Treaty (NTBT)" <https://www.oosa.unvianna.org/oosa/spacelaw/outerspace.html> Accessed on 10 September 2023

more pronounced after the United State successfully tested a hydrogen bomb and thermonuclear device with the power of eight megatons of TNT in early 1950s and when the USSR detonated a 50-megaton nuclear warhead in 1961[23]

The parties to the Treaty are enjoined to prohibit, prevent and not to carry out any nuclear weapon test explosion or any other nuclear explosion. Article 1 of the Treaty provides that:

Each of the parties to this treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at place under its jurisdiction or control:

a) In the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or

b) In any other environment if such explosion course radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without the prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the parties have stated in the preamble to this treaty, they seek to achieve

Suffice to say that this particular Treaty applies not only to the Outer Space but to atmosphere and under water. In fact, at the proposal stage, the Treaty intended to include banning of nuclear weapon test underground but the Soviet

[22]Britton. E. "The corpus jurisspatialis" <http://www.suit101.com> Accessed 17 September 2023
[23]Ibid

Union would only agree to test ban under Water, Outer Space and Atmosphere but not underground, a position the Western powers had long favored as an alternative to a more comprehensive underground environment ban. The intention to still accommodate banning of nuclear weapon underground is reflected in Article 1 (b).

The other 4 Articles only provide for amendment of the Treaty, ratification, withdrawal and the deposit of the English and Russian text of the Treaty in the Archives of the depositary Government[24]

The Treaty however fails to ban other types of weapons except nuclear weapon with radioactive emission coupled with the provision that suggest that the explosion should not be carried out outside the jurisdiction and control of a State. The provision also failed to provide for sanctions in the event that one of the signatory States contravenes the provision of the Treaty.

Another major defect of this provision is that it limits the test ban to a situation where the explosion would cause radioactive debris to be present outside the territorial limit of the State without providing for remedy where the debris found its way into a state.

[24]Art 2, 3, 4 & 5

Also, what happens when the debris caused by the explosion is not radioactive in nature but other types of debris which could include parts of the missile or the weapon itself? The only excuse for such lacuna could be an explanation as to the fact that the Treaty was clearly the first step towards a complete preservation of space for peaceful purpose as it was drafted at the beginning of both space exploration and nuclear development.

There is also the *Treaty on Principles Governing The Activities Of States In The Exploration And Use Of Outer Space, Including The Moon And Other Celestial Bodies. 1967*[25] generally referred to as the "Outer Space Treaty" The Treaty was inspired by the prospects opening up before mankind as a result of man's entry into Outer Space with the realisation and belief that the exploration and use of Outer Space should be carried on for the benefit of all people irrespective of the degree of their economic or scientific development thus resulting and contributing to the development of mutual understanding and strengthening of friendly relations between states and people.[26]

[25](the "Outer Space Treaty", adopted by the General Assembly in its Resolution 2222 (Xxi)), opened for signature on 27 January 1967, entered into force on 10 October 1967, 98 ratifications and 27 signatures (as of 1 January 2008) <https://www.oosa.unvianna.org/oosa/spacelaw/outerspace.html> Accessed on 19 September 2023

[26]See the preamble to the "Outer Space Treaty"

The Treaty call upon States to refrain from placing in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction and from installing such weapons on celestial bodies which was adopted unanimously by the United Nations General Assembly on 17 October 1963.

The provision of Article IV is one of the very important provisions of the Treaty as it deals with the prohibition of weapons on the outer space. The provision says that:

> States Parties to the Treaty undertake not to place in around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.
>
> The Moon and other Celestial Bodies shall be used by all States Parties to the Treaty exclusively for peaceful purpose. The establishment of Military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for the peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

Without doubt, this provision is a development on the 1963 Partial Text Ban Treaty.[27] The issue now is the adequacy of the provision despite the development, for the purpose of environmental protection. While the 1963 Treaty prohibits nuclear weapon testing alone, Article 4 places emphasis on the prohibition of placing of objects carrying nuclear weapons or any kind of weapons of mass destruction on the outer space. Can this be said to mean that where States test nuclear weapon in outer space temporarily or without placing the object used in carrying the weapon on the space, such provision will avail it? Especially since the provision did not state whether the placement prohibited is that of a temporary, permanent or outright placement prohibition. Also, what happens where the actual weapon is placed in outer space and not the object used in carrying it to outer space.

According to Malcolm Shaw, there are disagreements as to the meaning of this provision,[28] he went further to say that the article bans only nuclear weapons and weapons of mass destruction from outer space, the Celestial Bodies and from orbit around the earth ,but Article 1 does emphasis that the exploration and use of Outer Space shall be carried out for the benefit and interest of all

[27]Art. 1

[28]This issue became particularly controversial in the light of the US strategic Defense Initiative (Star Wars), which aimed to develop a range of anti-satellite and anti-missile weapons based in space. The UN committee on the peaceful uses of outer space considered the issue, although without the participation of the US, which objected to the matter being considered: see e.g. 21(6) UN Chronicle 1984.p18

Countries and it has been argued that this can be interpreted to mean that any military activity in space contravenes the Treaty[29]

This article disagrees a little with this argument because from the provision, one can deduce that the only military activity allowed by the article is where the military activity is necessary for the peaceful exploration in the areas which include deployment of military personnel for scientific research and peaceful purposes.

The Treaty also fails to prescribe sanction as to the contravention of this provision. Also, what would be the reaction where a non-State party places nuclear weapons on the Outer Space? This Treaty also fails to define what peaceful purposes is within the context of the Treaty, does it include the use of nuclear weapon on/from the outer space to rescue people whose Country is plagued with war crimes and genocide as well as the United Nations's right of intervention under the UN charter?

[29]Shaw. M.N, International Law. Fifth Edition. Cambridge University Press. P 482: Etudaiye Muhtar & Olatinwo Khafayat Yetunde, **(2017):** Freedom of Exploration and Militarisation of Outer Space. *Lexigentia Law Review* 4: ISSN: 2454-1613: 47-60, Published by Lloyd Law College, Greater Noida, Delhi, India. Avaialable online at www.lloydlawcollege.edu.in/publication/pdf/lexigentia%20Vol%204%202017.pdf>Also at http://kwasustaff.kwasu.edu.ng/public/viewpub/260?page=1>and <https://kwasuspace.kwasu.edu.ng/handle/123456789/840> Assessed 11 October 2023

The second paragraph of Article 4 states that it is only the moon and other celestial bodies that must be used exclusively for peaceful purposes which has been interpreted to mean that (a) only aggressive military activity is banned (b) and that all military activity is banned. States Parties to the Treaty are enjoined to pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to *avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial* matter and, where necessary, the state party is to adopt appropriate measures for this purpose and that outer space is to be used for peaceful purposes and the banning of weapons in outer space.

Countries, especially the technologically developed ones, still have and continue to use weapons in outer space for one reason or the other which adversely affect the preservation of space for human use. A typical example of the use of weapon in outer space occurred on 11 January, 2007, when a Chinese ground-based missile was used to destroy a spacecraft[30] This military success demonstrated China's ability to use weapons to target regions of space that are home to various satellites and space-based systems. This military act contributed to debris that is now hovering above the earth.

[30]Fengyun-ic. An aging satellite orbiting more than 500 miles in space since May,1999. Leonard David, 'China's Anti-Satellite Test: Worrisome Debris Cloud Circles Earth' Updated 17 November 2021 SPACE.COM <https://www.space.com/3415-China- anti-satellite-test-worrisome-debris-cloud-circles-earth.html> Accessed 11 October 2023

The United States has also had its share of space weaponisation and has also expressed the intention to expand its military capabilities as well as having weapons in space. While this has the advantage of providing additional important defense mechanism to the US, there is concern about the interest of the international community in their use of Outer Space, aside from the fact that it could be referred to as the beginning of an arms race, if each Country starts deploying space weapons.

The United Kingdom is not behind with respect to Military activities in space, even though it has both positive and negative implications for space debris. On the positive side, the UK's military space activities are governed by the Space Debris Mitigation Guidelines, which are designed to minimise the creation of space debris. The UK also participates in international efforts to track and remove space debris, such as SDMGSS and IADC. Similarly, UK has a military presence in space through its Royal Air Force (RAF) and its Space Operations Center (SOC).[31] The RAF operates a fleet of surveillance and communications satellites that provide data to military operations on Earth. The SOC coordinates and monitors the UK's military activities in space, including tracking and responding to debris and other threats.[32] While the UK's military activity in space has the potential to create space debris, it also has the potential

[31] Space Operation, <www.dstl.gov.uk/about-us/our-organization/capability-directorate/space-operations-centre> Accessed 23 October 2023.

to help reduce it. For example, the SOC monitors and tracks objects in space and can help prevent collisions and other events that could create debris.[33] Furthermore, the RAF operates the Skynet 5 satellite constellation, which provides secure communications and data transfer for military and government operations around the world. These satellites are monitored by SOC and are designed to operate in such a way as to minimise the risk of creating debris. The Skynet 5 satellite constellation is the main military space activity of the UK, it consists of five satellites that were launched between 2007 and 2012. The satellites are used for secure military communications, including voice, data, and video. The satellites are controlled from the Royal Air Force's Satellite Operations Center at RAF Fllingdales in North Yorkshire. The center also monitors the space environment for potential threats, such as space debris. The UK also has several ground stations around the world that support the Skynet 5 constellation. Furthermore, the Skynet 5 satellites are designed to have a long lifespan and to be highly resilient to damage. However, even with these measures, there is still a risk of debris being created. In 2008, a US satellite was accidentally destroyed by a US missile test, creating thousands of pieces of debris. While this incident did not involve the UK it highlighted the risk of

[32] ibid
[33] Lee M Handley, "UK Space Command: Bringing the UK's Defence into Space" <www.theguardian.com/world/2020/nov/26/royal-air-force-expands-into-space-as-military-plots-low-orbit-satellites> Accessed 23 October 2023.

debris being created from military activities in space. The UK is also reported to be working on new technologies to protect its satellites from debris. For example, the successor IMINT satellite will have a laser debris warning system that will detect and track space debris. The laser debris warning system is a key part of the successor IMINT satellite's design. It will use lasers to detect and track space debris and will then send alerts to the satellite operators. This will allow the satellite to be maneuvered to avoid debris and will help to protect it from damage. Additionally, the UK has contributed to international efforts to reduce space debris, such as the Inter-Agency Space Debris Coordination Committee (IADC) and the Committee on the Peaceful Uses of Outer Space (COPUOS).

Although Countries like China have made an effort to pursue a global ban on outer space weapons. The United State under President Bush, declared that they would seek to dominate space military and prevent a global treaty to ban weapons in outer space[34]

[34]Shah. A. Militarization and Weaponization of Outer Space Author and Page information <http://www.globalissues.org/article/69/militarization-and-weaponization-of-outer-space> Accessed 25 September 2023. Olatinwo K. Y, 'Dispute Resolution options in the legal Regimes Regulating Outer Space Activities' 2015 Indian Journal of Air and Space Law, 1: ISSN 2391-6091: 211-226. Published by Centre for Air and Space Law (CASL), NALSAR University of Law, Hyderabad India <https://kwasuspace.kwasu.edu.ng/handle/123456789/842> Accessed 25 September 2023

From the foregoing it can be deduced that instead of utilising the outer space for peaceful purpose and for the benefit of mankind, Countries like US, China and Russia are more interested in the military use of outer-space either for defense purpose, space dominance or to show how powerful they are technologically.

As pointed out earlier, there are other International Agreements in respect of States activities on Outer Space. The two identified here are basically the ones that try to provide on space environment as regards degradation. Also, none of these laws have made any provision concerning debris creation on outer space. The other laws include the *Convention on International Liability for Damaged caused by Space Objects 1972, Convention on Registration of objects launched into outer space (1975), and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968*

A critical weakness in the international law on space is that the existing space law is related to the use of space and not on regulation of space debris creation and clean-up. This means that commercial and government-sponsored space

launches can still create more debris without limits.[35]

With increasing growth of space technology and activities, the quality of the space environment is degrading, therefore, preserving and sustaining that environment as a valuable resource for future space users has motivated interested Space bodies to consider mechanisms to control the increase of debris. Such International meetings like the 5th European Conference on Space debris and the United States House of Representatives Committee on Science and Technology's Subcommittee on Space and Aeronautics on 'Keeping the Space Environment Safe for Civil and Commercial Space users have concluded that it is better to have Internationally agreed Space Debris Mitigation Methods for debris reduction and remedial mechanisms in the event of default.[36]

The role of non-profit organisations, NGOs or civil society in mitigating space debris is also worth mentioning. Organisations like American Astronautical Society and Committee on Earth Observation Satellites often creates awareness on space debris through forums, newsletters, events and publications related to space.[37] Another inter-governmental organisation dedicated to resolving issues

[35]Shri U. Determining Liability for Damage Caused Due to Debris in Outer Space: - Portal to a new regime. National Law University Jodhpur India. <HTTPS://www.isro.org> Accessed 25 September 2023

[36]Chaddha, Shane, 'Space Debris Mitigation' Revised (September 29, 2011). SSRN: <https://ssrn.com/abstract=1935386>< http://dx.doi.org/10.2139/ssrn.1935386> Accessed 11 October 2023

involving space debris is the long-standing Committee on the Peaceful Uses of Outer Space (COPUOS) established in 1958. COPUOS often create forum for the exchange of information in relation to space and this encourages international cooperation in outer Space activities. COPUOS holds annual meetings on Outer Space issues.[38]

In meeting up with its responsibility on space affairs the UNCOPOUS has put in place measures or seven (7) space debris mitigation guidelines[39], which was subsequently adopted by its Scientific and Technical Sub-Committee. Member States and International Organisation are enjoined to voluntarily take measures through national mechanisms or through their own applicable mechanisms to ensure that the guidelines are implemented to the greatest extent feasible, through space debris mitigation practices and procedures. It is pertinent to point

[37] Senechal T, 'Space Debris Pollution: A Conventional Proposal'. Senechal T, 'Space Debris Pollution: A Convention Proposal. <https://pon.harvard.edu/wp-content/uploadsc/images/posts/Art.2-Part-A.pdf> Accessed 25 September 2023 Senechal, Thierry, Orbital Debris: Drafting, Negotiating, Implementing a Convention (May 11 2007) <http://web.mit.edu/stgs/pdfs/Orbital%20Debris%20Convention%20Thierry%20Senechal%2011%20May%202007.pdf>Accessed 11 October 2023

[38]Robert. B.C. Procedural challenges to environmental regulation of space debris. Space Debris Mitigation and Prevention .Publication: American Business Law JournalSaturday, March 22 2003.<http://www.allbusiness.com/american-busineeslaw-journal> Accessed 29 September 2023

[39]All the guidelines can be sourced directly from United Nations Office for outer space affairs (DOCS). Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space. United Nations, Vienna 2010, Austrai.V.09-88517-Jan2010-1,000. <http://www.iadc-online.org><http://orbitaldebris.jsc.nasa.gov/library/space > Accessed 04 October 2023

out that these measures are not binding under International Space Laws, compliance is therefore voluntary and not mandatory.

The IADC, which was founded in 1933, is an international organisation that brings together space agencies and other organisations to share information on space debris creation and to develop mitigating measures.[40] The United Kingdom, for instance, at its national level has implemented the Space Debris Mitigating Guidelines,[41] which are designed to minimise the creation of debris from UK-based space activities. Additionally, the UK is working with the European Space Agency (ESA) on projects to track and remove space debris. Similarly, the UK Space Debris Mitigating Guidelines provide a framework for organisations in the UK to follow when it comes to reducing the creation of space debris.[42] These guidelines cover areas such as mission design, post-mission disposal, and tracking and cataloging of space debris. In addition to this, the UK Space Agency has also implemented a Space Debris Mitigation Plans, which outlines specific actions that the Agency is taking to reduce the amount of space debris created by its own nations.[43] These actions include

[40]Report of the IADC Activities on space Debris Mitigation Measures, May 8, 2023, <http;//orbitaldebris.jsc.nasa.gov/library/iadc-space-debris-guidelines-revision-2> Accessed 25 October 2023.

[41]Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space. United Nations, Vienna 2010, Austrai.V.09-88517-Jan2010-1,000.<http://www.iadc-online.org><http://orbitaldebris.jsc.nasa.gov/library/space > Accessed 25 October 2023

[42] UK's Space Agency's website, space debris mitigation guidelines <gov.uk/government/publications/Space-debris-mitigation-guidelines> Accessed 25 October 2023

tracking and cataloging debris, developing a space debris modeling tool and conducting research on debris mitigation technologies.[44]In terms of specific technologies being developed to reduce space debris, one example is the Active Debris Removal mission (ADR) developed by ESA. This mission aims to use a spacecraft to capture and remove large pieces of space debris from orbit. Another example is the deorbit mission, which is a European mission to reduce a large ESA satellite from orbit at the end of its life. There are also several companies developing technologies to collect and de-orbit small pieces of space debris, including Astroscale and D-orbit[45]. In addition to these efforts to reduce the creation of space debris, there are also efforts to protect existing satellites and other space assets from the impact of space debris. One example is the use of advanced materials for the construction of satellites. These materials are designed to withstand the impact of small pieces of debris.[46] Another example is the use of technology to monitor the space environment and provide advance warning of potential collisions.[47] In addition, this

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[43] Ibid
[44] Ibid
[45] Space sustainability, Astroscale, securing space debris, <https://astroscale.com/space-sustainability/> Astroscale.com, accessed 14 November, 2023
[46] Satellites Manufacturing Consideration, space debris, <https://axessnet.com/en/satellite-manufacturing-considerations/#:~:text=To%20manufacture%20a%20satellite%2C%20Kevlar,as%20aluminum%2C%20recyclable%20and%20lightweight> axessnet.com ,accessed 14 November,2023
[47]Marcin Frackiewicz, ts2 space (17 March, 2023), The Advancement in Satellite Technology for Space-based Environmental Monitoring <https://ts2.space/en/the-advancements-in-

technology helps to maneuver satellites to avoid collision and another debris impact. Beyond the space sector, there are also efforts being made to educate the public about the issue of space debris and its impact on our planet. For example, the Museum of Science and Industry in Manchester, UK, has an exhibition on space debris that explains the issue and how it can be mitigated.[48] Similarly, there are also several education resources available online, such as the European Space Agency's Space Debris Toolkit. These resources are aimed at children and young people, and provide information on the causes and effects of space debris.[49]At the international level, IADC has developed many guidelines and recommendations to reduce the creation of state debris.[50] These include guidelines for the design of space and space missions to minimise the amount of debris created, as well as guidelines for the safe disposal of spacecraft at the end of their missions.[51] The IADC has also developed a system for tracking and cataloging space debris, called the Space Debris Mitigation Guidelines Support System (SDMGSS). This system helps

satellite-technology-for-space-based-environmental-monitoring/#gsc.tab=0> ts2.space, accessed 14 November, 2023

[48] Mosi.org website, The Museum of Science and Industry's exhibition on space debris "The Art and Science of Rubbish in Space < www.mosi.org.uk/explore/exhibitions/space-junk-the-art-and-science-of-rubbish-in-space> Accessed 04 November 2023

[49] European Space Agency website, The ESA's space debris toolkit. www.esa.int/Education/teacher-Resources/Space-Debris-Toolkit. Accessed 04 November 2023

[50] Report of the IADC Activities on space Debris Mitigation Measures, May 8, 2023, <http;//orbitaldebris.jsc.nasa.gov/library/iadc-space-debris-guidelines-revision-2> Accessed 03 November 2023.

[51]ibid

to identify potential pollution and prevent it from occurring.[52]In addition, the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) has a dedicated working group on space debris. This working group has developed guidelines for the long-term sustainability of outer space including those related to space debris.[53]

Recent development

Recently, in an effort to mitigate space debris, the European Space Agency launched its Zero Debris Charter on 6 November, 2023. The initiative behind this Charter was first proposed at the ministerial conference of 2022, where ESA was encouraged by its member states to implement a Zero Debris Approach for its missions and to encourage partners and other actors to pursue similar part, thereby collectively putting Europe at the forefront of sustainability on Earth and in space while preserving the competitiveness of its industry. The initiative was announced at the Paris Air Show in June 2023 by ESA Director General and other executives. The Charter sets out several targets including that a mission's probability of generating space debris should

[52] Website of Space Debris Office of the European Space Agency (ESA), esa.int/spacinginimages /images/2017/10/ESA_Space_Debris_Office. Accessed 26 October 2023

[53]Robert. B.C. Procedural challenges to environmental regulation of space debris. Space Debris Mitigation and Prevention .Publication: American Business Law JournalSaturday, March 22 2003.<http://www.allbusiness.com/american-busineeslaw-journal> Accessed 30 October 2023

remain below 1 in 1000 per object[54]. It also sets a target of 99% success for post mission disposal including through external means when necessary[55]. Similarly, one of the major foresights is with the aim of shaping the global consensus on space sustainability which is said to be achieved by gathering a wide and varied array of space entities to define ambitious and measurable space debris mitigation and remediation targets for 2030. Paragraph 2 (4) similarly points out that routine and transparent information sharing should be facilitated and active participation in strengthening global space traffic coordination mechanisms should be encouraged, this if properly followed will among others bring a very good and excellent proposed results as envisaged by the end of 2030. Provided for is the access to timely and accurate data on space objects down to a size of 5cm or smaller in low earth orbit and 20 cm or smaller in geostationary earth orbit should be improved to enhance decision making capabilities for collision avoidance.[56]

Paragraph one of the Zero Debris Charter provides for its guiding principles. Sub (1) of the said paragraph provided that 'Space debris should not be intentionally released during space activities and the unintentional generation

[54] Paragraph 2 sub(1), Zero Debris Charter 2023
[55] Rachel Jewett, ESA officially launches its Zero Debris Charter, ' Satellite Today.com', <https://www.satellitetoday.com/sustainability/2023/11/08/esa-officially-launches-its-zero-debris-charter/> accessed 13 November, 2023
[56] Paragraph 2 sub(5) Zero Debris Charter

of space debris should be minimised.' This among others has specifically shown that the charter has put in place measures to completely eradicate space debris by the end of 2030 as proposed by the charter. The charter [57]by the virtue of its chapter 2 has completely defined jointly target and has encouraged states to work with the laid down provisions in other to achieve the proposed objectives, the emergence of this Charter if strictly followed will bring about achieving zero debris by the end of 2030 as the Charter is one-of-a-kind initiative and hopefully it achieves all its objectives by the end of 2030 and the outer space and it's environment became debris free.

At the national level, some countries have also developed their policies and regulations related to space debris. For example in the United States, the National Aeronautic and Space Administration has developed the Orbital Debris Mitigation Standard Practices.[58] These practices are designed to reduce the risk of collision between spacecraft and space debris, as well as to reduce the amount of debris generated by spacecraft.[59] In addition, NASA has some projects aimed at understanding and reducing the impact of space debris,

[57] Zero Debris Charter 2023
[58] FR Jones, Space Debris Mitigation; a united policy framework <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=15508&context=dissertations > Scholarsworks.waldenu, accessed 14 October, 2023
[59] National Aeronautics and Space Administration (NASA) Standard for Orbital Debris Mitigation, <www.nasa.gov/sites/default/files/atoms/files/nasa_std_8719.14a.pdf> Accessed 04 November 2023

including the Orbital Debris Program Office[60] and the Re-entry Breakup Recorder Project. Many other countries have also developed their policies and regulations related to space debris. For example, Canada has the Canadian Space Debris Mitigation Standard[61], which guides how to mitigate the risk of space debris for Canadian space activities. In Germany, the German Aerospace Center has developed the German Space Situational Awareness (G-SSA) program[62], which is aimed at developing the technologies in systems needed to monitor and track space debris. Similarly, in France, the Center National d-EtuSpatiales (CNES)[63] has several research projects related to space debris.

Moving Forward

As all hopes are up high with the introduction of Zero Debris Charter, it is noteworthy that while these several policies and regulations are important part of the effort to reduce space debris, they are only one part of the solution in addition to policy and regulatory efforts there are also technological solutions being developed to track and remove space debris. For example, the e-Deorbit

[60] NASA Orbital Debris Program office, <www.orbitaldebris.jsc.nasa.gov> accessed 04 November 2023
[61] Canadian Space Agency, 'Space Debris Mitigation Standard'< www.asc-csa.gc.ca/eng/publications/publi_std_stnd_032-10.asp> Accessed 04 November 2023
[62] German Aerospace Center, German Space Situational Awareness, <www.dlr.de/content/en/Portaldata/1/Resources/bilder/portal/portal_news/G-SSA_logo.jpg> Accessed 04 November 2023
[63]Center National d-Etude Spatiales, Research and Development'< www.cnes.fr/en/web/CNES-en/2243-research-development.php> Accessed 04 November 2023

mission mentioned is one example of a technological solution. Furthermore, there are several companies working on developing new technologies to reduce space debris such as Astroscale and ClearSpace. These companies are developing technologies such as space tugs[64] and the net to capture, reduce and remove space debris. Another area of technological development related to space debris is the use of Artificial Intelligence AI and machine learning. AI can be used to predict the movement of space debris and to plan for future missions to mitigate the risk posed by space debris. For example, NASA's Autonomous Learning for Orbital Debris Observation (ALODO) project is using machine learning to predict the risks of collisions between space debris and operational satellites.[65] This information can then be used to plan orbital maneuvers to avoid collisions and protect satellites. In addition to AI and Machine learning, another area of technological development related to space debris is the use of advanced sensors and imaging technologies. New censors and imaging technologies are being developed to detect and track space debris more accurately and efficiently. For example, the LaserCube project is developing a laser-based system to measure the size, shape, and spin of space

[64]Adam Bluestein, Innovative Space Companies <https://www.fastcompany.com/90849109/most-innovative-companies-space-2023>, Fastcompany.com, accessed 14 November, 2023.
[65] JC Liou, Orbital Debris Modeling and The Future Orbital Debris Environment <https://ntrs.nasa.gov/api/citations/20120015539/downloads/20120015539.pdf> ntrs.nasa.gov, accessed 14 November2023

debris. This information can then be used to develop more effective mitigation strategies. Other examples of new sensors and imaging technology include CubeSat and Optical Telescopes.[66]

Needful to restate the importance of Outer Space resources in man's existence, both immediate and as the final frontier. It is therefore necessary for States at the International level to rethink the incorporation of provisions on the regulation of Space debris creation, mitigation, and clean-up in the existing International Laws on Outer Space or rather a new Specific Agreement that will bear the concern of Space environment i.e. outright prevention of space debris creation and sanctions for default of the relevant provisions. Therefore this article recommends that there is the need to prevent Space debris formation and minimise its creation; as well as to minimise the impact of already formed debris to man whether in space or the earth surface; that there should be a Space Debris Convention which should aim at defining a liability and compensation for contravention of the space debris regimes; and a legal regime should be put in place to provide for a dispute settlement mechanism to determine liability for contravention of the Space Debris Regime and all other Space Laws. Aside the International Court of Justice, the dispute mechanism to be put in place

[66] JA Champagne, Cubesat Image Resolutions Capabilities with Deployable Optics and Current Imaging Technology, <https://digitalcommons.usu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3059&context=smallsat>digitalcommons.usu.edu, accessed 14 November, 2023

should provide for Alternative dispute resolution mechanisms[67]as this allows for easy and transparent processing since the dispute settlement would require the participation of all parties to the dispute. State parties to the Space Debris Convention must be expected to make contribution to funding the liability and dispute settlement mechanism and for more emphasis, there should be provision for sanctions for the contravention of the provisions of the space regimes

[67]That Is, Negotiation, Mediation, Conciliation, Arbitration etc

NEED FOR GENDER NEUTRALITY IN LEGAL AND CONSUMER ECOSYSTEM

Shovinita Acharya*, Soham Vijay Samant & Mansi Devbrat Sahani**

ABSTRACT

Consumer Protection is a fundamental concept for assuring consumer's right to information, education, safe products, protection of their economic interest, sustainable consumption, dispute resolution and non-discrimination. At the same time, talking about gender-neutral laws in India, their extent and their applicability are the focus of this research paper. Not only the legal system but also the worldwide & and national consumer ecosystem should inculcate gender-neutral principles to provide equal opportunities to buy and own the products as per needs and not as per gender. This not only helps to maintain law and order among the citizens but also helps in the protection of LGBTQ+ rights. Provided, before such applicability of rules and principles the facts and circumstances of the case should be taken into consideration and these laws should not violate the constitutional provisions. The main objective of this research paper is to put the limelight on the gender disparity happening in our national legal and consumer ecosystem as a whole. Even after the existence of special provisions that are enacted to protect those who suffer from such discrepancies in our legal and consumer field, there are a few flaws and loopholes that might hamper the main motive of the nation's legal aid and consumer protection ecosystems collectively.

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Keywords: *Gender Neutrality, LGBTQ, Consumer Ecosystem, Consumer Protection, Gender Disparity*

Introduction

Twin challenges of building pathways to sustainable development and achieving gender equality have never been more pressing. In the early 2000s, the Millennium Summit of the United Nations Organisation led to the formation of 'Millenium Development Goals' (MDGs) agreed by a majority of its member nations. The MDGs set targets for realizing and adopting globally agreed goals that included: eradicating extreme poverty, universal primary education, promoting gender equality and empowering women, reducing child mortality, ensuring environmental sustainability etc. The UN members expected to achieve these goals by the end of 2015 but failed to accomplish all of them, so the post-2015 development agenda came into existence which acts as a successor to MDGs. Now as the world moves towards the post-2015 development agenda, the present world survey mentioned in Global Gender Gap Report 2022 generated by the World Economic Forum[1], not only shows why each challenge is so important but also why both challenges must be addressed together, in ways that fully realise the human rights of women and girls and help countries to make the transition to sustainable development.

Gender-neutral laws are those laws, which do not discriminate against the public because of gender and sexual orientation, and treat all individuals as they are, such laws are applied to any individual irrespective of their gender, or sex and thus help in the overall progression of society as a whole. Formation of such laws which apply to every person regardless of sex and

[1] World Economic Forum, 16th Report on Gender Parity: Global Gender Gap Report 2022 (July 2022).

thus setting an equivalent mark for everyone will significantly change the way of applying the laws and serving proper justice to aggrieved and needful people. But every coin has two sides, one displays the good and optimistic approach and the other shows the negative, unstable, and destructible side. Gender-neutral laws come with the same two-sided aspects which are good as well as bad.

Gender-neutral laws are now a need today which will help in providing equal protection to everyone. There are many laws which are gender biased, even in India, many criminal laws are gender biased and discriminate against convicts and victims based on their sex, gender and stereotypes that are set by society and customs about a particular sex. Merely being a female, male or some other gender should not discharge the person from the liability of sexual offences that they commit. There is a need for legislative bodies to undertake such gender disparities happening in society and try to amend, modify, or form laws/Statutes/Acts that should have gender-neutral aspects, address every individual without discriminating against them based on their gender, and make every such person liable who commits the crime, irrespective of their gender.

The need to shift economies and society towards more sustainable routes is currently the subject of growing international debate, whether it be to prevent crisis and disaster or to promote prosperity through "green economies." Thus far, policy responses have not consistently prioritised addressing gender disparity or stressed how the realisation of human rights must direct such efforts. An understanding of the trade-offs involved is often absent from these kinds of discussions as well. Sustainability is frequently discussed as though there were simple rules to follow. However, several conundrums occur for example, how to pay for various forms of low-carbon energy; whether to prioritise food or biofuels when using land; and whether to

preserve trees to either reduce global climate change or meet local livelihood needs, to mention a few.

Offences affecting the human body are reported every year in the world and the graph of such offences is rising at an alarming rate, not only globally but also at the national level (India) one can see a significant increase in the magnitude of cases that have been filed every year related to such offence[2]. The worst part is, that women and children (mainly female children) are falling victim to such offences more often compared to any other gender and no doubt that any such person who commits such a heinous crime shall be punished strictly as per the law but simultaneously men are also falling as victims to sexual assault, sexual abuse, harassment, exploitation etc[3]. The high frequency of women being a victim of such offences doesn't rule out the possibility that men cannot face such consequences. Sexual violence can happen to anybody, and it can be committed by anyone, it doesn't matter what the gender of the perpetrator or victim is, the thing that matters is that sexual violence occurs against the will/consent of a person and it infringes the right to live with free will in the society. Sexual violence is not gender specific it can happen to anyone even though there is a greater number of cases portraying women as a sufferer. There's a stereotype rooted in our society that women are physically weaker than all men hence, this is why there are more female victims of sexual offences, but it is not true, even though men and women are physiologically different, it doesn't explain any person's strength and it does not depend solely on their gender but also on factors such as their profession, genetics, nutrition, and physical activity. While describing the sexual violence occurring on men and women the possibility of the same happening with transgenders cannot be neglected.

[2] The National Crime Records Bureau (NCRB), Report on Crime against women in India (July 2022)

[3] Kritika Kapoor, "Men too are victims of sexual harassment", Times of India, Dec. 21, 2012.

One more stereotype is that Transgender individuals cannot be raped or get sexually assaulted but that's not true either. In fact, transgender individuals are most vulnerable to sexual violence because they are stigmatised and face structural discrimination[4].

If a transgender individual suffers from such sexual violence, then there are no provisions for the redressal of such individuals. In fact, even if a transgender individual wants to file an FIR regarding such a crime committed by another transgender individual, police fail to act due to a lack of provisions for sexual violence against transgenders[5]. While analysing such topics and explicitly speaking about the same, as a researcher we think sexual offences or offences against the human body shall not be gender biased or shall not discriminate against any person based on their gender. After all, the offence against the human body is a crime against a body as a whole and not against any specific gender. Understanding India's stand on gender neutrality and what legislation has been passed to protect every individual against sexual offences and offences against the human body is also important.

Misuse of Law & Gender Neutrality: A Conundrum in the System

Several provisions (Section 354A, 354C, 354D of IPC) had been made which provide protection and redressal for women who suffer from sexual violence, harassment, assault, voyeurism, stalking etc. but no such provisions are made for men or any transgender individuals hence, lacking gender-neutral aspects. These provisions are enacted to provide safety and protection for female victims but in recent times the misuse of such provisions can be seen as they have been used as a weapon to achieve personal motives. The lack of

[4] Dr. Justice Dhananjaya Y. Chandrachud (Chief Justice of India), Handbook on Combating Gender Stereotypes 13, 23 (Supreme Court of India, Delhi, 2023).

[5] Kathelene Antony, "Police refuse to file complaint of assault of minor by transgender group" The Hindu, Nov. 27, 2020.

gender neutrality in such provisions also lets transgender individuals suffer from such heinous crimes and such cases go unreported. Indian Penal Code, which was enacted on 6th October 1860, covers all criminal laws that are meant to provide justice to victims of crimes and penalise the offenders, incarcerate criminals within the nation but this still lacks a significant perspective which still holds back the code from achieving its predominated motive to provide justice and call a halt on crime rates in India. IPC is not a complete failure but it's not complete either, several sections in this code are gender-biased and treat women as victims and men as perpetrators. In this way, the motto of convicting the offender and serving justice to the innocent fails. Let us know which are those sections which discriminate based on gender.

Section 375 of IPC, 1860 describes what will amount to rape along with its exceptions but the most unanticipated thing is that the section itself is gender biased as it describes that only men could commit a rape and only women are recognised as victims of such sexual offences which is infructuous. The word "rape" is derived from the Latin word *rapio* means "to seize". Thus, rape means a forcible seizure. It signifies in common terminology, "the ravishment of women without her consent, by force, fear, or fraud" or "the carnal knowledge of women by force against her will."[6] Firstly, rape is a sexual offence against the human body and thus it shall include any person's body regardless of their gender, secondly, as it is an offence against the body, there should be no gender disparity that such a heinous crime can only be committed by a man or a victim of such crime is only a woman! Rape is a sexual offence and it occurs when a person tries to have sexual activity with any other person without their consent and will to do so thus forcing them to have sexual intercourse by any means is a crime and this is what rape should

[6] K. D. GAUR, Textbook on Indian Penal Code 1049 (LexisNexis, New Delhi, 7th edn. 2020).

be defined as even a woman can commit rape by forcing a man to have sexual relation with her by threatening him for any reason also not only woman or a man but also any other gender community can also fall as a victim to such abhorrent crimes But still section 375 of IPC had set a stereotype that "Rape" is only a crime that can be committed by a man and a woman is the sufferer it does not even consider the other gender person who faces such gruesome acts. Back in a time when women's rights were suppressive and there were no such special provisions enacted protecting them against such crimes, the women were the victims and men served as the perpetrators but with modernisation and providing equal rights the scenario has changed.

The Indian criminal justice system is not victim-oriented but accused-oriented. Under the Code of Criminal Procedure 1973, the accused is provided with all possible help. A few constitutional protections are also available to an accused under Articles 20, 21 and 22 of the Constitution of India 1950; but, unfortunately, very few legal provisions exist in our criminal law and Constitution to provide succour to the victim[7].

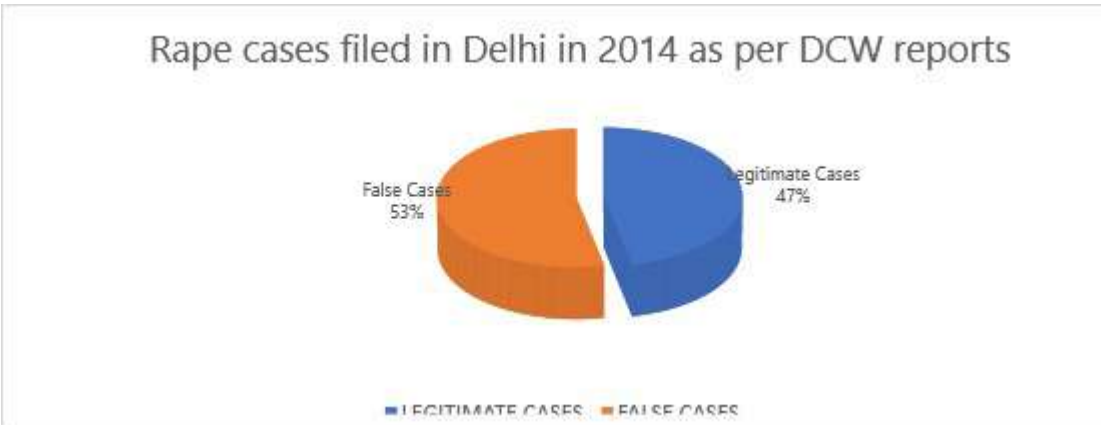
In the case of *Shivam Kumar Pal @ Sonu Pal v. State of U.P.*[8] Justice Ajit Singh held that the learned counsel of the Appellant made a criminal appeal at Allahabad High Court for bail application in crime case u/s 363, 366, 375, 504 IPC & 7/8 of POCSO Act & 3(1)(X) SC/ST (Prevention of Atrocities) Act 1989, which was earlier dismissed by the Farrukhabad Court was valid as the accused was falsely alleged by the applicant with a charge of rape and abduction but later while recording the evidence the victim girl herself stated that she was beaten by her mother and was raped by some other person plus she willingly went with the Appellant Shivam and she wanted to marry him also the FIR which was filed after 2 days of the actual incident by her uncle

[7] Dr. DIPA DUBE, Rape Laws in India, LexisNexis Butterworths (A Division of Reed Elsevier India pvt ltd), New Delhi, India, 2008.

[8] Cri. Misc, Petition No. 11560/2023.

was false and frivolous thus the court held that let the Appellant be released and imposed a fine of Rs.10,000/- on the Applicant for lodging a false FIR. From this case, we could clearly understand how such special provisions which are meant to protect women are exploited and used as weapons to extort money and defame a person in society.

In the year **2014,** a detailed analysis and investigation was done on rape cases that were filed in the same year and it turned out that **53.2%** of rape cases were false. In total 2,753 cases were reported among which **1,287 cases** were found to be genuine and the rest **1,464 cases** were false. The said investigation was done by the **Delhi Commission of Women (DCW)** to provide proper justice to each suffering from such a heinous crime. The said rape cases were filed from **April 2013 to July 2014** in Delhi among which half of the cases were false. This indicates how special provisions of criminal laws are used as a weapon against innocent persons. The said report was also got featured in **India Today News Network** alarming people about the ground reality of society[9]. In addition to this, one more statistical data is shown below regarding false rape cases filed in Haryana in past years.

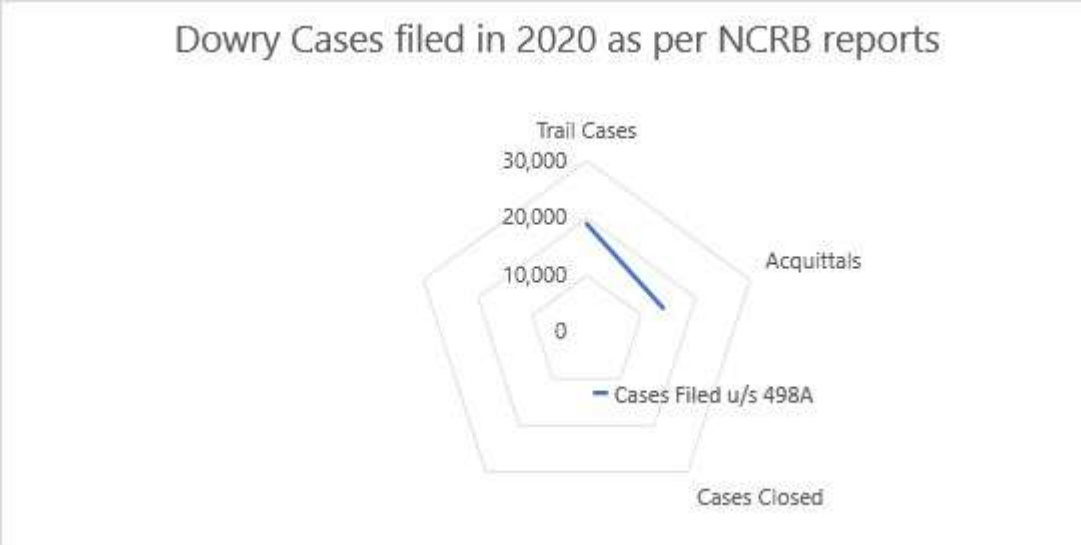


[9] Delhi Commission of Women, Report on false rape cases in Delhi in year 2013-14, (July 2014).

Section 498A of IPC says that if a woman is a victim of cruelty or harassment by her husband, or her husband's family or relatives then all such persons will be penalised with up to 3 years of imprisonment and liable for fine. No such provisions are made to protect men from any such harassment that happens to them at home! Even though the Supreme Court of India has decided various cases that seek gender-neutral aspects of such provisions but still the Act itself has not been amended yet so there are still some loopholes remaining. It is always presumed that only men should be accountable for such physical and mental harassment and that women are just victims but nowadays men are too suffering from such persecution. Two laws i.e., Section 498A of IPC & the Protection of Women against Domestic Violence Act are available for the benefit and protection of women but unfortunately, they are misused and exploited by some people to extort money and disrespect their husbands.

The predominant reasons behind such futile cases were mistakes of fact or law, extortion of money, matrimonial disputes, misunderstandings, and petty issues. Bombay High Court even held that 498A IPC should be a compoundable offence. According to the **National Crime Record Bureau (NCRB), 2020 reports 1,11,549 cases** were registered u/s 498A in 2020 of these, almost **15% of cases** were closed by the police for not finding merit. Over **19,000** cases were held for trial in court of which **14,000** cases ended in acquittal. The court also observed that section 498A has been exploited by married women who file a case framing their husbands and in-laws for petty issues. Following is the graphical representation of NCRB's 2020 report[10].

[10] National Crime Record Bureau, Report on Dowry Cases in India (March 2020).



Section 497 of the IPC criminalised adultery and even here the culpability is imposed on a man who engages in sexual intercourse with another man's wife but nothing in this applies to a woman! A woman cannot be held liable for adultery, nor she could be held as an abettor, she is exempted from prosecution. This was discriminatory. In early times especially in India the social status of women was as equal as men in every aspect of life. The women were allowed to choose their husbands as per their wishes and desire. But as time passes, the whole sanctity of our ancient social structure is hampered. In today's society, women are treated equally to men but one cannot observe the same in remote areas, even after the enactment of such provisions there's always a sword of Damocles for misuse of such laws.

Section 198(2) of CrPC states that "For Sub-Section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code; Provided that in the absence of the husband, some person who had taken care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf." This means that the

husband of an adulterous wife is an aggrieved person but the same does not apply to the wife of an adulterous husband! The wife of the adulterous husband is not treated as aggrieved and thus we can see gender disparity in this statute which violates Article 15 (1) that ensures that the state shall not discriminate against its citizens on the basis of sex, religion, place, caste or birth.

Section 497 IPC & 198 (2) CrPC together deal with the offence of adultery which has been held unconstitutional and struck down by the Supreme Court in the *Joseph Shine v. Union of India*[11] case. Making such laws gender-neutral will not only rectify a discriminatory issue in legislation but also help in providing equal protection for all. The case was first heard before a three-judge bench headed by Justice Dipak Misra later it was referred to a five-judge constitution bench and noted that "*Prima facie, on a perusal of Section 497 of IPC, we find that it grants relief to the wife by treating her as a victim. It is also worth noting that when an offence is committed by both of them, one is liable for the criminal offence, but the other is absolved. Ordinarily, the criminal law proceeds on gender neutrality, but in this provision, as we perceive, the said concept is absent.*" On September 27th, 2018, the bench decriminalised adultery. (Adultery is kept as the ground for divorce in matrimonial cases).

CONSUMER ECOSYSTEM: GENDER NEUTRAL ASPECTS

We looked at the lack of gender-neutral perspective in our legal system and how removing such gender disparity will bring a significant change in our society to protect every individual's rights and serve justice to society as a whole. Now let us understand what role gender neutrality plays in the consumer ecosystem, and whether this will affect the consumer's rights too!

[11] AIR 2018 SC 4898.

In today's world, there are tons of products available to the public according to their requirement and these products should get into the hands of their consumers as fast as possible. Consumers should be informed about such products, and this requires marketing strategies that help in promoting products and letting people know about them. Advertisements play an important role in introducing products to consumers but hardly anybody will ever think about how these advertisements affect our buying process and how they manipulate us to buy certain things. Advertisements can also be gender specific sometimes which manipulates us to often buy things which we don't plan for.

Talking explicitly the advertisement of contraception aka condoms is very gender specific and gender-biased too. Condoms (including male & female condoms) act as a barrier and are used as a protected way of having sexual intercourse, these products play a significant role in arresting unwanted pregnancies and sexually transmitted diseases so that both partners should be safe from any kind of disease. When someone sees an advertisement featuring a company that produces condoms you will notice that they always portray women in much less and tiny clothes which are seductive even though the advertisement is for male condoms! Promoting such products is fair but while doing so, degrading women's character is not acceptable.

Firstly, why women are shown bold with such exposure in a male condom ad & secondly why there are no such advertisements made for female condoms? The companies which manufacture male condoms are the ones who also produce female condoms then why aren't female condoms featured in any of the advertisements? This portrays gender disparity while marketing such products! Not only in legal provisions but also in the consumer ecosystem such discrimination is made. Advertisements with gender-neutral aspects portray realism and educate the public as a whole on specific topics.

We should openly talk about such things and pave a path to generalise the gender-neutral aspects of the same. One can hardly find any advertisements regarding female contraceptives. Only a handful of companies promote such advertisements. People should be aware of such products and meanwhile doing so there should not be a deterioration of any gender's character. This research is not about influencing men to promote a female condom or to encourage any marketing strategies but to educate people about how advertisements are gender biased and how they can manipulate the way we think. This is a serious issue for apprehension as to why we need a gender-neutral percept and in what ways such progressive principle will help the community to grow and know what rights they have.

All these issues were regarding males and females, but no such products are available for third gender or any trans person, not just condoms but there are no products that are marketed or displayed with subject to trans personalities. Let us delve into another such corner of the consumer network! Motor advertisements are mostly surrounded by more power, more speed and more performance which slightly portrays the masculine nature of such commercials. However, portraying certain messages in the public interest is fine but being gender-specific and lacking productivity in making gender-neutral advertisements is a major drawback. The time had witnessed some of the best female drivers in history like Lella Lombardi (an Italian racing driver), and Maria Teresa De Filippis who raced in the Formula 1 Racing World Championship and Grand Prix had set a great milestone in racing history that can be an inspiration to today's female drivers plus the rising stars of the modern racing world like Susie Wolff, Milka Duno is setting new records for new generation female drivers. Looking at such an exceptional female driver the Formula 1 Racing Board took an extraordinary step by forming a separate F1 racing academy which consists of all female drivers,

forming a separate club and racing series which will be focusing entirely on the upliftment of extraordinary female drivers who will be competing against each other in F1 Academy. The series which will be managed by the CEO of Formula Motorsport Limited Bruno Michel aims at uplifting young female drivers to reach the highest level of the motorsport field thus providing them with opportunities and maximising their potential by giving them world-class training programs. The consumer field should be open for all so that every one of us can get what we need as per our requirements. Such a gender-neutral aspect is necessary for the overall development of society and for providing equal opportunities to every person without discrimination. Let us now conclude this research work and understand the overall perception of the same.

Speaking globally, the automobile industry holds a greater number of male car owners than female, and all this is due to the indirect impact that stereotypical advertisements have upon the automobile market. Alone in the USA automobile market, almost more than half of the market is occupied by male owners and they own many luxurious car brands including Lamborghini, Ferraris, Porshe, Mercedes etc. and the remaining market is grabbed by female car owners of which 25% held second-hand car ownership. The problem is not regarding acquiring a luxury or sports car by any specific gender, but it is about the stereotypes that such a market holds about female consumers. Most sports car brands target male audiences more than female audiences as they promote masculinity in their brands rather than promoting their cars with gender-neutral aspects and encouraging them to buy them the eligible ones. The marketing team plays a significant role in showcasing which products are for whom, so rather than promoting cars for specific genders Whynot luxury car brands influence other genders to buy their cars as per their eligibility? A study by Edmund (American online

automobile inventory) shows that high-end car brands like Lamborghini, Ferraris, Porshe, Mercedes, BMW, Koenigsegg etc. have 90% of male owners. According to senior analyst Jessica Caldwell at Edmunds, the findings appear to indicate that males are more focused on maintaining their status and influence than their financial situation.

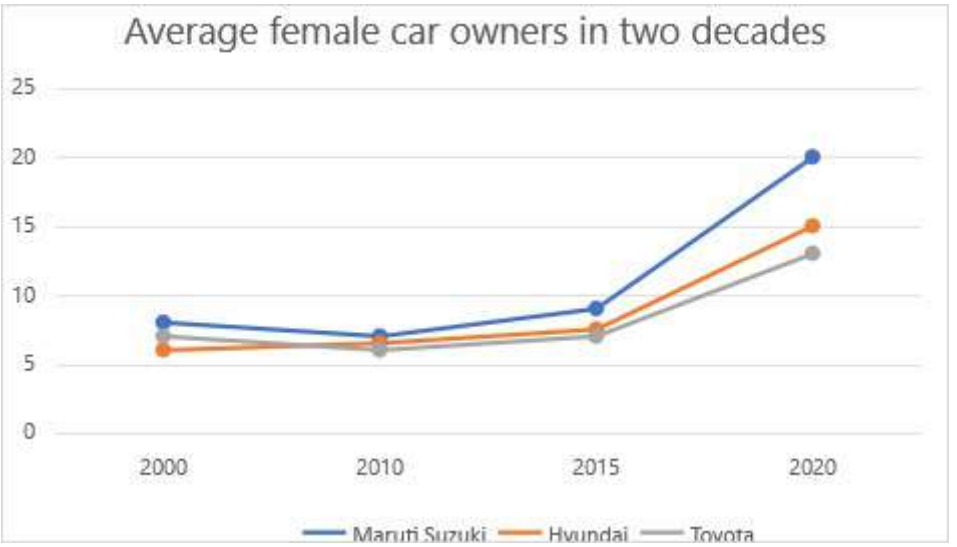
Gender Disparity in the Indian Consumer Environment

Delving into the Indian Automobile market, amount of female car owners is much higher than in any other market present globally. Maruti Suzuki, which is India's, one of the largest car manufacturing companies holds a significant amount of female car owners on the record. A remarkable jump from 7% to 12% in female car ownership has been recorded in recent years and most of them own a reliable and fuel-efficient car which is led by Maruti Suzuki & followed by Tata, Hyundai, Kia, and other cars as well. Even the executive director of **Maruti Suzuki**, **Shashank Srivastava** said *"Women buyers are going to be an important segment and we are trying to figure out how to make it easier for woman buyers and make Maruti Suzuki a preferred choice"*[12] This means Maruti Suzuki promotes a gender-neutral aspect and believes in consumer needs rather than being gender biased. There is also a magnificent growth in the share of woman buyers in the declining market who own a luxury car such as Mercedes Benz, Audi & BMW which has been at a higher rate of 15-20% in recent years.

We can say that the Indian Automobile Industry influences women to buy cars rather than just focusing on male audiences and promoting masculinity in their commercial ads, anyhow Indian automobile consumers prefer reliability, safety & efficiency over power, prestige, and luxury. According

[12] Mukherjee Sharmistha, Thakkar Ketan & Shyam Ashutosh, "Significant new customer category: More women in driver seat", The Economic Times, Feb. 08, 2020.

to industry experts, women currently account for 10%–12% of sales in India's 2.96 million car market. The past five years have seen an almost twofold increase in car sales to women, as more and more of them become financially independent.



Gender-based price Discrimination in India

The "Pink Tax," is commonly used to describe the extra amount of money paid by female customers for goods and services that are virtually identical but are marketed specifically to women and have special features that justify the higher price when compared to their male-targeted counterparts, is a well-known example of gender-based price discrimination. Why there is a "Pink Tax" Over the last ten years, there has been a surge in awareness regarding the pink tax, and both individual consumers and women's associations have voiced their opposition to this practice. Corporations have tried to use several excuses to defend their conduct in reaction to the resistance. The following are some of the possible contributing elements to the pink tax:

1. Differences in production
2. Price discrimination
3. Profit-making motive.
4. Gender-based tariffs

Gender-based price discrimination affects everyone differently since it exists in several industries such as personal care products, accessories, clothing, toys and even services. like hairdressing, makeup services and dry cleaning. For ex. The Pink tax is most associated with the personal care sector which includes body wash, hair products, deodorants, facial care products and other personal grooming products. For example, in India, personal care products like women's razors are manufactured by **Gillette**, which are identical to men's razors, but they contain different coloured packaging and are priced differently for women than men. The company uses its colour code to implement their propaganda to exploit more tax and money from female consumers men's razors are more often dark in colour (blue or black) packaging and lighter and pastel colours for women's (mostly pink/purple or light blue) colour packing. It costs women buyers as much as 13% more than men's razors even though the differences between them are minor. A haircut for men costs around Rs.150/- whereas a haircut for ladies might cost up to Rs.600/- or even more on similar lines deodorants of 150ml for men costs around Rs.120-150/- whereas the cost of women's deodorant of the same quantity starts from Rs.250-300/-. Eliminating the pink tax is necessary as it not only discriminates against consumers on their gender but also generates money by infringing consumer rights. The first action that consumers can take is to buy more generic and gender-neutral products which will ultimately lead to the downfall of gender-biased products by doing so other small start-up companies will also get a chance to expand their range among consumers and provide what exactly the customer need. Manufacturing,

Assembly, Packaging, Distribution, and supply are directly proportional to consumers' needs and requirements and not the way companies want!

Suggestions and Recommendations

Adopting gender neutrality in legislation is necessary for today's society. Modern times, modern problems need a modern and progressive solution hence, modern crimes and offences need a modern law with a gender-neutral concept that will make every such person liable who breaches the law and causes harm to any person. Laws with gender-neutral percept will not only treat every individual at the same pace but also eradicate gender-based discrimination from the penal code, in addition to this it will also help in arresting the false and frivolous cases that got registered with no merits. The same stands true with our consumer ecosystem where companies charge their consumers based on their gender which is intolerable! Even though the manufacturing process and the assembly line are the same for both genders' products, mere changes in colour code and packaging make them charge more and ultimately the burden falls on the consumer's pocket leaving them no choice but to purchase the product at higher rates.

'Pink Tax' as the name suggests imposes more tax and tariff on products which are intended to be bought by women as pink colour symbolises women in general! Many Western countries have been affected by this tax including Hungary, Argentina, France, Germany, the UK, Italy & India etc. which goes heavily into people's pockets especially women's! Pink Tax is mainly imposed on personal care products, clothing, and toys, which means even though a razor or shaving cream is the same for men and women, but still, female buyers will still have to pay a high for such products. Elimination of such taxes is necessary to bring equality among the consumers to buy their personal care products. Consumers should not face such discrimination

based on their gender as the market should be open to all and every such individual should get the right to buy with equal pricing as for others.

Here are some recommendations that could bring a significant change in law formation & and its applicability.

1. Affirming and implementing gender neutral principle which has been recommended to the parliament to replace **Indian Penal Code 1860** with **Bhartiya Nyaya Sanhita Bill, 2023[13].**
2. Adapting methodologies to understand the modern needs of society (amending, modifying and enacting laws that cover the gender-neutral aspects) and treating every such offender equally with no gender disparity and penalising/convicting every such person as same.
3. Considering the false cases that have been registered in recent years and understanding the cause of such issues will help in eliminating flaws in our legal system.
4. Improving the legal aid and spreading awareness about addressing complaints of transgender individuals also understanding and undertaking circumstances before considering any such false cases u/s **375, 376, 498A of IPC & 198(2) of CrPC** and eliminating any such frivolous cases for no merits.
5. Accepting the cases of sexual harassment from any person who faces such crimes and following the dedicated protocol to investigate and frame charges on any such person who commits the crime mentioned in this research work.
6. Talking about consumer ecosystem elimination of the 'Pink Tax' is more important to prevent the exploitation of consumers based on their gender.

[13] Bharti Jain, "Reintroduce in Bhartiya Nyaya Sanhita (BNS) adultery section in gender neutral form, say panel", The Times of India, Oct. 26, 2023.

7. Adapting and accepting a proper market analysis and consumer's needs while pricing any such products which are needed by all individuals.

CONCLUSION

Whether it's legal or consumer field gender disparity still resides in one or the other way. Understanding the essence of gender neutrality is the predominant moto of this research paper. Indian legal system has been adversely affected by gender-biased laws which are vulnerable to those who misuse them for their benefits. Talking about various criminal laws, especially the offences against the human body has certain sections which are of gender discriminatory aspect. Section 375, 376, 498A and section 198 (2) of CrPC give more preference to women and recognise men as culprits. Women nowadays are exploiting such special provisions by filing false cases against men and the magnitude of such cases is increasing day by day which will lead to the complete deterioration of our legal system. The objective of gender neutrality in the legal system is not to degrade women's status and overlook what consequences they face in society but to bring equal protection to every individual who falls victim to sexual offences in society and treat every such offender equally. The applicability of such provisions should take place by considering the facts and circumstances of cases to avoid a hurry to reach a judgment and make an unjust to an innocent person. Annihilating gender discrepancies from legal and consumer ecosystems will help people to stand on the same platform and meet the same standards making the give-and-take much easier and being pocket-friendly to consumers, especially female consumers.

India has a vast market for personal care products, clothing, cosmetics etc. and all these products have a marketing strategy that is very gender specific, charging differently for male and female consumers by just swapping the

colour combination for female products. The same goes with female clothing where the fabric and manufacturing go the same simultaneous to male clothes, but female jeans prices are always on the higher side so why is this price discrimination for different genders? Reforming such propaganda and adapting gender-neutral concepts by charging the consumers for what the product is meant for is necessary. A slight deviation in price is acceptable for marketing and distribution but exploiting consumers based on gender is intolerable and that's what needs to be changed! The aim of this research is to put the limelight on how our society is trapped in a stereotypical aura related to gender and its functionality in various ecosystems!

FROM BOOM TO BUST: LEGAL QUAGMIRES IMPACTING INDIA'S SLOWING STARTUP SCENE

Dr. Bhanu Pratap Singh*

ABSTRACT

India's startup ecosystem has documented colossal expansion, incurring the government's meticulous placement of public digital infrastructure, ease of doing business, private sector engagement, sector-specific incentives, and liberalization policies. Despite the preliminary improvement, a diminishing tendency and shrinking growth are indicated; the inadequacy of financial assistance and numerous statutory obstructions have been determined as significant strategic constraints. This paper comprehensively concentrates on the latter part and endeavours to specify the complexities startups encounter while conceding with diverse laws, regulations and compliances across states along with emerging issues in labour, intellectual property, competition, and data protection and privacy with the assistance of actual case analyses. Also, it contemplates insightful propositions for successfully navigating these complexities and reinforcing sustainable prosperity in the flourishing Indian startup ecosystem. In addendum, it unfolds the judicial approach and policy framers' perspective in conflict resolution and harmonizing the stakeholders' interests. After a thorough analysis and extensive review of Indian Economic Surveys, Union and State legislations, judicial pronouncements, departmental press releases, startup schemes portals, industry comments, and media reports, it is concluded that to foster a thriving entrepreneurial ecosystem, the government must enact explicit legislation, streamline processes, and boost aspiring business owners. The supportive legal environment can unravel the

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tremendous potentiality of startups and propel the country towards economic growth, creativity and innovation.

Keywords: *Startup, regulatory compliance, Intellectual property, Labour regulations, competition law, and data protection and privacy*

Introduction

"We recognise that start-ups and MSMEs are natural engines of growth. They are Key to socio-economic transformation by driving innovation and creating employment. We welcome the establishment of the Start-up 20 Engagement Group during India's G20 Presidency and its continuation," [1]

-G20 countries resolution at New Delhi Leaders' Declaration.

The World Economic Outlook foresees that global growth will decline from 3.5% (2022) to 3.0% (2023-24), although with state interventions, the inflation would likely recede from 8.7% (2022) to 6.8% (2023) and 5.2% (2024).[2] The reasons assigned for collapse are the pandemic, the Russian-Ukraine conflict, and central banks' interest rate hikes which have precipitated global output reduction, inflation upsurge, and imbalance in current account deficits of countries.[3] This inflation and monetary stiffening drive equity capital outflow towards the United States of America (USA).[4] Despite that, the Reserve Bank of India and the International Monetary Fund (IMF) anticipated Gross Domestic Product (GDP) expansion at 6.5% [5] and 7.0% in 2023-24. This illustrates India's economic resilience and capability to recuperate and renew.[6]

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[1] Soumyarendra Barik, Indian start-ups to have head start due to India's G20 presidency: Chintan Vaishnav, The Indian Express, Sep. 12, 2023.

[2] International Monetary Fund, World Economic Outlook-2023, https://www.imf.org/en/Publications/WEO (last visited on Nov. 2, 2023).

[3]Economic Survey 2022-23, "Agriculture & Food Management", 1, 5, Ministry of Finance, https://www.indiabudget.gov.in/economicsurvey/ (last visited on Nov. 4, 2023).

[4] Economic Survey 2022-23, Id. at 11.

This scenario emanates from meticulous reforms focused on ease of livelihood and doing business, economic productivity through generating public goods, and private sector engagement.[7] This strategy plays a prominent role in building the establishments, which influence entrepreneurial behaviour by encouraging constructive entrepreneurship and trimming inhibitions, thus strengthening extended value formulation, economic advancement, employment opportunities, and advanced global competitiveness.[8] Specifically the approach of extending public digital infrastructure, and ease of doing business, private sector's engagement as an associate, sector specialized production incentives, liberalization policy, and supportive policies for Micro, Small and Medium Enterprises (MSMEs)[9] fostered an ecosystem of entrepreneurship and innovation(domestic patent enrollments rose by 46% from 2016-2021, and ranked India 40th in the 2022 Global Innovation Index with a score of 9.49),[10] which cumulatively laid down the foundation for the world's largest Startup ecosystem (competent of generating over 9 lakh direct jobs, over 64% more jobs in 2022 over three years, and a concentration of 48% of startups in metropolitan. [11]

In the preceding five years, the number of startups has expanded from 60,000, traversing across 55 sectors. Presently, 42 unicorns appreciated at over USD 1 billion have reached India. Additionally, 28,000 patents were assigned in 2021, in contrast to merely 4,000 in 2013-14.[12] In this expedition, it is crucial to

[5] PTI, "GDP growth to be higher than RBI's estimate of 8% for June quarter, say Economists", THE HINDU, Aug.22, 2023.

[6] Supra note 3, at 12.

[7] Supra note 3, at 28.

[8] Anish tiwari, Teresa Hogan, et.al., "The Good, the Bad, and the Ugly of 'Startup India': A Review of India's Entrepreneurship Policy", 50, Economic and Political Weekly, Dec.11,2021.

[9] Supra note 3, at 30-35.

[10] Supra note 3, at 287.

[11] Yves-Marie Rault, Shawn Mathew, "An Imbalanced Ecosystem Start-ups in India", lIV, 45, Economic and Political Weekly, 46, Nov. 16, 2019.

commemorate the state's systematic thrust to solve and reinforce a favourable climate for entrepreneurs, by introducing a venture capital ecosystem, and modification in round-tripping regulations. Also, legislative amendments and policy liberalization reduce compliance burdens and costs. Moreover, the Startup India initiative, flexible Intellectual Property (IP) compliance, and its fast-tracking, tax benefits, and assimilation of entrepreneurship and innovation spirit across the startup ecosystem- through the National Initiative for Developing and Harnessing Innovations, Atal Innovation Mission, for funds and seed capital- Funds for Startups, catering research and development platform for technology sectors- Ministry of Electronics and Information Technology Startup Hub (MSH) and Technology Incubation and Development of Entrepreneurs (TIDE 2.0), international patent filing- Support for International Patent Protection in E&IT,[13] Market access initiative scheme for eligible startups to obtain airfare reimbursement up to 20% for partake in overseas events. Further, in the Budget 2022-23, provision for extension of startup incorporation dates for tax benefits, agriculture accelerator fund for young entrepreneurs in rural areas,[14] availing of three-year tax holidays in the first seven years of incorporation,[15] carrying forward the loss for Startups up to ten years for tax benefits, and the budget allocation of Rs. 283.5 and Rs.1000 crore to SISFS and FFS schemes, respectively in 2022-23.[16]Along with the World Bank-MSME Growth, Innovation and Inclusive Finance Project has dispensed finance of nearly USD 500 million through the Small Industry

[12] Et Tech, "PM Narendra Modi calls startups "backbone" of new India, declares Jan 16 as 'National Startup Day'", The Economic Times, Jan. 15, 2022.

[13] Supra note 3, at 287-290.

[14] Pami Dua, Deepika Goyal et.al, "Decoding the Union Budgets Financial Inclusion Agenda: A Review of India's Progress", lViii,13, Economic and Political Weekly, 23, Apr. 1, 2023.

[15] ET, "Budget 2023: key takeaways for India's tech and startup industry", The Economic Times, Feb. 1, 2023.

[16] Charu Lamba, "Startup community hails Nirmala Sitharaman's Budget 2023-24", ET RETAIL, Feb.13, 2023.

Development Bank of India (SIDBI) contactless lending platform to early stage/startups, services, and manufacturing units has proved workable.[17] Additionally, the insistence can be gathered[18]from the Prime Minister's speech and declaration of Jan. 16 as the National Startup Day. He accentuated that *the startups are the "backbone "of new India and the engine that will power the nati's economic growth up to the 100th year of Independence. The current decade is the "techade" of India, and his government will usher in massive changes to strengthen innovation, entrepreneurship and the startup ecosystem. Furthermore, it reaffirms its government commitment to liberating entrepreneurship and innovation from the web of government processes and bureaucratic silos, creating an institutional mechanism to promote innovation and handholding young innovators and enterprises."*[19]

It is proved beyond hesitation that India's extending startup ecosystem has witnessed substantial growth and gained global recognition. Nevertheless, recent trends indicate a decline in its performance, and despite its immense potential, it endures as an underachiever contrasted with alternative sectors. In Economic Survey it was highlighted that elusive financing, complicated tax structures and regulatory environment are functioning as an impediment.[20] Additionally, the Startup India and FFS schemes proved inefficient in reinforcing funds (FFS permits financial assistance to just 1.1% (320 out of 28,979); coupled with the consolidation of 80% financing to consumer tech, software, fin-tech, and tech driving.[21] Further, inadequate representation (women-led startups raised just 2.3% of the overall venture capital funding in

[17] Small and Medium Enterprises Finance, https://www.worldbank.org/en/topic/smefinance (last visited on Aug.6, 2023).
[18] Swati Dayal, "India's export Revolution: Innovative Incentives for Startups", Tice, Aug.4, 2023.
[19] Supra note 12.
[20] Supra note 3, at 288.
[21] Supra note 8 at 47.

2020), clustered entrepreneurial ecosystem (concentration 78% (108) startups valued over USD 500 million in Mumbai, Bengaluru, and Delhi NCR also accounts for 92% of funding),[22] prompted to regional economic imbalance and economic inequality.[23] Presently, Indian startups witnessed a 72% decline in funding, which ushered in stock listing delays,[24] and laying off, owing to investor focus on long-term profitability and sustainable growth, which is improbable due to ambiguous business models and regulatory hindrances.[25] The Stated factors resulted in the formulation of only 24 new unicorns in 2022, which is a 33% decline from 2021, along with the emancipation of phenomena known as 'Flipping', where numerous Indian Startups started headquartering themselves exclusively in foreign jurisdictions with profitable tax and legal environments. The favourite harbours are Dubai, Singapore (at the holding level, dividends received from a domestic corporation are exempted, and there is no tax on administering dividends to residents or non-resident shareholders), and the Netherlands (participation exemptions on dividends and capital gains); these countries have tailor-made their policies pertaining to tax and incentivize frameworks for hoarding IPs by regionally headquarters holding companies, the stated exemptions are non-existent in India and were liable for capital gain tax.[26] Significantly, the entire Indian ownership, comprising IP and data, is transferred to a foreign entity, which transformed into its subsidiary with the same founders and investors. The process initiates at an inception stage, in exploration for more robust IP protection and enforcement, commercial and

[22] Anish Tiwari, "Mapping the Startup Ecosystem in India", 58, 32, Economic and Political Weekly, Aug.12, 2023.
[23] Supra note 8 at 46.
[24] Alka Jain, "Indian startups witness 72% decline in funding during H1 2023: Report", Live Mint, Jul.7, 2023.
[25] Et Online, "Over 17,000 Indian startup employees laid off in the first half of 2023 as funding winter refuses to thaw", Economic Times, Jul.,31,2023.
[26] Supra note 3, at 288-289.

taxation benefits on licensing revenue from IP, access to offshore and capital markets, expensive valuations, and agile corporate structures.[27]

The research will predominantly swivel around the legal, institutional and regulatory inhibitions entrepreneurs face or are responsible for industry constriction and how they count to the nation's sluggish growth. Further, incorporates an appraisal of various schemes, and procedural modalities, with specific recommendations for improving the same. with specific recommendations for improving the same.

India's Startup Environment at a Glance

India sustained as the leader in exporting services, which comprises 4% of world commercial services exports, it is expected to heighten by 9.1% in 2023, incurring soaring demand for digital support, and cloud services. In 2022, out of USD 84.8 billion FDI inflows, the sector alone constituted USD 7.1 billion. The digital economy impetus led to the internet penetration, and endorsement of Smartphones and digital payments, integrated towards financial innovation. The Information technology and Business Process Management industry, stimulated by enhanced technology spending and adoption, registered revenue growth of 15.5% in 2022, and IT services beg 51% exports. As per estimates, the e-commerce market will multiply by 18% annually by 2025, coupled with the acknowledgement of digital solutions by MSMEs, in e-commerce and e-procurement has improved the prospects of reinforced revenues and margins.[28] The meticulously articulated state interventions have mapped an arable ground for service sector Startups to flourish while Startups face a convoluted and continually expanding regulatory terrain.[29] State policies perform a strategic

[27] The Global Startup Ecosystem Report 2023, available at: https://startupgenome.com/article/asia-insights-rankings-and-ecosystem-pages-1 (last visited on Sept. 3, 2023).
[28] Supra note 3, at 292-306.

role; nearly 68% of small and 75% of medium firms witness government policy administrative requirements as barriers to innovation in India. Reconciling the convoluted entrapment of regulations captures enough time and energy; it acts as a barrier to innovation competition and detracts them from central business expansion activities like formulation of attractive product lines, marketing strategies, integration of manufacturing and logistics, maintenance of relationships with distributors/customers, formulation of budgetary expenses, incentive plans, organizational norms and continual product innovations.[30]witness government policy administrative requirements as barriers to innovation in India.[31] Reconciling the convoluted entrapment of regulations captures enough time and energy; it acts as a barrier to innovation competition and detracts them from central business expansion activities like formulation of attractive product lines, marketing strategies, integration of manufacturing and logistics, maintenance of relationships with distributors/customers, formulation of budgetary expenses, incentive plans, organizational norms and continual product innovations.[32]

The USA, which stayed in sixth position in ease of doing business,[33] presents plentiful controls, along with sector-explicit regulations. Approximately 260 agencies enforce state, local, and federal regulations, increasing the overall volume and costs. In acquiescing, businesses must concentrate on equipment and procedures, wages, and benefits and engage professionals to manoeuvre.[34] Correlating to India's position in conducting business, imagine the number of

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[29] Swati Dayal, "How Is a startup different from SME?", Tice, Aug.2, 2023.

[30] Amar Bhide, "The Questions Every Entrepreneur Must Answer", Harvard Business Review, (Nov.–Dec., 1996).

[31] Anshul Pachouri, Sankalp Sharma, "Barriers to Innovation in Indian Small and Medium-Sized Enterprises", Asian Development Bank Institute, 588, Jul. 2016.

[32] Amar Bhide, "The Questions Every Entrepreneur Must Answer", Harvard Business Review, (Nov.–Dec., 1996).

[33] Ease of Doing Business in USA, https://tradingeconomics.com/united-states/ease-of-doing-business (last visited on Sep. 4, 2023).

administrative conformities, the arrangement of subjects in the state domain, and adherence to the cooperative federalism doctrine makes it an endless task. The prevarication of existing regulations and the state's inconsistent treatment of these constraints exacerbate entrepreneurs' hardships. Further, a complicated web of rules and adherence requirements traversing innumerable enterprises; compliance with all applicable legislation is a staggering assignment. David R. Malpass stated in the World Bank Doing Business, 2020 that

> "*Potential investors consider the overall quality of an economy's business environment and its national competitiveness, macroeconomic stability, development of the financial system, market size, rule of law, and the quality of the labour force*."[35]

The impetus via Make in India and Doing Business as a core reform strategy premised on taxes, export -imports, and resolving insolvency improved India's rank to 63. The main elements for commencing businesses are unrestricted start-up incorporation rules, facilitation of private land rights greater access to credit and restriction entrepreneurs from making suboptimal investment decisions; unreliable power causes damage to sensitive equipment and perishable goods, fluctuating labour market regulation vitiates workforce employment and productivity, as India was accused of incorporating restrictive labour regulations, which increased the labour costs by 35%, in fine-tuning the four labour codes were legislated.[36] Furthermore, judicial efficiency is crucial in productivity, contract enforcement mechanisms supporting credit markets,

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[34] Chris Edwards, "Entrepreneurs and Regulations: Removing State and Local Barriers to New Businesses", Cato Institute, May. 5,2021.

[35] World Bank 2020, "Doing Business 2020: Comparing Business Regulation in 190 Economies", The World Bank Group, available at https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf (last visited on October 12, 2023).

[36] Id. at 12, 30-32.

tariff liberalization, delayed labour disputes, adjudication,[37]and special civil tribunals. These benchmarks, with duration, suffered numerous ambiguities thwarting startup growth. The subsequent section tests and enumerates challenges the startups face in negotiating with state laws and regulations. and special civil tribunals.[38] These benchmarks, with duration, suffered numerous ambiguities thwarting startup growth. The subsequent section tests and enumerates challenges the startups face in negotiating with state laws and regulations.

Exploring The Fascinating World of Ride-hailing Services

The evolution of information technology in urban transportation systems has contributed to the prosperity of India's online taxi services market. It is expected to achieve INR 61.59 billion by 2024,[39] and the bike taxi sector to USD 1.4 billion by 2030. As debated, the startups are experiencing regulatory challenges. The dazzling moment was encountered in *Satish N v. State of Karnataka*.[40] Here, the Karnataka On-demand Transportation Technology Aggregators Rules, 2016, framed under Section 93 of The Motor Vehicles Act of 1988, were in question, which provides the licensing conditions for technological transport service providers, known as “aggregator” or startups engaging in the urban transportation system. Meanwhile, the aggregator’s permission applications were pending before the Regional Transport Authority (RTA) impounded the taxi vehicles for purported violations, as the aggregators were operating without them, forcing them to discontinue their operations

[37] Zia Haq, “Implementation of 4 labour codes stalled, The Hindustan Times, May 8, 2023.
[38] Supra note 34 at 54, 33-34.
[39]India's Online Taxi Services Market: Government Regulations And Market Influencers, https://www.globenewswire.com/news-release/2020/05/18/2034785/0/en/India-s-Online-Taxi-Services-Market-Government-Regulations-and-MarketInfluencers.html(last visited on Sep. 14, 2023).
[40] ILR 2017 KAR 735.

temporarily.[41] The court held that the "aggregator" also includes "operator" or "canvasser" occurs within sections 93, 95, 96 (1)(2) and rules framed there under the Motor Vehicles Act,1988, and rule 6(a), requiring a minimum of 100 taxis as a prerequisite for a license, is not violative of Article 14, 19(1) (g), is within the legislative domain of the state and enjoys discretion in determining the circumstances and means to promote and encourage the participation of the startups in the taxi sector; also, establishing limits of fare is legitimate. Further, rule 11(1) does not assign an unbridled power to the state to annul the license and declares rule 10 (o) prohibiting permit holders from independent operation as violative. Concerning passenger data access, the court interpreted that the State has promulgated both the Information Technology (Sensitive personal data or information) Rules, 2011, and the Intermediary Guidelines, 2011, which provide numerous safeguards for sharing information with a third party comprising the State. Section 43 (A), the IT Act defines "intermediary" and its liability concerning the disclosure of electronic information, Rule 6 of IT Rules 2011 stipulates prior permission from the provider of such information or under a lawful contract. Indeed, the state agencies authorized to retrieve sensitive personal data shall forward a request addressing the corporate entity and a declaration to maintain confidentiality. Hence, Rule 10(c), 10(v), and 6 of Sensitive Personal Data e and Rule 3(7) intermediary rules are violative of Article 19(1)(g)**,** Article 21 right to privacy, as it bequeaths an unbridled, power to access to the personal information of the passenger.

On identical lines, the RTA Maharashtra scrapping of the two-wheeler bike taxi application was challenged before the apex court in *Roppen Transportation Services Pvt. Ltd. v. Union of India*.The court, while affirming the state guidelines, noted that the union guidelines are persuasive, not mandatory. The

[41] S. Chakraborty, S.Poovannawala, "Uber may have to withdraw ride-sharing services in Karnataka", Live Mint, Jan.,26,2017.

granting of licenses and formulating rules remain[42]State legislative domain, which may consider the guidance while determining under Section 96. Further, in *Uber India Systems Private Limited v. Union of India*, the Bombay High Court observed that until state draft rules are concluded, the Union Guidelines[43] occupy the field, and the aggregator must adhere to the regulatory framework. Instead of restraining the aggregators, the court allowed them to apply for a license under Section 93(1). Extending it, the apex court held that under Section 93, no person can proceed as an aggregator without a license and permitted the aggregators to apply for a license within three weeks and make representation before the State government for a provisional license, similarly, in the *Government NCT of Delhi v. Roppen transportation services Pvt. Ltd*. The apex court, having regard to the suffering of the two-wheeler proprietor operating without proper licensing or permit under Section 93, incurring the omission of statutory provisions, stayed the injunction introduced by the Delhi High Court and authorized them to operate until the State joined up with [44] policy. After contemplation with the state administration, aggregators addressed the issues and capitulated essential regulatory requirements, approvals, and licenses to resume operations. Further, the state regulation is not focused on MV, Act violation but on safety and pollution; however, it cannot take place at the cost of the society incapable of accessing economical and extremely usable forms of transit. The convoluted, divergent, and frequently altering compliance mechanism among the states makes it disastrous and complicated for startups. However, the courts acted as a saviour and played a phenomenal role by embracing a harmonious approach by balancing stakeholders' concerns. To evade forthcoming confrontations, robust legislation, and a simplified nationwide consistent regulatory framework

[42] 2023 Live Law (SC) 100.
[43] 2023 Live Law (SC) 108.
[44] Civil appeal 4039/2023.

coupled with data protection compliances are warranted.The UBER/Ola haggling with the convoluted and multifarious regulatory mechanism has scintillated controversy about the prevalent startup ecosystem and calls for regulatory reforms and a cohesive approach for managing these emerging sectors., Act violation but on safety and pollution; however, it cannot take place at the cost of the society incapable of accessing economical and extremely usable forms of transit. The convoluted, divergent, and frequently altering compliance mechanism among the states makes it disastrous and complicated for startups.[45] However, the courts acted as a saviour and played a phenomenal role by embracing a harmonious approach by balancing stakeholders' concerns. To evade forthcoming confrontations, robust legislation, and a simplified nationwide consistent regulatory framework coupled with data protection compliances is warranted.[46]The UBER/Ola haggling with the convoluted and multifarious regulatory mechanism has scintillated controversy about the prevalent startup ecosystem and calls for regulatory reforms and a cohesive approach for managing these emerging sectors.

Issues Pertaining to Data Privacy

Administering enormous customer data presents a challenge for startups, specifically after the landmark *K.S Puttaswamy v. Union of India,* where the apex court acknowledged the right to privacy. The newly enacted Digital Personal Data Protection Act, 2023,[47] (hereinafter referred as DPDP) aims this along with strengthening transparency, accountability and obligations among businesses and data fiduciaries. In addition, informed authorization, data breach

[45]Aryaman Kapoor, Spraha Srivastava, "The Case For Regulating, Not Banning Bike Taxis", available at: https://www.livelaw.in/columns/the-case-for-regulating-not-banning-bike-taxis-223499#:~:text=The%20subject%20of%20Road%20transport,been%20imposed%20by%20several%20states (last visited on October 27, 2023).

[46] HT Correspondent, "MV Act: Parliament gives govt powers to set ground rules for Uber, Ola cabs", Hindustan Times, Aug. 1, 2019.

[47] Aishwarya Gridhar, Nidhi Singh , "A Privacy report card", The Indian Express, Sep.13, 2023.

security, erasing data upon consent withdrawal, redesigning to include consent-seeking checkboxes, compliance regardless of agreements or data principal duties, and establishing grievance redressal systems are ensured.[48] Although the act attempted to tame stern data localization and unrestricted flow, which would promote crypto startups, Fin-techs, and Startups established in foreign jurisdictions. However, it is presumed that Fintech Startups and payment aggregators will be burdened with increased compliance over and above the RBI regulations.[49]

Cleartrip, a prominent online travel agency,[50] OYO Rooms, the platform for reserving hotels and hospitality services, experienced the complications enveloping customer data solicited during reservation processes.[51]The online booking platforms employ sensitive personal information, accordingly, cyber security episodes and data violations have emerged as substantial issues, as they lead towards identity fraud, discrimination, social stigma, degraded value of their intimate data publicly divulged, negative publicity, embarrassment, declined sales, punishments and sanctions. The DPDP maintain "Ex ante safety regulation", compelling businesses to invest in a minimum standard of security controls,[52] through maintaining "reasonable security safeguards", infringement may entice costs up to Rs 250 crores.[53] Considerably, Ex-post liability arranges

[48] DNA web team, "Explainer: What is data fiduciary under 'Data Protection Bill'and how will proposed law impact business?" DNA, Aug. 5, 2023, available at: https://www.dnaindia.com/explainer/report-explainer-what-is-data-fiduciary-under-data-protection-bill-and-how-will-proposed-law-impact-business-3054681 (last visited on Nov. 2, 2023).

[49] ET, "Data Protection Act: A 'mind-what-you ask-for' moment for startups & other top tech stories", The Economic Times, Aug. 12, 2023.

[50] Live mint, "Cleartrip confirms data breach, customer data being sold on dark web", Mint, Jul.19, 2022, available at: https://www.livemint.com/technology/tech-news/cleartrip-suffers-customer-data-breach-asks-to-reset-password-11658198169104.html (last visited on Nov. 05, 2023).

[51] Sangmitra Kar, "Oyo leaves customer data exposed due to a security flaw", The Economic Times, Oct.1, 2019.

[52]*Sasha Romanosky*, *Alessandro Acquisti*, *"*Privacy Costs And Personal Data Protection: Economic And Legal Perspectives", 24, Berkeley Technology Law Journal, (2009).

for compensating injured parties, and information disclosure forces corporations to publish information about the risks of their productions, along with acknowledging when a breach occurs.[54] These safeguards are unable to secure their place in the act; it became problematic when businesses preferred to maintain secret data breaches incurring negative publicity.[55] Owing to his experts, asserted, that it is simply a rubber stamp arriving after a digitization process, interminable with no safeguards.[56] The government would employ other means to cater for this. However, the startups can display responsible behaviour via self-regulation, as performed by VISA and MasterCard. It is arduous to counteract obeying data privacy regulations and preserving a seamless user experience. Experts opined that self-regulation and laws will effectively hold businesses accountable and enable them to increase care. The compliance and data breaches will likely expand[57] which might impede early stages and potential startups. Furthermore, robust data security, prioritization of protecting and safeguarding customers' data, and adherence to regulatory compliances are requisite for startups dealing with sensitive consumer data businesses. The Startups were required to invest in secure payment gateways, IT infrastructure, integration of the core data principles, provision for data erasure and capacity building, so as to gain and retain customer trust.[58]

Unfair Trade Practices and Startups

[53] John Brittas, Aneesh Babu, "What Lies Beneath The PR Blitz On The New Data Protection Act?", The Wire, Aug.,27,2023.
[54] Supra note 51, at 1072, 1074.
[55] Supra note 52.
[56] Srinivas Kodali, "Why the Personal Data Protection Bill Won't Stop Data Proliferation in Digital India", The Wire, Jul. 10, 2023.
[57] Supra note 51, at 1071, 1101.
[58] Malini Bhupta, "Devil in the detail: New privacy law has startups in a bind as government may not grant exemptions" ,The Business Insider, Aug.17,2023.

The dynamic startup ecosystem confronts scrutiny from the Competition Commission of India (CCI), which constrains businesses to uphold fair market disciplines and transparency. Swiggy/ Zomato encountering investigation over plausible anti-competitive behaviour by CCI [59] in *National Restaurant Association of India ('NRAI') v. Zomato Limited & Others*.[60] The CCI scrutinized MakeMyTrip, Goibibo, and OYO (online travel aggregators (OTAs)) on accusations of anti-competitive practices,[61]in *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. (MMT).*[62]It was pleaded that MMT-Go had inflicted price parity in its agreement/contract with hotel partners, which caused them to be unqualified to advertise their rooms to other OTA at a price below offered. However, at its prudence, MMT-Go could fluctuate the prices, which accuses them of predatory pricing, and enlargement of the customer base employing deep pockets, which led to the exit of the smaller OTA market players. The Treebo and Fab Hotels were refused market access via elimination from the platform as they were incapable of paying commission and further preferential treatment to OYO as per confidential commercial agreements. In disagreement, OYO asserted that apart from MMT-Go, there are alternative effective online travel agencies, direct websites, hotel owners' apps, and offline channels extending competitive options. Also, the transaction with MMT is nominal and repudiated the accusation of foreclosing any adversary. However, the CCI proclaimed it anti-

[59] J. Sarkar, "Swiggy, Zomato face probe for alleged anti-competitive practice", The Times of India, Apr.14, 2002.

[60] National Restaurant Association of India ('NRAI') Vs. Zomato Limited, Case No. 16 of 2021, Competition Commission of India, decided on Jan. 01, 2022.

[61] Saurav Anand, "CCI imposes Rs. 392 crore penalties on MakeMyTrip, Goibibo, OYO", Mint, Oct. 19, 2022.

[62] Pallavi Mishra, "Make My Trip, Go-Ibibo and Oyo Penalised for Rs. 392.36 Crores by CCI for Anti Competitive Practices", LIVE LAW, Oct.23, 2022, available at: https://www.livelaw.in/news-updates/cci-penalty-make-my-trip-go-ibibo-oyo-anti-competitive-practices-212375 (last visited on Nov. 01, 2023)

competitive along with directions to modify and abandon the agreements, parity obligations, exclusivity conditions, and access to hotels on a fair, transparent and non-discriminatory basis, and imposed a monetary penalty on OYO and MMT-Go amounting to Rs. 168.88 and Rs. 223.48 crores respectively.[63] The same was challenged before the NCLAT, which stayed the order along with a stipulation of depositing 10% of the penalty cost, as a pre-condition for admission of the appeal. Further, the aggrieved moved Delhi High Court in *MMT Pvt. Ltd. v. CCI,*[64]where it was observed that MMT-Go predominant service is online intermediation, where two user sides interact and intricately intertwined, and verticals derive strength from each other, the entire platform is taken as a unit, also, directions that there is no recovery for the remaining 90%.

The decision received mixed reactions, as it was proclaimed that it would bring relief to the hospitality industry from aggregators' domination and would discipline the OTAs. Another set of experts believes that it will prejudice business by influencing the standard of competition and expansion of the e-commerce market.[65] Legal experts opined that the decision aligns with international wide parity clauses, although the European Commission excuses narrow parity. It is an opportunity and guiding path for businesses to do the cumulative appraisal and reexamine their contractual adjustments as CCI conducts a collective assessment of the facts, contractual terms, demand–supply and its aftermaths on the ecosystem. Revision of agreements with trading associates in the light of removing wide parity obligation, standard form digital 'click-wrap agreement' [66]objective and clarity in listing, filtering or excluding a particular offering.[67] Also, experts surmised that global firms'

[63] Id.
[64] CM APPLs. 53757/2022.
[65] Soumyarendra Barik, "Why has the CCI imposed a Rs 392 crore fine on MakeMyTrip, Goibibo and OYO?", The Indian Express, Oct. 20, 2022.

capital dumping alters competition and manipulates the market, hampering local labour market expansion, thus entailing protectionist strategies.[68]

In upholding a fair and competitive market, entrepreneurs like MakeMyTrip and Swiggy should prioritize complying with fair competition rules, encouraging transparency, and abstaining from unethical business operations. Additionally, these businesses must proactively address any considerations pertaining to competition legislation.

Intellectual Property Mechanism and Startups

The startup prospect revolves around innovative contributions advocated by meticulously designed IPR, economic performance, business potential and financing opportunity.[69] Further, it offers insurance against impersonators, distinctive existence to consolidate their market existence, and survival when bankruptcy and the origin of critical technical business intelligence stimulate them to make informed decisions.[70] IP transforms intellectual productions into tradable commercial assets, strengthens the corporate value and multiplies the chances of a profitable exit.[71] A Startup demands simple, attractive, competing, readily attributable products/services for purchasers on which they may establish confidence, recognize and purchase repeatedly; accordingly,

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[66] Vijay Pratap Singh, Swaha Sinha et. al., "Clarity on parity? Potential implications of the CCI's order against MMT-Go for intermediation platforms", Cyril Amarchand Mangaldas, Jan. 5, 2023, available at:

[67] Id.

[68] Ashish Pandey, Cries for Protectionism,lIi, 38, Economic and Political Weekly, 31, Sep. 23, 2017.

[69] Sudipta Ghost, Parag Arora, *et.al.*, Relevance of Intellectual Property For Startups, Wipro, https://www.wipro.com/blogs/sudipta-ghosh/relevance-of-intellectual-property-for-startups/ (last visited on Sept. 15, 2023).

[70] Wipo, "Enterprising Ideas A Guide to Intellectual Property for Startups", WIPO, Intellectual Property For Business Series Number, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_961.pdf./(last visited on Sept.19,2023).

[71] Jag Singh, "How startups and SMEs should think about IP: an investor's perspective", Wipo Magazine, https://www.wipo.int/wipo_magazine/en/2021/02/article_0006.html(last visited on Sept. 29, 2023).

distinctiveness is the key that is guarded by trademarks, design rights andcopyrights.[72] The Unicorn valuation leans on intangible reputation emanating from the quality of activities and, consequently,[73] mandates potent IP safeguards.

In the ICT domain, the advent of digital technology startups comprising Artificial Intelligence, Blockchain, and Augmented Reality–Virtual Reality concentrating on healthcare, manufacturing, supply chain, and retail is on the upswing. Presently, AI technology startups constitute 39% of patents and receive 56% overall financing, in which China's proportion of filing patents is 37%, USA 36 %, India 24.3% and France 30.8%. Also, the average financing of startups with patents is approximately 2.5 times higher without them.[74] Thus, in a competitive era, enticing foreign financing and more robust IP protection are consequential for startups, as their distinctive concepts and unique contributions are the groundwork for their accomplishment.[75] In the contemporary economy, IP resources generally guide prevailing and prospective returns, so investors like to observe that entrepreneurs have assimilated IP rights into their business strategies.[76]

In the changing tech realm, Startups uncover advanced forms of IP protection comprising confidentiality and invention assignment agreements, agreements by advisors/independent contractors in assigning IP and acquiring patents, non-patent intellectual property, trade secrets, and confidentiality agreements. Inadequate enforcement and convoluted certifications (non-adherence of

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[72] Supra note 68, at 23.

[73] Saibal Ghosh, "The Growth of Unicorns India in a Global Perspective", lVii, 52, Economic and Political Weekly,21, Dec.24, 2022.

[74] Supra note 67.

[75] Yug Chauhan, Dhruv Dedhia, "The Legal Framework for Foreign Investment in India: A Comparative Analysis of the Laws and Regulations Governing Foreign Investment", 5, INDIAN J.L. & LEGAL Rsch. 10 (2023).

[76] Supra note 69.

Trademark Rules 2017) in IP protection mechanisms are a considerable deterrent for startups to invest in research and development, further acquiring and safeguarding IPRs through lawsuits is time-consuming and costly and disrupts the expansion and potential of startups. To dispose of a patent cl[77] takes 58 months, China 20 months, and the USA 23 months. The overall number of patents filed in India was 56,771, compared to China's 14.97 lakh and the USA's 5.97 lakh. However, the government pat it is back by launching online processing of forms, new timelines for disposition of applications, review of patenting disputes through video-conferencing for accelerated and contact-less proceedings,[78] and scheme Startups Intellectual Property Protection (SIPP) with an aspiration to stimulate awareness and acquisition of IPR rights among startups, nurture innovative technologies, and provide access to high-quality IP services and support to startups. Under this arrangement, facilitators, or IP Mitras, were empanelled to facilitate startups in filing and processing their patent, design or trademark applications.[79]

It is indispensable to specify Swiggy, wrangling in *Bundl Technologies Private Limited v. AanitAwattam,*[80] where a dispute referring to trademark infringement of the Swiggy Instamart platform by using domain names "swiggy-instamart.co.in" without any authorization by GoDaddy.com was begun. In bestowing ad interim relief, the court directed the Registrar of domain names to suspend the contravened domain names and avoid subsequent misuse of no

[77] Richard Harroch, Neel Chatterjee, "10 Intellectual Property Strategies For Technology Startups", Forbes, Jun. 6, 2017.

[78] Sanjeev Sanyal, Aakanksha Arora, "Why India Needs To Urgently Invest In Its Patent Ecosystem?*"*, Economic Advisory Council to the PM, Aug. 2022.

[79]Department of Industrial Policy and Promotion, "IPR Facilitation For Start-Ups", 1, available at: https://ipindia.gov.in/writereaddata/images/pdf/startups_IPRFacilitation_22April2016.pdf (last visited on Nov. 12, 2023). Also, *See* Kritika Narula, Ragini Kumar, "Safeguarding Innovation: Government's Focus on Startups'

[80] COMMERCIAL IP SUIT NO. 26549 OF 2022, https://www.livelaw.in/pdf_upload/godaddy-455501.pdf (last visited on Sept. 29, 2023).

registration without authorization. In contrast, the Registrar indicated his inability to acquiesce as the technology for registering domain names is a mechanical operation and, in any manner, unable to evaluate the lawfulness of any domain name preferred by the new registrant, and therefore, submitted for recall of omnibus directions. The court, while understanding the dynamic nature of technology and the rights of the parties affected, had modified its ad interim relief to future infringement and directed the plaintiffs to approach the court in every case. Further, the registrar cannot escape its duty by taking refuge in technology, and the registrar shall disclose to the plaintiff on a separate occurrence that registration of a domain name, which possesses the registered trademark, is granted "Swiggy." However, the judgment was again tested before the division bench in *GoDaddy.com LLC v. Bundl Technologies Pvt. Ltd*[81] It was asserted that the onus to inform is unworkable, as there are 2600 registrars in the world to whom such registration can be carried out. Not consistently, the aggregators were sufferers, and vice-versa. unworkable, as there are 2600 registrars in the world to whom such registration can be carried out. Not consistently, the aggregators were sufferers, and vice-versa.

In a separate instance, the aggregators Zomato Ltd., and Swiggy, were constrained by the Delhi High Court in *Gupta and Gupta Pvt. Ltd v. Khan Chacha Hyderabadi Biryani*, where a trademark infringement suit was brought against the same for using or advertising, directly[82]"KHAN CHACHA", which has been registered since 1972. KHAN CHACHA", which has been registered since 1972.

[81] WTR, "Repeat showdowns between Swiggy and GoDaddy shed light on key aspects of intermediary liability*"*, World Trade Mark Review, Apr. 6, 2023.
[82] CS (COMM) 62/2023.

The episodes of unauthorized IPR usage might diminish startup brand recognition, reputation, and customer trust and establish misunderstanding. These controversies renewed the dynamic interchanges of technology and law, and the persisting issues startups encounter in the digital marketplace, incurring IP misusage and insufficiency in protection mechanisms; also, the instances of infringement by startups. However, the courts excellently harmonised the stakeholders' interests in the omission of explicit regulations.

Labour Regulations and Startups

The inauguration of venture capitalism led to the expansion of startups, which contributed to the demand for an extensible, flexible and cost-effective workforce; gig workers fulfil all the touchstones, and the void of statutory safeguards offers the requisite advantage.[83]This scenario, strengthened with the upswing of digital technologies, gave origin to varied occupations, and micro-entrepreneurs that employ digital mechanisms to approach consumers, which was boosted after the pandemic. Protecting worker rights within a flexible platform poses considerable challenges, specifically when concurring with employment regulations and determining worker classifications. This grey territory was illuminated in the Urban Company squabble, which serves as an intermediary platform for executing standard and customized home services through the facilitation of connection between customers and service providers. [84] Here, the women employees revolted against the freshly introduced flexi scheme, which served to nominal earnings and jobs to individuals with instantaneous response rates; along with the for better wages, prudent working conditions and social security benefits. In retaliation, the company filed for a

[83] Isana Laisram, Ravi Shankar, "Editorial Note: Navigating Labour Law in the Gig Economy", ix,14 NUJS L Rev., 10, 11, 14 (2021).

[84] Uma Rani, Ruth Castel Branco et. al., "Women, Work, and the Digital economy", Oxfam, 30, 3, Gender & Development421–435, (2022).

permanent prohibitory injunction suit constraining them from carrying out any demonstration near the premises.[85] Here, the Urban company attributes its employees as "service partners", which is an approved practice among aggregators to classify them as 'self-employed' or 'independent contractors, [86] thus enabling them to bypass state regulations, labour codes, and social security benefits (Industrial Relations Code, implementation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013).

The correlation of risks and accountability towards exceedingly monitored algorithmic functions premised on consumer reviews and rating scores, contributes to work-life misbalance, and fluctuating wages. Further, the dearth of a legally binding work contract, deterioration of customer–worker interactions and inconsequential workers' grievance redressal make the situation opaque**.** In contrast, the company asserted that it extends guaranteed payments, the flexibility of join and exit, credit access and readymade market. The resistance visibility in the public realm, influencing corporations' reputations, forces Urban Company to withdraw.[87] It was accentuated that the classification serves as a free hand to corporations to allow miserable working conditions, as employees have indispensable rights to associate, bargain, comprehensive labour securities.[88]

Urban Company episodes underlined emerging businesses' challenges and also afforded an opportunity for framing deliberations and innovative solutions for balancing platform-based business models' flexibility and the essential

[85] Ismat Ara, "Urban Company Sues Workers for Protesting Against 'Unfair Labour Practices'. Protest Called Off", The Wire, Dec. 23, 2021.
[86] Supra note 82, at 426.
[87] Dipsita Dharand, Ashique Ali Thuppilikkat, "Gendered labour's positions of vulnerabilities in digital labour platforms and strategies of resistance: a case study of women workers struggle in Urban Company", Oxfam, 30, 3 Gender & Development, (2022).
[88] Supra note 82, at 431.

adjustable statutory frameworks to safeguard workers interests, coupled with streamlining state regulations in the gig economy and ironing out the difficulties in the management of employment and labour rules encountered by startups (The state of Rajasthan passed the Platform-Based Gig Workers (Registration and Welfare) Bill, 2023[89] is live example.

India was indicted of consolidating restrictive labour regulations, which advanced labour costs by 35%.[90] In consequence, the four labour codes passed during 2019-20, although the same has been halted of being contentious and anti-worker till general elections.[91] The issues were asserted in a PIL filed on behalf of gig workers by the Indian Federation of App-based Transport workers, seeking social security benefits from Online aggregators. The fundamental issue is whether the "Right to Social Security" is a guaranteed right for people engaged in formal or informal sectors. It was asserted that **"**gig workers" and "platform workers" are effectively within the definition of "workman" and amenable to social security benefits as there occurs an employment relationship with aggregators, who enjoy complete supervision and control over the manner and method of work and therefore segregating them or entering "partnership agreement" does not exonerate aggregators. Furthermore, the fixed-term employment contract is in nature of "accept it or drop it", which left workmen with no opportunity for sustaining their livelihood, accordingly against public policy. Also, enforcement of observations made by the U.K. Supreme Court mutatis mutandis, as aggregators, are multinational entities operating worldwide on similar terms and conditions. Additionally, the non-inclusion of platform workers under "unorganized workers" or "wage workers" as per the Unorganized Workers

[89] Sudeep Lavania, "Rajasthan passes bill for formation of welfare board, fund for gig workers", India Today,Jul. 22,2023.
[90] Supra note 34 at 32.
[91] Zia Haq, "Implementation of 4 labour codes stalled", The Hindustan Times, May. 8, 2023.

Social Welfare Security Act, 2008, acts as a failure on the part of the State to furnish social security is an infringement of Articles 14, 21 and 23.[92]

The Code on Social Security, 2020, currently unenforceable, provides for consolidating laws and extending social security to workers engaged in the organized or unorganized sectors. It encompasses aggregators under Section 2(2) and gig workers under Section 2(35) who function outside the traditional employer-employee relationship. Section 2(61) explains "platform worker" and Section 2(60) the platform work, which is any working structure outside of a conventional employer-employee relationship along with the utilization of a networked platform in providing services. The Code imposes several constraints on employers, penalizes them for deducting employees' income, and mandates contributions to the Social Security Fund. This comprehensive shaking engenders a suspicion that it may contribute towards selective hiring, non-maintenance of record, and economic hardships for fresh businesses, as they are incapable of experiencing the cost of social security,[93] economic growth, deterioration of service delivery, innovation pace, and expansion encouraged by aggregators in the digital space. The argument that aggregators are barely an online facility connecting drivers and riders, and the IT Act does not cover the same is not maintainable in the light of the European Court of Justice (ECJ) decision where it was declared as a transport service rather than an information service. Thus, regulation of gig workers, requires public policies

[92] Shruti Kakkar, "Gig Workers' Approach Supreme Court Seeking Social Security Benefits From Zomato, Swiggy, Ola, Uber", Live Law, Sep. 21, 2021, available at: https://www.livelaw.in/top-stories/gig-workers-approach-supreme-court-for-social-security-zomato-ola-uber-swiggy-182107#:~:text=Raising%20questions%20of%20great%20public,food%20delivery%20apps%20such%20as (last visited Nov. 12, 2023).

[93]Rashmi Bagri, "Gig Workers, Platform Workers & Gig Economy, Live law, Jan.18, 2022, available at: https://www.livelaw.in/know-the-law/the-code-on-social-security-2020-gig-workers-ifat-indian-federation-of-app-based-transport-workers-industrial-disputes-act-1947-189769 (last visited on Nov. 01, 2023).

reinforcing emerging divergent forms of digital work and investment in research and development, public services, and social protection.[94] The startups should consult with legal experts, and business associations, to ensure compliance along with the focus on capacity building and transparency.

Conclusion and Suggestions

The plentiful obstacles entrepreneurs experience in India's vibrant entrepreneurial environment present insightful and valuable instructions, including the diverse legal challenges, from modifying legal frameworks to the evolving gig economy to safeguarding IPR for innovation and competitiveness, from overcoming funding limits to negotiating tax difficulties and compliance. Furthermore, dealing with worker classification and following employment and labour regulations is imperative, especially in the gig economy. Businesses, like Urban Company are vital in guiding dialogues and achieving the appropriate balance between worker protection and flexibility; also, businesses like Cleartrip and OYO must prioritize data protection to secure customer confidence while complying with fluctuating data privacy provisions in a field where data security and privacy are indispensable. Additionally, as manifested by MakeMyTrip and Swiggy, preserving fair competition and abiding by competition laws are essential in safeguarding the industry's integrity. To ensure the market's health, startups must proactively endorse moral business principles and encourage transparency. To establish a reputation and dependability in regulated industries, entrepreneurs must be proactive in their interactions with regulatory organisations, earmark funds for compliance, and maintain awareness of the continually evolving laws. In order to ensure long-term success, innovation, and competitiveness in the dynamic business landscape, entrepreneurs in India's booming ecosystem must embrace these

[94] Supra note 82, at 431.

lessons, proactively exercise legal problems, and prioritize compliance. In conclusion, the startup environment in India is a dynamic yet challenging place where creative ideas are met with rigorous regulatory requirements.

At the crossroads of the fourth industrial revolution, the integration of cutting-edge technologies such as cloud computing, and artificial intelligence into manufacturing processes possesses tremendous possibility,[95]which can be efficiently exploited by startups and can positively contribute towards India's developing business environment if they proactively manage these issues, interact with stakeholders, and abide by the law. As new and existing enterprises negotiate the complex legal system in search of success and sustainability, the lessons from these instances offer insightful guidance for both. The economic survey suggests simplification of corporate laws, and foreign investment laws, coupled with transparency and accountability, [96] process for grant of Inter-ministerial board certification, and taxability of employee stock options, and corporate laws. Further, minimal tax litigation, tax cascading, and restrictions on capital movement, along with provision for hybrid securities, and capital flows, can act as a roadmap for assisting startups to be successful in fostering India's economic growth and in achieving reverse flipping.[97]

Recently, India's initiative, of Start-up 20 working group in the G20 framework to afford impetus to smaller businesses and upcoming start-ups has been initiated, which recommended global annual investment of USD 1 trillion for the creation of global networks systems, bilateral and multilateral fora, international market access without locating, global interests, capacity building, embracing practices to make them more inclusive; and of global

[95] Supra note 3, at 290.
[96] Supra note 74.
[97] Supra note 3, at 289.

interests; further calls for global definitions for startups premised upon the legal entity, age, size, scalability and innovation. Legal entanglement such as IPR compliance, funding and investment stipulations, excessive tax and compliance burden, and privacy and data security issues hinder India's startup ecosystem expansion, sustainability, and declining growth rates. To foster a thriving entrepreneurial ecosystem, the government must enact explicit legislation, streamline processes, and boost aspiring business owners. Also, Startups must embrace sound practices and sustain the fundamental tenets of corporate governance.[98] The supportive legal environment can unravel the tremendous potentiality of startups and propel the country towards economic growth, creativity and innovation. The policy architects must ensure that endeavours to reform, not entirely reconstruct the history but still apprehend recent opportunities; otherwise, initiatives such as Make in India, ease of doing business, five trillion economy, and ATMANIRBHAR BHARAT will remain mere sloganeering.

[98] Think Tank Recommendations On Corporate Governance For Indian Start-Ups, June 2023, available at: https://uploads-ssl.webflow.com/639ecca066f41623b6090b98/64a01b5675853314ccbe1412_Recommended-Governance-Framework-for-Start-ups-A4.pdf (last visited Aug.6, 2023).

MENS-REA IN CONTEMPORARY LEGAL DISCOURSE: DEVELOPMENTS AND IMPLICATIONS

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ABSTRACT

This research paper delves into the foundational concept of Mens-rea within contemporary legal discourse, highlighting its crucial role in determining the culpability or innocence of accused individuals. Mens-rea, representing the psychological condition of the offender during a crime, stands as a pivotal factor in establishing the ethical responsibility of the accused. By drawing insights from various Supreme Court decisions, the paper thoroughly examines the relevance of Mens-rea in the field of criminal jurisprudence, shedding light on associated challenges and implications. Through the inclusion of illustrative case studies, the research aims to offer practical insights, contributing to a nuanced understanding of Mens-rea and its profound impact on the criminal justice system. The absence of Mens-rea absolves individuals from responsibility for unintended actions or those resulting from a lack of mental capacity to understand the consequences. The research underscores the pivotal role of Mens-rea in maintaining the equity and reliability of the criminal justice system, ensuring that punishment is reserved for those with a culpable state of mind. This principle becomes particularly significant in contemporary legal discourse, emphasizing recent developments and their implications for the delivery of justice. The research paper ultimately navigates the multifaceted landscape of Mens-rea, providing comprehensive insights into its contemporary significance and its consequential role in shaping legal outcomes.

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Keywords: *Mens-Rea, Criminal Law, Mental State, Guilty Mind, Convictions*

Introduction

Mens-rea[1], a Latin term embodying the concept of a "guilty mind," represents a cornerstone in contemporary legal discourse, navigating the intricate terrain of criminal law. As societies grapple with the complexities of justice, the nuanced understanding of an accused individual's mental state during the commission of a crime becomes paramount.

In the panorama of criminal law, Mens-rea emerges as a crucial linchpin, offering insights into the intentions, knowledge, or recklessness of individuals embroiled in legal proceedings. Its Latin origins denote a fundamental principle that transcends linguistic boundaries, encapsulating the essence of criminal culpability. As we delve into contemporary legal discourse, Mens-rea unfolds as a dynamic concept, adapting to societal shifts, technological advancements, and evolving moral standards.

The journey through recent developments in Mens-rea necessitates an exploration of judicial decisions, legislative changes, and societal expectations. Legal systems worldwide are grappling with questions of individual responsibility, blameworthiness, and the delicate balance between ensuring justice and protecting the rights of the accused.

Within the Indian context, Mens-rea assumes a distinctive significance, weaving itself into the fabric of culpability and liability. Recent judicial pronouncements and legislative amendments have sparked debates and reshaped the contours of how mental states are considered in criminal

[1] Sapna Jain, "*Mens-Rea* – An Important Element to Criminal Law," Call for Papers Volume 4 | Issue 2, International Journal of Advanced Legal Research (ISSN: 2582-7340), 2021

proceedings. The implications extend beyond individual cases, influencing the broader legal framework and societal expectations of justice.

As we commence this investigation, it is crucial to acknowledge that the Mens-rea state is not a fixed notion; instead, it is a dynamic influence that adapts to the changing dynamics of human conduct, ethics, and legal philosophy. The complexities inherent in establishing the mental state of an accused person have profound implications for the fairness and effectiveness of the criminal justice system. Therefore, a nuanced examination of recent developments is imperative to comprehend the contemporary nuances of Mens-rea[2].

The paper will unfold in subsequent sections, beginning with an in-depth analysis of recent judicial decisions that have shaped the understanding and application of Mens-rea. Legislative changes and their impact on the legal landscape will then be scrutinized to unravel how Mens-rea adapts to the evolving needs of society. Case studies will be employed to illustrate practical implications, providing a real-world context to the theoretical framework.[3] The objective of the paper's comprehensive approach is to contribute meaningfully to the ongoing discourse on Mens-rea in contemporary legal thought.

The Significance of Mens-rea

Mens-rea, the Latin term for "guilty mind[4]," is a foundational concept in criminal law, carrying profound implications for the fairness, morality, and justice of legal proceedings. This section delves into the multifaceted

[2] Bidisha Banerjee “Mens Rea The intent behind the crime” - Aishwarya Sandeep- Parenting and Law (12th July 2023)
[3] Sangkul Kim, Rethinking the ‘Crime of Mens Rea’. Belgium, Torkel Opsahl Academic EPublisher, 2016.
[4] Hemant More “Concept of Mens Rea (guilty Mind)”, The Legal Quotient (14th April 2023)

significance of Mens-rea, exploring its role in safeguarding individual liberty, addressing moral blameworthiness, and ensuring a just legal system.

Safeguarding Individual Liberty

Presumption of Innocence:

- ***Burden of Proof:*** Mens-rea imposes a significant evidentiary obligation on the prosecution, necessitating them to establish not only the physical action (actus reus) but also the mental state of the accused. This rigorous standard safeguards individuals from unfounded or arbitrary allegations, reinforcing the presumption of innocence until proven guilty.
- ***Due Process:*** The insistence on establishing Mens-rea safeguards due process, ensuring that individuals have a fair opportunity to contest the charges against them. This, in turn, prevents the erosion of personal freedoms through unwarranted legal actions.

Fair Treatment:

- ***Individualized Justice:*** Mens-rea facilitates individualized justice by recognizing that criminal liability should reflect the unique circumstances of each case. By evaluating the mental condition of the accused, the legal framework avoids applying a one-size-fits-all approach, acknowledging the inherent complexity of human behaviour.
- ***Mitigation of Harsh Consequences:*** The consideration of Mens-rea[5] acts as a mitigating factor in sentencing. Courts can tailor punishments based on the degree of intent, preventing disproportionately harsh

[5]Roma Bennur, "IMPORTANCE OF MENS REA AND ACTUS REUS IN STATUTORY OFFENCES", Legal-lore (2022)

consequences for individuals whose actions may have been unintentional or influenced by external factors.

Addressing Moral Blameworthiness

Moral Culpability:

- ***Conscious Wrongdoing:*** Mens-rea[6] distinguishes between individuals who engage in conscious wrongdoing and those whose actions are devoid of malicious intent. This recognition allows the legal system to differentiate between morally blameworthy conduct and instances where individuals may have acted without a malevolent state of mind.
- ***Ethical Dimension:*** By acknowledging the ethical dimension of criminal behaviour, Mens-rea ensures that legal consequences align with societal expectations of justice. It affirms that individuals who intentionally violate the law bear a different level of moral responsibility than those who commit offences,[7]

Proportional Punishment:

- ***Reflecting Society's Values:*** Mens-rea[8] contributes to proportional punishment, aligning legal consequences with societal values. Offences committed with a higher degree of intent receive more severe penalties, reflecting the collective judgment that deliberate wrongdoing merits a greater response from the legal system. contributes to proportional punishment, aligning legal consequences with societal values. Offenses committed with a higher degree of intent receive more severe penalties,

[6] "Mens Rea", Tripaksha litigation (18th August 2023)
[7] Harish Chander. The Indian Penal Code: A Critical Commentary. India, Eastern Law House, 2017.
[8] Kratika Khandelwal "Mens Rea", Brain Booster Articles (26 April 2023)

reflecting the collective judgment that deliberate wrongdoing merits a greater response from the legal system.

- ***Deterrent Effect:*** The application of punishments in proportion to the offence acts as a deterrent, dissuading individuals from participating in deliberate criminal behaviour. This preventive element plays a role in upholding social order and ensuring safety.[9]

Ensuring a Just Legal System

Nuanced Understanding:

- ***Circumstantial Consideration:*** Mens-rea allows for a nuanced consideration of the circumstances surrounding a criminal act. Courts have the flexibility to consider elements like motive, knowledge, and recklessness, promoting a thorough comprehension of the accused's mental state and intentions.
- ***Individualized Adjudication:*** The nuanced approach afforded by Mens-rea supports individualized adjudication, recognizing that legal determinations should be tailored to the specific details of each case. This flexibility enhances the accuracy and fairness of legal outcomes.

Preserving Public Confidence:

- ***Transparency and Trust:*** Mens-rea contributes to transparency in the legal system, signalling to the public that judgments are based on a comprehensive understanding of both the concrete action and the psychological state of the alleged offender. This transparency fosters trust in the justice system.
- ***Social Contract:*** By preserving public confidence, Mens-rea upholds the social contract between the governed and those entrusted with

[9] Supra 7

administering justice. This mutual trust is essential for the continued legitimacy and effectiveness of the legal system.

Mens-rea[10] transcends being a mere legal technicality; rather, it stands as a foundational pillar that reinforces the principles of justice, fairness, & individual liberty within the realm of criminal law. Its multifaceted importance ensures that legal proceedings acknowledge the intricacies of human behaviour, striking a delicate balance between the necessity for accountability and the imperative to safeguard the rights and freedoms of individuals in society.

Essential Elements of Mens-rea

To prove someone guilty based on Mens-rea, certain essential elements need to be established. These components differ based on the offence and the legal jurisdiction, but here are some common essential elements of Mens-rea[11]:

Intention:

Intention refers to the conscious desire or purpose to commit a specific act. It involves a deliberate mental state where the individual acts with the knowledge and desire to bring about a particular result.[12]

Example Scenarios:

- ***Theft with Intent to Deprive:*** In the context of theft, an individual who takes another person's property with the intent to permanently deprive them of it demonstrates a purposeful act. The intent, in this case, is to achieve ownership or control over the stolen property.

[10] S.N. Mishra, Indian Penal Code, Central Law Publications, Allahabad, 22th edn. 2018
[11] Toppr, "Element of Crime" available at: https://www.toppr.com/guides/legal-aptitude/indian-penal-code/elements-ofcrime/#:~:text=The%20term%20mens%20rea%20has,include%20intention%2C%20motive%20or%20knowledge. (last visited on Nov, 2023)
[12] A Handbook on F.I.R.: From Investigation to Trial. N.p., Notion Press, 2021.

- ***Assault with Intent to Cause Harm:*** If someone engages in an assault to cause physical harm to another person, their intent is a key factor. The deliberate choice to harm another individual distinguishes this act from accidental or unintentional conduct.

Knowledge*:*

Knowledge involves awareness and understanding of certain facts or circumstances surrounding the prohibited act. The accused person must have been aware that their devious intention would lead to the consequences or harm associated with the offence.

Example Scenarios:

- ***Possession of Contraband:*** In cases involving the possession of illegal substances, knowledge may be established if the accused is aware that they have controlled or prohibited substances in their possession. This awareness is crucial for establishing criminal liability.
- ***Fraudulent Activities:*** In cases of fraud, knowledge may be demonstrated by proving that the individual was aware of the false representations or deceptive practices they engaged in to deceive others.

Recklessness:

Recklessness denotes a mental state in which the accused individual knowingly ignores a significant and unwarranted risk that their actions may lead to harm or the commission of an offence.[13] It entails being cognizant of the associated risks but choosing to proceed with the act, nonetheless.

Example Scenarios:

[13] Modern Histories of Crime and Punishment. United States, Stanford University Press, 2007.

- ***Reckless Driving:*** A common example is reckless driving, where an individual operates a vehicle with a conscious disregard for the safety of others on the road. Speeding excessively or weaving in and out of traffic with awareness of the risks involved may constitute recklessness.
- ***Reckless Endangerment:*** Engaging in activities that pose a significant risk to others, such as firing a gun in a crowded area, may be considered reckless endangerment.

Negligence:

Negligence pertains to a lack of adherence to the reasonable care and caution that a prudent individual would have exercised in comparable circumstances. The accused individual might not have intended or been aware of the consequences, but their failure to implement reasonable precautions led to harm or the commission of the offence.

Example Scenarios:

- ***Vehicular Manslaughter:*** In cases of vehicular manslaughter, negligence may be established if a person causes a fatal accident due to distracted driving, such as texting while driving, without consciously disregarding the risk.
- ***Medical Malpractice[14]:*** Negligence in the medical context may involve a healthcare professional neglecting to deliver the anticipated standard of care within their domain, leading to harm to the patient

Wilful Blindness:

Wilful blindness occurs when the accused person deliberately avoids obtaining knowledge or information about certain facts or circumstances to avoid being

[14] Nihit Nagpal, "Would Lack of 'Mens Rea' constitutes Medical Negligence, Mondaq, Contributors India (October 2021)

held responsible for the offence. It implies a conscious decision to remain ignorant while suspecting or having reason to believe that the act is unlawful.

Example Scenarios:

- ***Financial Fraud:*** Situation: A high-ranking executive in a corporation becomes suspicious about the company's financial dealings. However, rather than investigating further or seeking clarification, the executive deliberately avoids asking questions or reviewing financial documents, choosing to remain ignorant of any potentially fraudulent activities.
- ***Drug Trafficking:*** Situation: A courier is asked to transport a package for a friend. The courier, however, becomes suspicious about the contents of the package due to its weight and Odor. Despite having these suspicions and the awareness that the friend has been involved in illegal activities before, the courier refrains from inquiring about the package, deliberately choosing not to know what it contains.

Transferred Intent:

Transferred intent applies when an individual intends to commit a particular offence against one person but ends up committing the offence against a different person. The law recognizes that the intent transfers from the intended target to the actual victim.

Example Scenarios:

- ***Original Intent to Harm Person A:*** Situation: An individual, with the intent to harm Person A, fires a gun. However, the bullet misses Person A and hits Person B, causing injury.
- ***Transferred Intent:*** In this scenario, the law applies the concept of transferred intent. The original intent to harm Person A is transferred to Person B, even though they were not the intended target.

- ***Transferred Intent in Assault:*** Situation: A person, aiming to assault one individual, mistakenly attacks another person nearby.
- ***Transferred Intent:*** The legal doctrine of transferred intent may apply, treating the unintended victim as if they were the intended target to establish criminal liability.

It is essential to recognize that the specific components required to establish a culpable mental state can differ based on the offence and jurisdiction. The burden falls on the prosecution to prove these elements convincingly, demonstrating the accused individual's culpable mindset and securing a conviction.

Mens-rea is a Necessary Element for Conviction

The indispensability of Mens-rea, regularly referred to as the "guilty mind," in securing a conviction within the dominion of criminal law is underscored by several compelling reasons that collectively contribute to the impartiality, justice, and efficacy of the criminal justice system. Mens-rea[15] plays a pivotal role in not only establishing the culpability and moral blameworthiness of an accused individual but also in safeguarding the fundamental principles upon which the legal system is built.

At its core, Mens-rea is deemed necessary for conviction due to its inherent commitment to the philosophies of impartiality and justice. By mandating the consideration of an individual's mental state, it ensures that criminal liability is not imposed on those who neither intended nor could have reasonably foreseen the consequences of their actions.[16] In doing so, the criminal justice system

[15] O.P. Shrivastava, Principles of Criminal Law, Eastern Book Company, Lucknow, 6th edn. 2016

[16] Ananya Brajesh Anand, Detailed Study of Mens Rea with Special Reference to Ipc, 1860: Volume 1, Issue 3 of Brain Booster Articles. N.p., Notion Press Media Pvt Limited, 2021.

upholds a foundational tenet of fairness, steering clear of punishing individuals who acted innocently or lacked the requisite mental state.

Moreover, Mens-rea emerges as an essential element in the legal toolkit for distinguishing between a mere moral wrong and a criminal act. This crucial differentiation acknowledges the nuanced nature of culpability, ensuring that not all morally reprehensible actions are subject to criminal punishment. The inclusion of a mental element introduces a vital dimension to the assessment of the blameworthiness and gravity of the offence, aligning the legal response with the severity of the moral transgression.

The protection of individual liberties stands out as another significant rationale for the insistence on Mens-rea. By obliging a thorough examination of an accused person's mental state, the legal system acts as a check on the potential overreach of state power.[17] This meticulous consideration ensures that convictions and subsequent punishments are not solely based on actions but take into account the subjective state of mind, thereby guarding against arbitrary and unjust legal proceedings and preserving the fundamental rights and freedoms of individuals.

Additionally, Mens-rea[18] serves as a linchpin for the effective implementation of deterrence and rehabilitation strategies within the criminal justice system. Its inclusion allows for a nuanced examination of the cognitive condition of the accused, enabling the tailoring of appropriate penalties and rehabilitation programs that address the underlying causes and motivations behind the offence. This individualized approach aligns with the broader goals of a rehabilitative justice system, fostering the potential for reform and reducing the likelihood of future criminal behaviour.

[17] Id.
[18] Michael Moore, Act and Crime: The Philosophy of Action and its Implications for Criminal Law (Clarendon Law Series), OUP Oxford; Reprint edn (5 August 2010)

The principle of the "presumption of innocence" is intricately tied to Mens-rea, compelling the prosecution to conclusively demonstrate the accused's culpable state of mind. Until guilt is proven beyond a reasonable doubt, the accused is rightfully presumed innocent, underscoring the pivotal role of Mens-rea as a crucial element for conviction.

Furthermore, Mens-rea acts as a safeguard against strict liability offences, preserving the principle of moral blameworthiness in criminal law. It confirms that persons are not held feloniously responsible for acts they neither intended nor foresaw, contributing to a legal framework that aligns punishment with the presence of a guilty mind.

The consideration of circumstances surrounding the offence is [19] by Mens-rea, allowing for a comprehensive evaluation of factors such as provocation, self-defence, or mistake of fact. This nuanced approach enables the court to assess extenuating circumstances that may impact the determination of guilt or the severity of punishment., or mistake of fact. This nuanced approach enables the court to assess extenuating circumstances that may impact the determination of guilt or the severity of punishment.

Beyond these considerations, Mens-rea[20] plays a crucial role in preserving public confidence in the criminal justice system. By acknowledging the accused's mental state, the legal system assures the public that individuals will not be unfairly or arbitrarily punished for acts lacking criminal intent. This transparency promotes trust in the legal system's ability to uphold justice and maintain public confidence.

Moreover, Mens-rea assists in establishing a causal connection between the psychological state of the suspect and the resulting criminal act. It reinforces

[19] K D Gaur, General Principles of Criminal Law, (Central Law Publication, 2021-11-01)
[20] P S A Pillai, Criminal Law, (Lexis Nexis, 15th edn. 2023)

the link between culpability and the committed offence, establishing that the accused's mental state was the driving force behind their actions.

In guiding prosecutorial discretion, Mens-rea provides crucial guidance to prosecutors in evaluating cases, determining charges, and assessing the strength of evidence.[21] The presence or absence of Mens-rea aids prosecutors in making informed decisions that align with legal standards and principles.

Mens-rea emerges as an indispensable element for conviction in criminal law as it ensures fairness, protects individual liberties, and distinguishes criminal acts from mere moral wrongs. By considering the psychological state of the suspect, the criminal justice system can accurately assess guilt, tailor appropriate penalties, and promote deterrence and rehabilitation. Mens-rea safeguards the principles of fairness, justice, and the presumption of innocence, ultimately contributing to a more just and equitable criminal justice system.

Mens-rea May Not be Required for a Conviction

There are certain situations in which Mens-rea[22] may not be required for a conviction.

Strict Liability Offenses

In some cases, certain offences are categorized as strict liability offences. These are typically regulatory or public welfare offences where the focus is on public safety rather than individual culpability. In cases of strict liability offences, the prosecution doesn't need to create the perpetrator's intent or knowledge of the unlawful act. The commission of the offence itself is adequate grounds for

[21] Stanhope Kenny, Courtney. Outlines of Criminal Law. India, Alpha Editions, 2019.
[22] An Act Committed without Mens Rea, available at: https://www.lawteacher.net/free-law-essays/tort-law/an-act-committed-without-mens-rea.php, 3rd Nov 2020, (last visited on Nov 29, 2023)

conviction. Examples of these offences comprise traffic violations, statutory rape, & some ecological offences.

Statutory Presumptions

In certain situations, the law may create a legal presumption where the presence of certain facts is considered sufficient evidence of guilt. These presumptions can shift the burden of proof to the accused, requiring them to prove their innocence or rebut the presumption. Statutory presumptions may apply in cases such as possession of stolen goods, illegal drugs, or firearms. While Mens-rea is not eliminated in such cases, the burden of proof shifts to the defendant to show their lack of knowledge or intent.

Inchoate Offenses:

Inchoate offences are crimes that were begun but not completed. These include attempts, conspiracy, and solicitation. While these offences involve a bent to commit a crime, the actual completion of the crime is not necessary for conviction. The focus is on the defendant's actions and intent to engage in criminal activity, rather than the harm caused by the completed offence.[23] Therefore, Mens-rea plays a role but is not required for the completion of the full offense.

It is imperative to underscore that the specific criteria governing Mens-rea and any exceptions to it may exhibit variations across jurisdictions. Different legal systems and statutes might provide diverse interpretations and stipulations. Therefore, it is strongly advised to refer to the relevant laws and consult with legal authorities in a particular jurisdiction to ensure accuracy and obtain the most current information.

[23] Barry Wright, Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform. N.p., Taylor & Francis, 2016.

Legislative Amendments: Influencing Mens-rea Standards

Legislative[24] amendments play a pivotal role in shaping and refining legal standards, particularly those about Mens-rea in criminal law. It delves into the impact of legislative amendments on Mens-rea standards, exploring how changes in statutes can redefine the mental elements required for criminal liability.required for criminal liability.

Evolution of Mens-rea Standards: The evolution of Mens-rea standards within the legal landscape is a dynamic process that reflects the changing perspectives, values, and societal norms over time. As legal systems adapt to contemporary challenges and philosophical developments, the Mens-rea concept undergoes continuous refinement, ensuring its relevance and effectiveness in determining criminal culpability.

Influence of Legislative Intent: The Mens-rea standards are profoundly shaped by the legislative intent behind statutory provisions. Legislative bodies articulate their purpose and goals when enacting or amending laws, and this intent serves as a guiding principle for the interpretation and application of Mens-rea requirements. Understanding the motives and objectives of lawmakers is essential for comprehending the nuanced intricacies of mental state elements in criminal offences.

Broader Mens-rea Standards: Legislative amendments occasionally strive to establish broader Mens-rea standards, encompassing a wider array of mental states that signify varying degrees of culpability. This approach acknowledges the multifaceted nature of human behaviour and purposes to safeguard that entities can be held responsible for a spectrum of mental states, including recklessness, negligence, and even indifference to criminal consequences. The

[24] Bebhinn Donnelly-Lazarov, "A Philosophy of Criminal Attempts", Cambridge University Press, Cambridge Core, 2015)

objective is to capture the diverse nuances of intent and mental culpabilitycomprehensively.

Narrowing Mens-rea Standards: Conversely, legislative changes may seek to narrow Mens-rea standards, demanding a more specific and stringent mental state for criminal liability. This approach is driven by concerns about maintaining precision in legal definitions and providing clear guidance to courts and juries.[25] A narrower focus on particular mental states aims to reduce ambiguity and enhance the predictability of legal outcomes, aligning with the principle of legal certainty.

Impact on Legal Interpretation: Legislative amendments wield significant influence on how Mens-rea is understood and functional in lawful contexts. Courts often look to legislative intent to discern the meaning of statutory language, especially when faced with ambiguous or unclear terms. Changes in Mens-rea standards through legislative action thus have a direct impact on the legal interpretation of criminal offences, influencing how judges and legal practitioners assess the mental states of accused individuals.

These elements – the evolution of Mens-rea standards, the influence of legislative intent, the dynamics between broader and narrower Mens-rea standards, and the resultant impact on legal interpretation – collectively contribute to the ongoing development and adaptation of the Mens-rea concept within the wide-ranging outline of unlawful law. Understanding this evolution is crucial for maintaining a legal system that is both just and responsive to the evolving complexities of human behaviour and societal values.

Challenges and Implications

[25] Supra 16

The imperative of Mens-rea[26] for securing convictions in criminal law unfolds a tapestry of challenges and implications that intricately weave into the fabric of the legal system. Foremost among these challenges is the formidable task of deciphering and substantiating the psychological state of the defendant at the precise moment of committing the alleged crime. This burden, placed squarely on the prosecution's shoulders, demands a level of unequivocal proof that becomes particularly intricate in cases where evidence is largely circumstantial or involves individuals grappling with mental health issues. The nuanced nature of this burden of proof unfurls a series of inquiries into the very essence of fairness and efficacy embedded within the criminal justice system, prompting contemplation on the ramifications of potential acquittals, especially when mental health factors come into play.

A delicate tightrope walk emerges as the requirement of Mens-rea intertwines with the imperative to balance the rights of the accused with the overarching need for justice. While the insistence on establishing a culpable mental state seeks to ensure that only those morally accountable face legal consequences, it simultaneously lays the groundwork for potential acquittals for individuals whose criminal acts stem from mental illness or other mitigating circumstances. This conundrum sparks broader conversations about the equilibrium between justice and the protection of individual rights, adding layers of complexity to the overall legal landscape.

Delving further into the realm of Mens-rea, the ever-evolving technological landscape introduces a novel set of challenges, particularly evident in cases of cybercrimes. The intricate nature of these offences, often devoid of direct contact between perpetrator and victim, introduces complexities in determining intentions, further testing the boundaries of legal interpretation and precedent.[27]

[26] Jeremy Horder, Ashworth's Principles of Criminal Law, (Oxford University Press, 10th edn. 2022)

Corporate criminal liability, another frontier of complexity, raises questions about how to attribute Mens-rea to specific individuals within an organization where decisions and actions arise from collective decision-making processes.

Cultural and social factors weave into this intricate tapestry, influencing an individual's perception of right and wrong. Recognizing that cultural practices can vary significantly across jurisdictions, determining Mens-rea becomes a nuanced endeavour, demanding an appreciation for diverse value systems and ethical frameworks. This cultural relativism adds another layer to the complexity of legal interpretations, inviting reflection on the universality of legal principles.

The intricate relationship between mental health and Mens-rea introduces yet another layer of complexity. Mental illnesses, affecting an individual's cognitive processes, can significantly impact their ability to form the requisite mental state for a crime. The acknowledgement of insanity as a mitigating factor raises profound questions about the treatment and rehabilitation of individuals within the criminal fairness system, pushing the boundaries of conventional legal discourse.

In the realm of legal defences[28], such as self-defence, duress, or necessity, Mens -rea takes centre stage in intricate trials where the accused must provide evidence to substantiate their claims. These legal manoeuvres introduce additional layers of complexity to legal proceedings, sparking debates about the appropriate burden of proof for such defences and the delicate balance between protecting individual rights and ensuring justice is served.

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[27] Supra 18

[28] Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law, (Oxford University Press, 2010)

In essence, while Mens-rea stands as a cornerstone for ensuring accountability only for those morally culpable, its stipulation in criminal law unravels a multifaceted tapestry of challenges and implications. From the complexities of evolving technological crimes to the intricacies of attributing criminal liability within corporate structures and the cultural nuances shaping perceptions of guilt, these challenges underscore the necessity of a nuanced, adaptable legal framework. Addressing these intricate challenges is not merely an academic exercise but a fundamental quest to sustain the ideologies of fairness, efficacy, and justice within the criminal justice system.

Case Studies: Practical Implications of Mens-rea in Action

Judicial pronouncements play a pivotal role in shaping the interpretation and application of Mens-rea, the Latin term signifying a "guilty mind." As courts navigate complex legal landscapes, their decisions become a guiding force that influences how intent, knowledge, and recklessness are assessed in criminal proceedings.

1. In the case of *R v Jogee*[29], the Supreme Court of the United Kingdom revisited the doctrine of joint enterprise, which holds that a person can be convicted for a crime committed by another person if they were part of a common plan. The court held that the doctrine was based on an incorrect understanding of Mens-rea and that it had led to wrongful convictions. The court observed that the doctrine of joint enterprise had resulted in a significant number of convictions of individuals who did not have the required Mens-rea for the crime. The court held that the requirement of Mens-rea for conviction must be applied consistently and that the doctrine of joint enterprise must be reformed.

[29] UKSC 2015/0015, (2015)

2. In the case of *R. Balakrishna Pillai v. State of Kerala*[30]: this case highlighted the importance of Mens-rea in offenses related to the Prevention of Corruption Act. The Supreme Court held that Mens-rea or guilty intention is a necessary element for establishing offences under the Act. It emphasized that the mere existence of a public servant-contractor relationship does not automatically imply criminality unless there is evidence of dishonest intention or abuse of an official position
3. In the case of *State of Maharashtra v. Mayer Hans George*[31]: the Supreme Court affirmed that Mens-rea is a crucial element for securing a conviction in criminal cases. The court emphasized that "a person cannot be held guilty of an offence unless he has a guilty mind."
4. In the case of *Suresh Chandra Bahri v. State of Bihar*[32]: the Supreme Court reaffirmed that Mens-rea is a fundamental element for obtaining a conviction in criminal cases. The court underscored that "the basic principle of criminal liability is that there can be no crime without Mens-rea."
5. In the case of *Subhash Shamrao Pachunde v. State of Maharashtra*[33]: the Supreme Court held that the involvement of special Mens-rea, which consists of 4 mental attitudes in the presence of any of which the lesser offence becomes greater, is important in determining the distinction between culpable homicide and murder.
6. In the case of *Debeswar Bhuyan v. State of Assam*[34]: The court observed that the burden on the accused to establish the plea of unsoundness of mind under Section 84 IPC is no greater than that on a party in a civil proceeding. It further highlighted that in a murder charge, according to the principle

[30] 1996 AIR 901, 1996 SCC (1) 478 (SC)
[31] 1965 AIR 722, (1965) SCR (1) 123
[32] 1994 AIR 2420
[33] IV (2005) CCR 316 (SC)
[34] (2011) 04 GAU CK 0016

'actus, non facit reum nisi mens sit rea,' the prosecution must demonstrate the coexistence of the act of assault and the accused's guilty state of mind, i.e., Mens-rea. In simpler terms, for an act to be considered murder under the Penal Code, the accused's alleged action must always be accompanied by a culpable thought or Mens-rea. The court also emphasized that if the evidence on record raises doubts about the accused's mental culpability, it must be concluded that the prosecution has not successfully proven the charge of murder. This conclusion is acceptable even if the accused has not been able to prove beyond a reasonable doubt that he was of unsound mind at the relevant time. After a thorough examination of the factual details, the court determined that the accused was not in a normal state of mind at the time of the attack, making it implausible to infer that he possessed the Mens-rea necessary to commit the charged crime.rea necessary to commit the charged crime.

7. In the case of *State of Rajasthan v. Rajaram*[35]: In this particular case, the Supreme Court established that Mens-rea is a vital element for securing a conviction in cases of culpable homicide not amounting to murder. The court articulated that "culpable homicide not amounting to murder requires Mens-rea, and the prosecution must prove that the accused had the intention or knowledge that his act would cause death."
8. In the case of *Prabhat Kumar Singh v. State of Bihar*[36]: The Supreme Court recently asserted that the absence of Mens-rea, indicating malicious or evil intent, is not a pertinent factor in cases of medical negligence. Concurrently, the Court has emphasized the importance of adhering to the proper procedure in the adjudication of any criminal complaint related to medical negligence.

[35] (2003) 8 SCC 180
[36] SLP(Crl.) Nos. 2395-2396 of 2021

9. In the case of *Mukesh v. The State of Madhya Pradesh*[37], the question that arises for consideration is whether there is any illegality in the finding recorded by the learned trial Court. At the outset, we have examined whether an offence under Section 307 IPC has been perpetrated. To establish an offence under Section 307 of IPC, two essential elements are required: firstly, the intention or knowledge to commit murder, Mens-rea, and secondly, the actual criminal act to commit murder, actus reus. Therefore, the presence of both Mens-rea and Actus-rea is indispensable

Conclusion

In conclusion, Mens-rea obliges as a pivotal element in criminal law[38], guaranteeing that only those morally culpable for their actions face punishment. However, the prerequisite of Mens-rea for conviction introduces various challenges and implications. The weight of the trial to prove the psychological state of the accused can be arduous, carrying the potential for wrongful convictions. Striking a delicate balance between the rights of the accused and the imperative for justice poses a complex issue that demands a nuanced approach. The paper draws insights from various Supreme Court judgments, emphasizing the importance of Mens-rea in distinguishing a wrongful act from a criminal act. Although Mens-rea is a requisite element for conviction in the majority of cases, exceptions exist, particularly in instances of strict liability offences. A nuanced approach is essential, one that carefully weighs the rights of the accused against the imperative for justice.the majority of cases, exceptions exist, particularly in instances of strict liability offenses. A nuanced

[37] Misc. Criminal Case No. 48266 of 2023
[38] Toppr, "Element of Crime", available at https://www.toppr.com/guides/legal-aptitude/indian-penal-code/elements-of-crime/ (last visited 5th January 2024)

approach is essential, one that carefully weighs the rights of the accused against the imperative for justice.

Mens-rea, at the time of committing a crime, is an indispensable element for conviction in Indian criminal law, supported by several factors. The presumption of innocence, a fundamental principle in Indian criminal law, reinforces the importance of Mens-rea. It ensures that individuals are not convicted and punished solely based on their actions but also considers their state of mind. The requirement of Mens-rea aligns with the principles of fairness and justice, preventing the punishment of those who did not possess the requisite guilty mind. Moreover, Mens-rea plays a crucial role in establishing moral culpability, recognizing that criminal liability should not solely be based on the act itself but also the accompanying mental state. The Indian Penal Code's specific provisions further reinforce the necessity of Mens-rea, explicitly requiring the presence of a guilty mind to establish guilt. This legislative intent demonstrates the recognition that the mental element is a vital requirement for conviction.

The role of Mens-rea as a necessary component for conviction in Indian criminal law is firmly supported by principles of fairness, justice, the presumption of innocence, legal precedents, and the provisions within the Indian Penal Code. By examining the cognitive condition of the accused, the legal system preserves the integrity of the criminal justice framework and harmonizes the requirement for accountability with foundational rights and principles. As we navigate the complexities of the modern legal landscape, the enduring significance of Mens-rea remains a testament to its role as a guiding principle in the quest for a fair, just, and morally grounded criminal justice system. In this journey, the interplay between the guilty mind and the principle

of justice[39] continues to shape the contours of legal thought, reminding us that the quest for justice is an ever-evolving, dynamic process.

This conclusion finds further support in the legal precedents set by the Supreme Court of India. Through landmark judgments, the court has consistently accentuated the importance of Mens-rea in criminal law. These judgments underscore that the prosecution must prove the accused's guilty state of mind beyond a judicious doubt, highlighting the essential nature of Mens-rea in securing a conviction. The analysis of Supreme Court judgments and case studies underscores the significance of a uniform and just application of the requirement of Mens-rea for conviction. While there may be extraordinary instances, such as in cases of strict liability offences, where Mens-rea can be relaxed, the fundamental principle of Mens-rea remains crucial to ensure the delivery of justice. This research paper delves into the role of Mens-rea in criminal law, scrutinizing its necessity as an element for conviction. Overall, the Supreme Court consistently asserts that Mens-rea is a vital component for most criminal offences. Nevertheless, exceptions exist, as seen in cases of strict liability offences, where Mens-Rea is not a requisite element for conviction.

[39] Clatalouge, "Actus Reus and Mens Rea under the Indian Penal Code" available at https://lawctopus.com/clatalogue/clat-pg/actus-reus-mens-rea-indian-penal-code/ (last visited on 5th January 2024)

BALANCING JUSTICE: THE INDIAN JUDICIARY'S STANCE ON PUBLIC ACCOUNTABILITY AND THE RULE OF LAW

Dr. Anil Kumar Dixit*

Abstract:

In a democracy, status and power entail responsibilities, and all public employees have a duty to answer to the people, who have political sovereignty. Because the judiciary cannot afford to shave moral standards concerning other arms of government, it is imperative that the court be held accountable.

Legal precedents, societal expectations, and constitutional principles interact dynamically to shape the Indian judiciary's perspective on public responsibility and the rule of law. With its foundation in the Constitution, the judiciary upholds the rule of law as a vital facet of democratic governance. In this context, the ideals of justice, transparency, and the defence of people's rights are all strongly intertwined. Due to important decisions and growing jurisprudence, the judiciary's role in upholding public accountability has changed over time. This position frequently involves resolving difficult moral and legal issues. By finding a balance between the rights of the individual and the interests of society, the Indian court is essential to the development of a legal framework that upholds a system of equitable and responsible governance. This essay discusses the importance of the judiciary's independence as well as the function of checks and balances in the legal system. The main point of the paper is the role of the Indian court in promoting public accountability. The researcher's goal is to investigate the rule of law and the role that the Indian judiciary plays in upholding it.

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Keywords: *Indian Judiciary, Rule of Law, Public Accountability, Judicial Review, Independent Judiciary, Judicial Activism*

Introduction

Judicial review is a basic concept found in the constitutions of many nations today. The Australian Administrative Procedures (Judicial Review) Act, of 1977 governs judicial review. Judicial review is mentioned in the constitutions of Canada, Australia, and India. It has also been shown that the idea of judicial review is a fundamental part of our Constitution. The High Courts are governed by Articles 226 and 227 of the Constitution. Articles 32 and 136 of the Constitution deal with the Supreme Court. Article 32 is a basic right to enforce any of the fundamental rights listed in Part III.

Judicial review of Indian state and federal governments' administrative actions. To be respected legally, one must be accountable. Another rationale, as in early Dicey editions, amended in subsequent editions, is that: Conferring discretion leads to arbitrariness, which is contrary to the rule of law[1]. With time, it becomes clear that discretion cannot be completely removed from the circumstances of a given case. To prevent it from becoming arbitrary, conventions, rules, or guidelines should control the discretionary area. The court must therefore regularly assess the standard of non-arbitrariness.

Judicial review has grown as the judiciary's inevitable response to offer the appropriate check on public authority. Growing public awareness of rights, judicial review of all significant government actions, and even the executive branch's willingness to seek judicial resolution of contentious or contentious

[1] Nathubhai Bhat, "Accountability of Judiciary to Bar and Society at Large", 28 Indian Bar Review 163 (2001).

matters—sometimes to avoid accountability for the decision—have all contributed to the importance of the judiciary.[2]

The concept of judicial accountability and answerability is not new. Several countries' constitutions include provisions for judicial accountability[3]. It is to limit the consolidation of power in the hands of a single state organ, particularly in nations like India, where judicial activism is blamed for interfering with and invading the domain of other organs. However, judicial independence is a requirement for every judge whose oath of office requires him to operate without fear or favour, affection or malice, and to follow the country's. The idea of answerability and accountability in the legal system is not new. Many countries have clauses relating to judicial duty in their constitutions. Its objective is to stop an excessive amount of authority from concentrating in the hands of one state organ, particularly in nations like India where judicial activism is perceived as invading and interfering with the domain of other organs. However, all judges must possess judicial independence because their oath of office requires them to operate impartially, without favouritism or malice, and in compliance with the country's laws and constitution. One of the duties of judges is to maintain the legal system. favouritism or malice, and in compliance with the country's laws and constitution. One of the duties of judges is to maintain the legal system.

Judges must avoid making arbitrary decisions without a solid legal basis, even in situations where they aim to create new legal territory. In this situation, less really is more. The decisions must be clear, exact, and logically sound. Since the mid-1990s, European justice systems have been held to

[2]Rao,G. "India: Judicial Review in India", available at http://www.mondaq.com/india/x/20649/Constitutional+Administrative+Law/Judicial+Review+in+India (last visited on 19th July 2023)

[3] V.R. Krishna Iyer, "Limits of Judicial Conduct, The Hindu", August 7, 2009

higher standards of accountability, quality of service delivery, and efficiency in tandem with other public sector branches. The Indian judiciary has brought new meaning to the idea of individual accountability.

Preserving Democracy: The Imperative of an Independent Judiciary

The criteria governing the judiciary's independence are intended to protect judges from outside influences and from any authority that isn't the law. Institutional control overrides the notion of accountability. Judicial independence cannot be viewed as a distinct entity since citizens may only put their trust in a competent court. Accountability is the first step toward putting an end to misconduct since a dishonest judge should not be on the bench.

Former CJI Justice J.S. Verma says-

> *"I think most of us prefer self-correction over external enforcement. That, in my humble opinion, is the honourable way for higher court judges, and it seems to have been the framers' perspective as well".*

The Supreme Court laid the groundwork for formal legislation governing the right to information by highlighting the right's relevance to actions taken by public bodies. In a system of accountability like ours, where every member of the public service is answerable for their actions, few secrets can exist. It is not in the best interests of anyone to keep everyday business under wraps; everyone in our nation has a right to know what their elected representatives are doing. Secrecy is rarely the best policy. For political, personal, or bureaucratic reasons, it is necessary. The duty of authorities to defend their actions is the first line of defence against authoritarianism and corruption. Independence promotes and strengthens the rule of law. It is critical that judges be independent in administering the law and giving judicial judgements for the law to apply equitably to all persons in the country[OBJ].

Parties have the ability to make demands and issue threats to judges, especially the criminal element of society. The independence of the judiciary is a generally accepted standard in the majority of democracies.

The three major objectives of an independent judiciary are to ensure that the authority does not misuse its power, that the person is treated fairly, and that the authority does not make an inaccurate legal decision.

The Supreme Court noted in *Minerva Mills Ltd. v. UOI*[4] that "the constitution provides an independent judiciary with the authority of judicial review to examine the legitimacy of administrative action and legislative validity. The court has a constitutional obligation to keep the state's organs within the constitutional limitations of their authority by performing judicial review". Legal review would apply to government authorities using contractual rights to avoid arbitrariness or bias. However, in *State of Bihar v. Balmakund Shah*[5], the judiciary's independence was raised to a constitutional principle.

Need for judicial accountability

In a "democratic republic," the ability to exercise power with personal responsibility is essential to the survival of any democratic government. Accountability should be sufficiently broad to cover all those in positions of authority, not only judges and bureaucrats. Positions of power and responsibility come with responsibilities in a democracy, and public employees are always accountable to the people, who have political sovereignty.[6]

The administration of justice through the courts is the responsibility of the judicial system. Judges are the people who sit in on behalf of the courts. They

[4] 1980 AIR 1789, 1981 SCR (1) 206

[5] 2021 Latest Caselaw 5120 Patna

[6] Sir Moti Tikaram, "Public Accountability – Who Judges the Judges?" 19 Commw.L. Bull. 1231 (1993)

are more than simply the external manifestations of courts; they are real, living people. The way judges carry out their duties shapes the public's perception of courts and the legitimacy of the legal system.[7] Judges have been held in great regard in India since the beginning of time. However, as a result of several bad incidents, people are gradually losing faith in the judiciary and taking the law into their own hands. It's a complete disgrace. Since the judiciary is the most valuable branch of government to maintain declining moral standards, it is imperative that we hold it responsible as defenders of our constitution.

The idea of answerability and accountability in the legal system is not new. Its goal is to prevent too much power from consolidating in the hands of one state organ, especially in countries like India where judicial activism is accused of meddling in and encroaching on the territory of other organs.[8] Nonetheless, judicial independence is a prerequisite for all judges, who take an oath of office requiring them to uphold the nation's laws and constitution and to act without fear, favour, affection, or malice. The Indian court has grown to be the most powerful institution in the state, an outcome that the founders of the Indian constitution could not have imagined.[9] With unchecked and imperial powers, the Indian court has become one of the most powerful in the world through it all. All executive officials were required to obey court orders, which were sometimes issued without even informing the parties involved, or face being found in contempt of court. On the other hand, the courts have the authority to invalidate executive orders and even laws.

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[7] Prashant Bhushan, "Judicial Accountability or Illusion: The National Judicial Council Bill" available at http://www.judicialreforms.org/files/judicial_acc_or_illusion_pb.pdf, (last visited on 21st July 2023)

[8] Frances Kahn Zemans, "The Accountable Judge: Guardian of Judicial Independence", 72 Southern California Law Review 625 (1999)

[9] V. Venkatesan, "Of Accountability to the People", Frontline The Hindu, Sept 25, 2009

Naturally, these authorities were frequently and suitably used to address outrageous presidential inaction.

Use of the Check and Balance Idea in the Judiciary

The Rule of Law and the Judiciary

Like any other arm of government, the court may go awry. They, too, are human and may be influenced by factors other than law and justice. They may be driven by personal beliefs, prejudices, and corruption. S.H. Kapadia, C.J. -

> "Usually judges remark on politicians, physicians, engineers, executives, and students. Even judges must follow ethics. We tell everyone what to do, but who will? The rule of law does not exempt us from enforcement. Judges should also obey the code".

Justices Hedge, Shelat, and Grover were three senior justices who were replaced in 1973 by Chief Justice A.N. Ray. Justice Ray transferred justices between high courts because they made important decisions that were detrimental to the federal and state governments, not because of their performance. Recent cases demonstrate how important it is for judges to be transparent. The dismissal of judges is another challenge for the judiciary. The President may remove justices of the Supreme Court and High Court for misbehaviour or ineptitude under Article 124(4). The application needs to be moved by 50 Rajya Sabha and 100 Lok Sabha MPs.

Two requirements must be met:

- A judge's wrongdoing should be documented.
- Publication of evidence & charges

Article 124(4) of the Constitution, which forbids any other venue from investigating without the Chief Justice of India's prior assent, shields the

judges from prosecution. The Supreme Court decided that *"No High Court or Supreme Court judge may be investigated for any crime, including corruption, without the prior written agreement of the Chief Justice of India"*. Judge was accused of criminal misconduct after being exposed while serving as chief justice of the Madras High Court in 1974.

Judicial Stance Towards Administrative Discretion and Arbitrariness

Legal activism

In positivistic words, egalitarianism is opposed to arbitrariness. Equality and arbitrariness are, in fact, sworn enemies; one is associated with a republic, the other with an absolute monarchy. Arbitrary acts violate Article 14, and arbitrary acts that affect public employment violate Article 16. Unfair or arbitrary state action is forbidden by Articles 14 and 16. They need that state behaviour to be based on true, pertinent principles that apply equally to everybody in identical circumstances in order to[10] Articles 14 and 16 apply to the active cause for state action, which is outside the purview of permissible considerations and is different from the motive that arises from the mind's antechamber. The petitioner was merely acting in that capacity and had no claim to the position of Chief Secretary. Articles 14 and 16 are not relevant, although Article 311 might be. Articles 14 and 16 apply to the active cause for state action, which is outside the purview of permissible considerations and is different from the motive that arises from the mind's antechamber. The petitioner was merely acting in that capacity and had no claim to the position of Chief Secretary. Articles 14 and 16 are not relevant, although Article 311 might be.

In *State of Uttar Pradesh v. Raj Narain*[11], the court said,

[10] P.J. Dhan, "Dr. Ambedkar and the Principle of Independence of Judiciary", 24 Indian Bar Review 97 (1997)

> *"The public interest does not sustain the administration's overwhelming support for exclusive authority to determine what subjects could endanger national security. There are few public interest topics that cannot be discussed in public if national security considerations are removed."*

Justice K.K. Mathew added:

> *"A government that holds everyone accountable for their activities makes it difficult to maintain secrets. Everyone is entitled to be informed about the activities of their public representatives. They are entitled to know every aspect of every deal that is made public. When confidentiality is claimed for transactions that don't affect public safety, it should cause one to question the validity of the right to know, which is derived from the idea of freedom of expression. It is not in the public interest to keep routine business secrets. Seldom is secrecy the right goal. It is required for bureaucratic, personal, or political reasons. The primary line of defence against despotism and corruption is the obligation of authority to justify their acts."*

For reasons of public interest, certain records should not be disclosed; in Raj Narain's case, this was made very evident. One type of paper that the law has acknowledged as being entitled to protection from disclosure is those that are essential to the regular operation of the public service.[1213]s. . Documents in this class are exempt from disclosure not because of their content, but because of their class.

The court referenced Halsbury's Laws of England:

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[11] (1975 AIR 865, 1975 SCR (3) 333)

[12] Prashant Bhushan, "Judicial Accountability: Asset Disclosures and Beyond", 44 Economic & Political Weekly. 8 (2009).

> When referring to discretionary authority, phrases like "may," "shall be legal," "if it sees fit," and "as it considers fit" are commonly employed. However, legislative discretion is not always or typically unrestricted; it may be confined to explicit or implicit legal obligations to follow substantive and procedural rules before concluding. It may also be up to the individual to decide how to respond, although there is an obligation to act when certain conditions are met. Therefore, duty and discretion may go hand in hand. When the above conditions are met, a duty without discretion is a simple ministerial act that demands behaviour in a prescribed manner and form.

The Supreme Court noted:

> *"[I]n a responsible administration like ours, there can be few secrets. The citizens of this nation have a right to know what their officials do in public. They have a right to know every detail of every public transaction".*

D.B. Belliappa, a three-judge panel of the Supreme Court decided that protection under Articles 14 and 16(1) extends to temporary government employees and that employer actions proven to be arbitrary or discriminatory may be annulled. Rejecting the appellant's claim that Articles 14 and 16 are irrelevant to the termination of temporary workers' employment, their Lordships ruled as follows:

> *"Mr. Veerappa's first claim is that Articles 14 and 16(1) of the Constitution do not apply to a temporary employee whose service is terminated in conformity with the terms and circumstances of his employment".*

The seven-judge panel in *S.P Gupta v. UOI*[14] added a fresh liberal perspective to the call for openness in public life. In this instance, it was decided that information must be made public in order for the government to function effectively and that confidentiality can only be justified in situations when it serves the public interest. The right to request information disclosure clashes with the state's right to protect data pertinent to its urgent issues.

The Supreme Court noted that

> *"It is very evident from the Constitution that we have a democratic system of governance. If people have made democracy their guiding principle, they ought to be aware of what their government is doing. The right to choose their government, to choose how it will be run, and to hold those in power responsible are all guaranteed to citizens. Without accountability, a democratic administration cannot function, and accountability necessitates public knowledge of the administration's activities. Understanding how the government operates is a must for citizens to play their part in transforming democracy into a really participatory one. Therefore, one of the fundamental tenets of a democratic state is the people's right to know the truth about their government. Because of this, governance transparency is growing in favour throughout the world".*

In *Krishan Yadav v. Haryana*[15], the Supreme Court stated:

> *"The case will inevitably come to this conclusion: fraud has escalated. Amazingly, all of this was driven by external circumstances. There were no background checks or physicals conducted before selection. The whole collection was geared on strength training. Arbitrary action*

[14] 1982 AIR 149
[15] AIR 1994 SC 2166

> *by public authorities purges administration. That many in public service have forgotten that their jobs are sacred trusts is extremely disheartening. These offices are solely to be used."*

In other words, the pick is random. It is the system that is flawed, not the candidates. So, the court annuls the selection of Taxation Inspectors. It was said in *Shiv Sagar Tiwari v. Union of India*[16] that the importance of these high administrative law principles was underscored since, as was later stated, there was a notable misuse of discretionary power in the housing distribution to government employees. With the rise of the 10% discretionary limit to 70%, 8,768 homes were granted on "Special Compassionate Ground". Those who weren't accommodated in accordance with the rules responded violently.

The Discretionary Power

Discretionary power is ubiquitous in the modern administrative state. It is used by representatives of the federal government, local and state governments, and other public bodies. The ability of an official or agency to make decisions within predetermined parameters is referred to as discretionary authority. No one should be denied equality before the law or equal protection of the laws within Indian territory, according to Article 14 of the Indian Constitution.[17] Over the past fifty-five years, courts have construed equality to include any arbitrary actions by the government and its agents. The ever-expanding reach of the equality clause has led to an increase in petitions for relief only on the basis that another individual has received remedy from the public body. Until recently, judges considered whether the state or any other public body's acts

[16] AIR 1997 SC 2725
[17] Supra

benefited some parties more than others, but they upheld the equality clause and heard the petitioners' allegations.

Indian Judiciary - An Integrated Framework

As part of the constitution's architecture, an integrated legal system is to be established, led by the Hon'ble Supreme Court of India and including the Hon'ble State High Courts as essential constituents. It should be noted that the State High Courts' constitution, authority, and jurisdiction are all specified in it. Actually, before appointing someone to the Hon'ble High Court, the president of India must consult with the state governor, the Chief Justice of India, and the Chief Justice of the High Court in the event that a judge other than the Chief Justice is involved. The problem is that the idea of independence is misused; rather than being seen as independence from accountability, it should be seen as independence from the executive and legislative branches.

Lord Woolf beautifully articulated the spirit of independence when he said, “The independence of the judiciary is not the judiciary's property, but a commodity to be held by the judiciary in trust for the public.”

Power and the Courts

- The rule of law governs the use of numerous discretionary powers. To determine the reach of public law principles, one should look at who wields power or the power itself.
- The purpose of giving a judge's discretion is to:
    - This discretionary authority affects the nature of rights and interests.
    - The court ensures that the government follows the

Constitution's provisions.

The Indian judiciary's contribution to Public Accountability

In *Common Cause (A Registered Society) v. UOI*[18], the Supreme Court held that: "No public worker court arrogates himself the capacity to act in a way which was manifestly arbitrary."

The Supreme Court noted,

> *"Holding public servants responsible for whatever wrongdoings they may have committed while doing their duties is long overdue. We believe it is clear as day that a public servant who abuses their position by acts or omissions may be held legally responsible for any damage or loss of public property. No government employee may claim they can change an order without holding me personally accountable."*

The Supreme Court added:

> *"No public servant may act in an arbitrary manner. The government gives out money to citizens in a welfare state in the form of land, houses, gas stations, mineral leases, contracts, quotas, and licenses. There are various kinds of government grants. A minister who serves as the department's executive head distributes these riches. On their behalf, the people choose him to be in a position of trust. He cannot betray the trust of the people. A transparent and unbiased procedure is needed."*

Violations of human rights and misuse of authority claims made under public law are recognized grounds for upholding and defending those rights, the court decided in *Nilabati Behera v. State of Orissa*[19]. Thus, every person has an

[18] (2018) 5 SCC 1, AIR 2018 SC 1665

enforceable claim to compensate when his basic rights are violated. In such a case, the court noted:

> *"[T]hat Leaving victims to civil law remedies diminishes constitutional courts' function as defenders and guarantors of citizens' basic rights. Thus, courts must hold the state or its agents responsible to the people by paying them for rights violations".*

In *R. Rajagopal v. State of Tamil Nadu*[20], the Supreme Court stated that the law makes it quite clear that unless an officer's behaviour is directly tied to their job, their unapproved actions are not illegal.

In *Amritlal Prajivandas v. A.G.*[21], the Indian Supreme Court enforced public accountability by drawing on Reid's ideas of constructive trust and equality. The validity of the 1976 Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (SAFEMA) was contested in this case. Property obtained by smuggling or other illegal means may be seized under the Act. The legality of the Act was upheld by the court.

In *State of Bihar v. Subhash Singh*[22], the court found that-

> *"Except in rare cases, the department head bears ultimate responsibility and liability. The Supreme Court held that although there is a hierarchy of accountability for decisions, the department head or designated official is ultimately responsible and liable for the choice. If there is a clause that absolves him of responsibility or if another person bears responsibility for his actions, he must inform the court. The commanding officer holds them all accountable; otherwise,*

[19] 1993 AIR 1960
[20] 1995 AIR 264
[21] 1994 (5) SCC 54
[22] 1991 AIR 420

> *they risk discipline. The goal is to make sure that the rule of law is respected. Public accountability has been reinforced by the court's stringent execution of the contempt rules. A number of well-known public servants were recently imprisoned for disobeying court orders. The court also fined the erring officer for failing to perform his duty on time. Similarly, if a public worker has caused a loss to the public coffers, the court has enabled the government to sue the officer personally".*

In the matter of *Superintending Engineer, Public Health, Union Territory v. Kuldeep Singh*[23], it stated:

> *"Every public employee must act with honesty, integrity, sincerity, and loyalty in the implementation of political, social, economic, and constitutional policies in order to achieve quality and efficiency in public administration. A public servant tasked with carrying out constitutional policy ought to be accountable for accomplishing the goals of the document and should operate transparently".*

In *P.V. Narasimha Rao v. State*[24], a majority in Congress was only 14 votes away. On July 28, 1993, a motion of no confidence was rejected by a vote of 265 to 251. The Jharkhand Mukti Morcha and other parties were accused of arranging a scheme to receive money in return for their votes against the proposal. A constitutional bench of the Delhi High Court heard an application to quash the FIR. By a vote of 3 to 2, the constitution bench determined that Article 105 of the constitution guarantees parliamentarians the right to free expression and the freedom to vote. Therefore, MPs who accept bribes and cast ballots are not subject to legal punishment. On the other hand, MPs who

[23] Special Leave Petition (C) No. 492 of 1997
[24] (1998) 8 SCC (Jour) 1

refused to cast a ballot or took bribes might face legal action.

Since MPs are employees of the government, they could be charged under the Prevention of Corruption Act and the Indian Penal Code. This decision sparked a lot of debate. Article 105 of the Constitution does not offer any defence against corruption. In an effort to unearth high-level misbehaviour, the court overturned previous findings. It is evident that a legislator's independence is maintained by immunity, and that safeguarding him from illegal behaviour is inimical to that goal. Article 105 of the Constitution does not establish a legal defence against criminal laws.

Rule of Law

Today's Democratic Government is extending its horizons beyond Dicey's 19th Century Rule of Law. Now they employ the due process clause to justify their acts and avoid arbitrariness. There may be unexpected events or situations that public authorities must deal with without adequate rules to sustain the Rule of Law. The function of Article 14 changed after *E.P Royappa v. State of Tamil Nadu*[25]. It is now possible to contest any arbitrary action or judgment as violating Article 14. The primary concerns are about what can be done to regulate it and who can be held responsible for arbitrary judgments. This is a challenging problem to resolve since people are worried about the arbitrary acts of the government, the necessity of holding them accountable, and the right to individual equality. Public accountability is a new concept of personal responsibility that the court may create by using Article 14 and the rule of law as a weapon to protect against arbitrary behaviour by public officials.

[25] 1974 AIR 555

The Indian judiciary's contribution to the Rule of Law

However, it is the judicial use of Article 14 that has developed a wide norm of reasonableness. In *E P Royappa v. State of Tamil Nadu*[26], Justice Bhagwati, with Js. Chandrachud and Krishna Iyer, observed: "Egality is antithetical to arbitrariness in positivistic terms".In *E P Royappa v. State of Tamil Nadu*[27], Justice Bhagwati, with Js. Chandrachud and Krishna Iyer, observed: "Egality is antithetical to arbitrariness in positivistic terms".

Article 16 states that everyone has an equal chance to apply for positions and be appointed to public office. It is imperative to bear in mind that although Article 16 provides legislative guarantees of equality of opportunity in public employment, it is but one implementation of the equality established in Article 14. Thus, Article 16 implements the principle of equality in all areas related to public employment.

It was also mentioned that equality and the prohibition against discrimination serve as the fundamental principles supporting Articles 14 and 16. Within traditional and doctrinaire boundaries, equality is "cabined and limited," however it is a dynamic concept with many dimensions. In positivistic words, egalitarianism is opposed to arbitrariness.

An arbitrary act is implicitly unequal in political logic and constitutional law, and so violates Article 14, and if it impacts public employment, it also violates Article. 16. 14 and 16 combat state arbitrary action and assure justice and equality of treatment. To deny equality, they need that state conduct be founded on relevant principles that apply equally to individuals similarly situated.

Articles 14 and 16 apply where the operational cause for state action is not

[26] Supra

valid and relevant but is extraneous and beyond the scope of authorised considerations. Power abuse and arbitrariness are fatal radiations emerging from the same vice: the matter encompasses the former[28]. Articles 14 through 16 are not limited to situations in which the impacted public employee is entitled to a job. Public employees who are subjected to the state apparatus's arbitrary or unfair treatment or who witness the dishonest exercise of power are covered by Articles 14 and 16. It is not a response to the allegation of Articles 14 and 16 to say that the petitioner was only operating in the capacity of Chief Secretary and had no legal claim to the position. Articles 14 and 16 are not relevant, although Article 311 might be.

The court ruled:

> *"[T]he transfer of the petitioner from Chief Secretary to Deputy Chairman and subsequently to Officer on Special Duty, combined with Sabanayagam's elevation and confirmation as Chief Secretary, was plainly arbitrary and in violation of Articles 14 and 16. The petitioner's transfer was therefore an abuse of authority and unlawful".*

In *E.P. Royappa v. State of Tamil Nadu*, this Court revealed a new dimension of Article 14, highlighting its highly activist nature and guarantee against arbitrariness. Justice Bhagwati remarked that:

> *"Now the issue is, what is Article 14's requirement: what is the substance and scope of the great equalising principle enunciated here? It is undeniably a constitutional religion. It is the basis upon which our democratic republic is built. So it can't be restricted, pedantic, or lexicographic. No effort should be made to reduce its activist scope and purpose. Equality is a dynamic notion with*

[28] Contini, F and Mohr, R. "Reconciling independence and accountability in judicial systems", available at http:/www.utrechtlawreview.org/ (last visited on 27th July 2023)

numerous dimensions that cannot be confined by tradition or doctrine. Article 14 prohibits state conduct that is not fair or equal".

In the instance of the International Airport Authority, the Supreme Court upheld this. Since any action that is arbitrary must inevitably undermine equality, it is evident that Article 14 is directed against arbitrariness. The concept of classification used by the courts is neither an interpretation of Article 14 nor its purpose. It's simply a quick and simple method of determining whether a legislative or administrative action violates equality by being arbitrary. If the classification is not reasonable and satisfies the two previously mentioned criteria, the relevant legislative or executive action would be considered arbitrary. Article 14 takes immediate action to overturn any arbitrary State action, whether it is legislative, executive, or "power" under Article 12. In reality, the notion of reasonableness and non-arbitrariness is woven throughout the Constitution like a golden thread.

The Delhi Special Police Establishment Act, 1946 (the Act) is challenged in this case. The Act was amended to include this Section on September 12, 2003. The Prevention of Corruption Act, 1988 stipulates that any inquiry or investigation into any alleged violation must first receive clearance from the Central Government. It used to be required to obtain prior authorization from the Central Government through a government decree called the "Single Directive." The CBI received instructions on how to conduct an inquiry from several Ministries and Departments in the form of a Single Directive.

As the approval is coming from the Central Government, there won't be any protection against political and bureaucratic influence or secrecy. The criminal-bureaucrat-politician triangle would be involved in approving or disapproving prior to the initiation of an inquiry or probe. Officers may unintentionally be made aware of the department's previous penalties, and a

police investigation necessitates a thorough investigation and the gathering of evidence without notifying any individuals who might be held accountable. As demonstrated by other decisions made by this Court, most notably Vineet Narain's, knowledgeable senior counsel believes that it is irrational and capricious to shield well-positioned public officials from examination or criticism. Amicus Curiae claimed that Section 6-A of the Act was unreasonable and illogical and that it was in violation of Article 14 of the Indian Constitution. Aside from the three-judge bench ruling in Vineet Narain's case, several decisions have been cited in support of the constitutional validity argument. The court viewed:

To underline that the lack of arbitrary authority is the foundation of our whole constitutional structure. Observations are given by a three-judge bench in *Khoday Distilleries Ltd. v State of Karnataka and Ors*[29]. In *State of A.P. v McDowell & Co.,*[30] No enactment may be invalidated based on arbitrary or unreasonable findings.

Limitation of judicial review power:

a) India embraced the Rule of Law, which established broad standards of responsibility. But there is still room for abuse. In addition to dispersed responsibility, precise and tangible measures are required. It is a precise and real approach to reducing administrative burden. True, Indian courts have a constitutional obligation to interpret the Constitution and declare laws invalid if they violate any provision of the Constitution. Various common law doctrines have restricted the extent of judicial authority in judicial review. This restricted examination is to guarantee compliance with the Rule of Law.

[29] (1995 (1) SCC 574
[30] 1996 AIR 1627

b) To avoid arbitrariness or bias, the idea of judicial review would apply to the government's contractual powers. However, the authority of judicial review has inherent restrictions are a few.

c) Judicial review examines not the decision's merits, but the decision-making process itself. The court must thus limit itself to legality. Be concerned about:

- Did a decision maker go too far?
- Made a legal mistake
- Violated the natural justice norms
- Made a decision a reasonable tribunal would have made,
- Exerted its might.

When reviewing administrative action, courts cannot examine the validity of discretionary authority unless it is abused. The judiciary has intrinsic flaws. It is more suited to resolving disagreements than administrative tasks. Applying the principles of natural review might sometimes reveal a culture of arbitrariness inside the judicial circles[31]. An arbitrary decision is not based on set rules, processes, or laws. It comes in many forms. Judicial arbitrariness manifests itself in four primary forms:

- Courts replacing the decision with their own.
- Court misapplying established rules
- Infringement on established principles by a court.
- Courts do not intervene when they should.

[31] Mulgan, R. "The processes of public accountability, 56 Australian journal of public administration" 25-36. (1997)

Conclusion

A judge's review of an administrative action is the finest means of examining a public authority's legal jurisdiction. A court may assess the method's appropriateness and fairness, the goals behind it, the type and extent of the discretionary power, and other factors. The harm that the public authority's operations cause is a matter of accountability. Of course, it would be unfeasible and unnecessary to investigate each administrative action or judgment. The constitutional courts exercise restraint while using their judicial review jurisdiction to ensure that the authorities granted it act truthfully, impartially, and for the intended purpose.

The modern intelligentsia and society are ready and willing to engage with a knowledgeable public. This is the only deliberative paradigm that allows for direct public participation. Young people's engagement in the democratic political system may increase as a result of this. It's also true that increased public participation reduces accountability. This highlights the significance of having a robust anti-corruption body (Lokpal). The significance of the right to information in India's democratic system cannot be overstated. It raises public knowledge and increases government responsibility. The Right to Information Act may be used to expose public wrongdoing, and the court may play a significant role in this case. The judiciary has identified a number of areas that require revision, section 24 of the Act being one of them.

The judicial output of the doctrine can be grouped along several themes by using the analytical distinctions between various components of judicial review theory. These topical inquiries allow us to evaluate the judicial output, identify current strengths and shortcomings in the doctrine, and address issues over its excessively broad and thoughtless application. The state and its representatives are required to uphold the goals of the Constitution. Indian

democracy has its roots in public welfare, socialism, and customs. Government staff and agencies need goals and core policies to achieve this. They do, nevertheless, require a criterion for revealing their objectives and outcomes.

People need to be aware of what their government is doing in order to hold it accountable. In various decentralization programs, formal redress processes have been implemented as an accountability tool, even when word-of-mouth may be sufficient at the local level. Both pillars must support the rule of law. The most effective way to ascertain if a public agency is operating within the bounds of its legal authority is through judicial review of administrative action. A court may evaluate the method's goals, the kind and scope of the discretionary power, and its appropriateness and fairness, among other things. Accountability for the harm caused by the public authority's operations is important. Naturally, it would not be necessary or practical to look into every administrative action or judgment.

CYBERSECURITY LAWS AND REGULATIONS: NAVIGATING THE COMPLEXITIES IN THE DIGITAL AGE

Monika Ghai*

Abstract

In the rapidly changing digital environment, cybersecurity emerges as a critical concern for individuals, businesses, and governments. This article comprehensively explores the domain of cybersecurity laws and regulations, emphasizing the challenges and opportunities they present. As technological advancements introduce new threats, the need for robust legal frameworks to safeguard digital ecosystems becomes imperative. The exploration begins by outlining the scope of cybersecurity, emphasizing the essential requirement for protective measures in our interconnected world. The historical context is examined, tracing the evolution of cybersecurity laws from their inception to their current complexities.

The article covers international standards, regional variations, and emerging trends in cybersecurity governance. A significant portion is dedicated to dissecting major cybersecurity laws at national and international levels, supported by real-world case studies that illuminate their application, effectiveness, and potential limitations. Recognizing the dynamic nature of cyberspace, the article stresses the continual reassessment of legal frameworks.

Stakeholder roles in shaping and enforcing cybersecurity laws are explored, emphasizing the crucial contributions of governments, private enterprises, and individuals. Ethical implications, including privacy concerns, surveillance, and the delicate balance between security and individual liberties, are discussed. Case studies from diverse regions illustrate the global challenge of

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cybersecurity, considering cultural, political, and economic factors that influence legal approaches. The article concludes by highlighting the significance of international cooperation and information sharing in effectively combating cyber threats. Targeting policymakers, legal professionals, businesses, and individuals navigating the digital age, this article provides a comprehensive overview, essential for ensuring a secure and resilient digital future.

Keywords: *Cybersecurity laws, Digital age, Data protection, Surveillance, Threat awareness, Ethical implications*

Introduction

In an era dominated by digital interconnectedness, the safeguarding of information has transcended from a mere necessity to an existential imperative. The sprawling networks that define our digital age have brought unparalleled opportunities but, concurrently, have birthed intricate challenges—chief among them being the omnipresent threat of cyberattacks. As the cyber landscape evolves with each technological leap, so too must the legal frameworks designed to protect against an ever-expanding array of digital threats.

Defining the Digital Battlefield: Cybersecurity in the 21st Century

The term "cybersecurity" has evolved from a niche concern to a global focal point till the 21st century[1]. Essentially, cybersecurity encompasses an extensive range of practices, policies, technologies, and strategies strategically devised to defend digital systems, networks, and data against unauthorized access, attacks, and potential.

[1] Steve Zurier "Threat Intelligence: The gold standard for 21st century cybersecurity", August 22, (2023)

As our lives become increasingly entwined with digital technologies, encompassing everything from personal communication to critical infrastructure, the need for effective cybersecurity has become paramount. It involves not only the protection of sensitive information but also the assurance of the integrity, availability, and confidentiality of digital assets.

The Imperative of Cybersecurity Laws in a Connected World

The escalating frequency and sophistication of cyber threats demand a robust legal framework capable of addressing multifaceted challenges[2]. Cybersecurity laws serve as the guardians of our digital realms, providing the necessary guidelines and repercussions to deter malicious actors while fostering a secure environment for innovation and communication. As we embark on this exploration of cybersecurity laws and regulations, it is essential to comprehend the historical journey that has shaped these legal bulwarks, the global standards that attempt to harmonize diverse approaches, and the ongoing debates that underscore the necessity for adaptability in this dynamic domain. Join us as we navigate the complexities of cybersecurity laws in the digital age, unravelling the layers that constitute this critical line of defence in our interconnected world.

The Expanding Digital Landscape

The digital landscape is a dynamic and expansive realm where information flows ceaselessly, connecting individuals, businesses, and governments across the globe. With the proliferation of smart devices, cloud computing, and the Internet of Things (IoT), this landscape is not only expanding but also evolving at an unprecedented pace. The boundaries between physical and digital realities

[2] Banoth Pavan, Safeguarding Our Digital World: The Imperative of Cybersecurity and Data Privacy available at https://www.linkedin.com/pulse/safeguarding-our-digital-world-imperative-data-privacy-banoth-pavan/ (last visited on Dec 22, 2023)

blur as we embrace innovations like artificial intelligence, big data analytics, and decentralized technologies. While these advancements bring unprecedented opportunities, they also create new vulnerabilities, providing fertile ground for cyber threats to flourish.

The Growing Importance of Cybersecurity

With the increasing dependence on digital technologies, the significance of strong cybersecurity measures[3] is on the rise. Cybersecurity is no longer a concern confined to IT departments; it has become a boardroom priority and a societal imperative. The repercussions of cyberattacks extend widely, affecting not just individual privacy but also influencing the operations of critical infrastructure, financial systems, and even national security. In the era of the digital age, the effectiveness of cybersecurity measures has become paramount for the resilience of nations, economies, and individuals. It goes beyond safeguarding data; it involves maintaining the trust and stability that form the foundation of our interconnected world. In this landscape, understanding and implementing effective cybersecurity measures are not optional but rather a fundamental prerequisite for navigating the complexities of the digital age.

Historical Context

Understanding the historical context of cybersecurity laws is essential to appreciate the challenges and innovations that have shaped the current regulatory landscape. The evolution of these laws reflects the dynamic nature of cyberspace, where the cat-and-mouse game between security measures and malicious actors has been ongoing since the inception of digital communication.

[3] SRM University, The Growing Importance of Cybersecurity in the Digital Era available at https://srmuniversity.ac.in/blog/best-university-for-computer-science-in-sonepat/#:~:text=Cybersecurity%20protects%20digital%20systems%2C%20networks,our%20personal%20and%20professional%20lives. (last visited on Dec 22, 2023)

Evolution of Cybersecurity Laws

The origin of cybersecurity laws[4] can be traced to the initial stages of computing, a time when networks were limited to academic and research institutions.

In these nascent stages, the focus was on basic security protocols to protect against unauthorized access. As computer networks expanded beyond academic circles to the business and government sectors, the need for more comprehensive legal frameworks became evident.

The 1980s represented a crucial period marked by the introduction of early computer crime laws, exemplified by the enactment of the U.S. Computer Fraud and Abuse Act (CFAA). These legislations established the foundation for tackling unauthorized access and data breaches, paving the way for the dynamic changes in the threat landscape.

Early Stages to Present Complexities

The 1990s witnessed the mainstream adoption of the internet, propelling cyberspace into every facet of modern life. With this rapid expansion came new challenges, including a surge in cybercrime and a growing awareness of the need for international cooperation. Early cybersecurity laws primarily focused on criminalizing unauthorized access and hacking, but as the digital ecosystem matured, so did the complexities of cyber threats.

During the 2000s, the landscape witnessed the emergence of more intricate threats, comprising the likes of malware, ransomware, and advanced persistent threats (APTs). This prompted a shift in focus towards comprehensive

[4] History of cyber law in India, available at : https://indiancybersecurity.com/cyber_law_history_india.php#:~:text=The%20information%20Technology%20Act%20is,ElectronicCommerce%20on%20International%20Trade%20Law. Last visited on Dec 1, 2023)

cybersecurity strategies that encompassed prevention, detection, and response. Legal frameworks had to adapt to address these new challenges, leading to the development of laws governing data protection, breach notification, and critical infrastructure security.

Milestones in the Development of Cybersecurity Regulations

The evolution of cybersecurity regulations is punctuated by significant milestones[5]. In the early 2000s, Europe introduced data protection laws, marked by the Data Protection Directive. This laid the foundation for the more rigorous General Data Protection Regulation (GDPR) in 2018, which set a new benchmark for privacy and data security, exerting a considerable influence on global cybersecurity approaches.

Internationally, the Budapest Convention on Cybercrime, adopted in 2001[6], stands as a milestone in fostering global cooperation against cybercrime. It established a framework for harmonizing laws and facilitating the investigation and prosecution of cybercriminals across borders.

In recent years, the surge in high-profile cyber incidents has propelled cybersecurity regulations to the forefront of national agendas. Countries are consistently enhancing and broadening their legal frameworks to confront emerging threats, showcasing a persistent endeavour to stay ahead of the constantly evolving landscape of cyber threats.[7]

International Standards and Regional Variations

[5] The History of the General Data Protection Regulation, available at: https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en, last visited on Nov 16, 2023)

[6] The Budapest Convention (ETS No. 185) and its Protocols, available at: https://www.coe.int/en/web/cybercrime/the-budapest-convention, last visited on Nov 22, 2023

[7] Uchenna Jerome Orji, Cybersecurity Law and Regulation. Netherlands, Wolf Legal Publishers, 2012.

Key International Standards

In the complex realm of cybersecurity, establishing global benchmarks is crucial for fostering consistency, cooperation, and effective response mechanisms. Several international standards have emerged to guide nations in formulating their cybersecurity regulations and best practices.

ISO/IEC 27001[8] serves as a foundational standard, offering a systematic approach to the management of sensitive company information. This standard serves as a guide for structuring, implementing, sustaining, and continually improving an information security management system.t serves as a foundational standard, offering a systematic approach for the management of sensitive company information. This standard serves as a guide for structuring, implementing, sustaining, and continually improving an information security management system.

NIST Cybersecurity Framework (National Institute of Standards and Technology)[9] is a widely embraced approach in the United States, providing standards, guidelines, and best practices to manage cybersecurity risk. It emphasizes five core functions: Identify, Protect, Detect, Respond, and Recover. The framework is voluntary and offers businesses an outline of best practices to better understand, manage, and reduce their cybersecurity risk. It is designed to help organizations improve their management of cybersecurity risk and is one of the most widely adopted security frameworks across all U.S. industries.

[8]Security Standards, Java T point, available at: https://www.javatpoint.com/cyber-security-standards#:~:text=ISO%2027032%2D%20It%20is%20the,arrangements%20with%20clients%20and%20suppliers., last visited on Nov 22, 2023

[9] CYBERSECURITY FRAMEWORK, available at: https://www.nist.gov/cyberframework, last visited on Nov 23, 2023

Common Criteria (ISO/IEC 15408)[10] stands as an international standard for computer security certification, presenting a framework to assess and certify the security attributes of IT products and systems. This standard promotes a uniform approach to cybersecurity, fostering standardized practices across borders.

Overview of Globally Recognized Cybersecurity Standards

These international standards serve as guiding principles for nations striving to fortify their cybersecurity measures. They offer a common language and a set of best practices that transcend borders, facilitating global collaboration in addressing the shared challenges of cyberspace.

Regional Variations

The diversity in cybersecurity regulations among regions emphasizes the impact of distinct legal, cultural, and economic landscapes. This section delves into the global variations[11] in approaches to cybersecurity, emphasizing the necessity of navigating the complexities of regional cybersecurity governance. Despite the existence of international standards, there are significant differences in the implementation of cybersecurity regulations across regions. These factors can shape the way organizations approach cybersecurity risk management and the specific measures they take to protect their assets and data [12]. It is important for organizations to consider these factors when developing their cybersecurity strategies to ensure they are effective and appropriate for their specific context.

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[10] Information security, cybersecurity and privacy protection - Evaluation criteria for IT security - Part 1: Introduction and general model, available at: https://ccsp.alukos.com/standards/iso-iec-15408-1-2022/. , ISO/IEC 15408-1:2022

[11] Regional Briefing, Cybercrime in the Middle East and North Africa available at: https://www.consumersinternational.org/media/314597/cybercrime-mena-briefing-dec2019.pdf, Dec 2019

[12] Advancements in Global Cyber Security Laws and Regulations. United States, IGI Global.

European Union (EU)

The EU has taken a prominent role in formulating comprehensive data protection regulations, exemplified by the landmark General Data Protection Regulation (GDPR). This regulation sets stringent standards for the protection of personal data and enforces significant penalties for any breaches of compliance.

United States

The U.S. takes a sectoral approach to cybersecurity regulation, with various laws governing different industries. The landscape is evolving, with an increasing focus on enhancing national cybersecurity capabilities and fostering the exchange of information between the public and private sectors.

Asia-Pacific

The cybersecurity regulatory landscape in the Asia-Pacific region is diverse, reflecting the varied economic and political contexts of the countries within it. Nations like Singapore and South Korea have implemented robust cybersecurity frameworks, while others are in the process of developing and refining their regulations.

Middle East

In the Middle East, cybersecurity regulations are evolving rapidly as countries recognize the strategic importance of securing digital infrastructure. Some nations are implementing comprehensive cybersecurity strategies, while others are in the early stages of developing regulatory frameworks.

Contrasts in Cybersecurity Regulations Around the World

These regional variations highlight the challenges of harmonizing cybersecurity regulations on a global scale. While international standards

provide a common foundation, the nuances of regional contexts necessitate tailored approaches. The contrasting regulatory landscapes underscore the need for ongoing dialogue, collaboration, and the exchange of best practices to navigate the complexities of the global digital ecosystem.

Major Cybersecurity Laws: National Frameworks in Key Countries

As the digital landscape continues to expand, nations around the world have recognized the imperative to fortify their cybersecurity defences through comprehensive legal frameworks. Examining major cybersecurity laws in key countries provides insights into diverse approaches to address the evolving challenges of cyberspace.

United States - Cybersecurity Laws

The United States has a multifaceted approach to cybersecurity laws[13], reflecting the complex nature of cyber threats and the country's diverse regulatory landscape. Key aspects of cybersecurity laws in the United States include:

- **Computer Fraud and Abuse Act (CFAA):** Enacted in 1986, the CFAA is a foundational U.S. cybersecurity law criminalizing unauthorized access to computer systems. It has undergone amendments to address evolving cyber threats and plays a pivotal role in prosecuting various cybercrimes.
- **Cybersecurity Information Sharing Act (CISA):** Enacted in 2015, CISA facilitates the sharing of cybersecurity threat information between the government and private entities, which is crucial for fostering a

[13] Cybersecurity Laws And Regulations In US [2023], available at: https://www.eescorporation.com/cybersecurity-laws-and-regulations-in-us/, last visited on Nov 22, 2023

collaborative defence against potential cyber threats, and the nation's collective capacity to respond to and mitigate cyber threats.

- **California Consumer Privacy Act (CCPA):** While primarily focused on privacy, CCPA has significant implications for cybersecurity. Enacted in 2018. This regulation bestows upon California residents the right to be informed, request the deletion, and opt out of the sale of their personal information. It catalyzes for businesses to elevate their cybersecurity measures.

European Union - General Data Protection Regulation (GDPR)

The European Union (EU) has established one of the most comprehensive and influential cybersecurity regulations known as the General Data Protection Regulation (GDPR)[14].

Key features of GDPR include

- *Unified Data Protection Standard:* Enforced in May 2018, the GDPR establishes a uniform data protection standard applicable across all EU member states. It supersedes the Data Protection Directive, striving to standardize data privacy laws within the EU.
- *Extraterritorial Application:* A distinctive aspect of the GDPR is its extraterritorial reach. It not only pertains to EU-based businesses but also extends to organizations outside the EU processing the personal data of EU residents. This global impact influences how personal data is managed.

[14] The general data protection regulation, available at: https://www.consilium.europa.eu/en/policies/data-protection/data-protection-regulation/#:~:text=data%20protection%20rules-,What%20is%20the%20GDPR%3F,the%201995%20data%20protection%20directive (last visited on Nov 22, 2023)

- *Data Subject Rights:* The GDPR empowers individuals with significant control over their data. Data subjects possess rights such as understanding data processing, accessing their data, and requesting its deletion, among other entitlements.
- *Data Breach Notification:* Stringent requirements are introduced for organizations to report data breaches to the relevant supervisory authority within 72 hours of awareness. Data subjects must also be informed if the breach poses a high risk to their rights and freedoms.
- *Privacy by Design and Default:* GDPR advocates for integrating privacy measures into the initial design of systems and processes (privacy by design). It also endorses defaulting to the highest privacy settings for users (privacy by default).
- *Data Protection Officers (DPOs):* Some organizations are mandated to designate a Data Protection Officer, responsible for overseeing GDPR compliance. DPOs serve as points of contact for data subjects and supervisory authorities.
- *Substantial Penalties for Non-Compliance:* GDPR imposes severe penalties for breaches, including fines of up to 4% of the annual global turnover or €20 million, emphasizing the imperative for organizations to adhere to the regulation.

China - Cybersecurity Law of the People's Republic of China

China's Cybersecurity Law, enacted in 2017, is a comprehensive legal framework that governs various aspects of cybersecurity within the People's Republic of China[15]. Key features of China's Cybersecurity Law include:

[15] Cybersecurity Law of the People's Republic of China, available at : http://www.npc.gov.in/englishnpc/c23934/201706/8cfc6a1f46bb4f0c8d8a2d7d4f4f4fcb.shtml (last visited on 25 November 2023)

- *Data Localization Requirements:* Mandated by the law, stringent data localization requirements dictate that specific critical information infrastructure operators store personal and vital data within the borders of China. Cross-border data transfers undergo security assessments and require approval.
- *Critical Information Infrastructure (CII) Protection:* The Cybersecurity Law identifies certain sectors as Critical Information Infrastructure (CII), encompassing energy, transportation, finance, and public services. Operators within CII sectors face additional security obligations and heightened regulatory scrutiny.
- *Network Operator Responsibilities:* Network operators are obligated to implement measures ensuring the security of their networks, preventing cyber-attacks, and responding to incidents. Regular security assessments and the establishment of contingency plans are also mandated.
- *Personal Information Protection:* The law introduces provisions dedicated to safeguarding personal information, necessitating businesses to inform individuals about the purpose and extent of data collection and secure consent. Individuals retain the right to request the deletion of their personal information.

Singapore - Cybersecurity Act

Enacted in 2018, the Cybersecurity Act of Singapore[16] defines a comprehensive framework crafted for the regulation and safeguarding of critical information infrastructure within the nation. It empowers authorities to respond effectively to cybersecurity threats and incidents, fostering a resilient and secure digital environment.

[16] Singapore Statutes Online Act, (2018)

India - Information Technology (IT) Act

Enacted in 2000, India's IT Act[17] has been amended to address contemporary cyber threats. It criminalizes unauthorized access, data breaches, and the spread of malicious content. Recent amendments aim to enhance data protection and regulate critical data.

Russia - Federal Law on Personal Data

Russia's legal framework, particularly in the realm of cybersecurity, places a strong emphasis on data protection. The Federal Law on Personal Data oversees the procedures for handling personal information and places explicit obligations on entities involved in the processing of such data, emphasizing a structured and accountable approach to privacy and data protection.

Australia - Privacy Act and Notifiable Data Breaches Scheme

The Privacy Act in Australia outlines principles for handling personal information, emphasizing cybersecurity measures. The recent introduction of the Notifiable Data Breaches Scheme makes it mandatory to report specific data breaches, thereby amplifying transparency and accountability in data management.

Japan - Act on the Protection of Personal Information (APPI)

Japan's Act on the Protection of Personal Information governs the handling of personal information, establishing guidelines and standards for ensuring the privacy and security of individuals' data. While not exclusively a cybersecurity law, it emphasizes the importance of securing personal data against unauthorized access.

South Africa - Protection of Personal Information Act (POPIA)

[17] Information Technology (IT) Act, 2000 (No. 21of 2000)

Enacted in 2013, South Africa's Protection of Personal Information Act (POPIA) advocates for the safeguarding of personal information, setting out measures and guidelines to ensure the privacy and security of individuals' data. It sets conditions for the lawful processing of personal data, emphasizing the need for robust security measures.

Examining major cybersecurity laws in key countries reveals a diverse and evolving global landscape. While common themes such as data protection and critical infrastructure resilience emerge, the specific nuances of each nation's approach underscore the complex and multifaceted nature of cybersecurity regulation on the international stage. As the digital era progresses, these legal frameworks will continue to adapt to emerging threats, shaping the future of cybersecurity governance worldwide.[18]

Ongoing Debates and Proposed Amendments: Navigating the Dynamic Nature of Cyberspace

The dynamic nature of cyberspace[19] presents an ever-evolving challenge for legislators and policymakers. The ever-evolving digital landscape, continuous debates and suggested amendments to cybersecurity laws are imperative to guarantee the relevance, effectiveness, and ethical integrity of legal frameworks.[20]

Adapting Laws to Evolving Digital Landscapes

Continuous Updates: The rapid pace of technological advancement requires a commitment to continuous updates and amendments to existing cybersecurity

[18] Melissa Lukings and Arash Habibi Lashkari, Understanding Cybersecurity Law and Digital Privacy: A Common Law Perspective. Switzerland, Springer International Publishing, 2021.
[19] Legal Edge Law School, "The Legal Landscape of Cybersecurity: Protecting Digital Frontiers", September 27, (2023)
[20] Tari Schreider, Cybersecurity Law, Standards and Regulations, 2nd Edition. United States, Rothstein Publishing, 2020.

laws. Legislation that remains static in the face of evolving threats becomes outdated quickly, necessitating agility in the legal framework.

Emerging Technologies: The advent of cutting-edge technologies like artificial intelligence, quantum computing, and decentralized systems introduces a host of new intricacies and challenges in various domains. Ongoing debates revolve around how these technologies impact cybersecurity and how laws can adapt to regulate and secure their implementation.

Cross-Border Challenges: The borderless nature of the internet poses challenges for law enforcement and regulatory authorities. Ongoing debates focus on creating legal mechanisms that facilitate international cooperation and Collaboration which is crucial in tackling cyber threats that extend beyond national borders

Debates Surrounding Cybersecurity Laws

Balancing Security and Individual Freedoms: A key debate within the domain of cybersecurity laws centres on striking the appropriate balance between guaranteeing security measures and upholding individual freedoms. Striking this delicate equilibrium involves weighing the necessity of certain security measures against potential infringements on privacy and civil liberties.

Proactive vs. Reactive Approaches: Debates persist regarding the most effective approach to cybersecurity—whether to adopt proactive measures that prevent cyber threats or reactive measures that respond to incidents after they occur. Balancing these strategies is crucial for building a comprehensive and resilient cybersecurity framework.

Legal Jurisdiction in Cyberspace: Defining legal jurisdiction in cyberspace remains a contentious issue. With cybercrimes often transcending national

borders, ongoing debates explore how laws can effectively govern activities that occur in a virtual environment without clear geographic boundaries.

Privacy Concerns and Surveillance

Extent of Surveillance Measures: The ethical implications of increased surveillance measures continue to be a focal point of debate. Questions arise regarding the extent to which governments and private entities should monitor digital activities and the potential encroachment on individual privacy [2122]

Data Collection and Consent: Debates regarding the practices of collecting data delve into concerns related to obtaining consent and ensuring transparency. The intricate ethical challenge lies in striking a nuanced balance between acquiring necessary information for cybersecurity objectives and preserving the rights to individual privacy.

Encryption and Access to Information: The ongoing debate revolves around the tension between the imperative for robust encryption to safeguard sensitive information and the demand for lawful access to encrypted data. Policymakers are challenged with determining the equilibrium between the security advantages of encryption and the legitimate concerns of law enforcement.

Proposed Amendments for the Future

1. *Ethical Frameworks:* Propose and integrate ethical frameworks within cybersecurity laws to guide decision-making and ensure the protection of individual rights.

[22] Advanced Introduction to Cybersecurity Law. United Kingdom, Edward Elgar Publishing Limited, 2022.

2. *International Collaboration:* Advocate for and participate in international forums to foster collaboration on the development and amendment of cybersecurity laws that have global implications.

3. *Public-Private Partnerships:* Strengthen public-private partnerships to enhance the effectiveness of cybersecurity measures while respecting individual freedoms.

4. *Education and Awareness:* Develop and implement educational initiatives to raise awareness about the implications of cybersecurity laws, promoting a well-informed public discourse.

5. *Flexibility in Legislation:* Embed flexibility within legislation to accommodate emerging technologies and evolving cyber threats, ensuring that laws remain adaptable to the dynamic nature of cyberspace.

The ongoing debates and proposed amendments in the realm of cybersecurity laws underscore the need for a responsive and adaptive legal framework. As the digital landscape evolves, stakeholders must engage in constructive dialogues to address the ethical challenges, balance security concerns with individual freedoms, and ensure that laws remain effective in safeguarding the ever-changing cyberspace.

Stakeholders in Cybersecurity Governance

Cybersecurity governance is a collaborative effort involving various stakeholders, each playing a crucial role in fortifying digital defences. The key players in this dynamic landscape include governments, private enterprises, and individuals.

Government Involvement

The Role of Governments in Shaping and Enforcing Cybersecurity Laws:

Governments hold a pivotal role in establishing, shaping, and enforcing cybersecurity laws and regulations. Their responsibilities extend beyond national borders, encompassing the development of strategies to safeguard critical infrastructure, protect national security, and mitigate cyber threats. Key aspects of government[23] involvement include:

1. *Legislation and Regulation:* Governments enact and update laws to address emerging cyber threats. These laws commonly encompass domains like data protection, critical infrastructure security, and legal measures for prosecuting cybercrime.

2. *National Cybersecurity Strategies:* Governments formulate comprehensive strategies delineating their approach to cybersecurity. These strategic frameworks guide the allocation of resources, coordination of efforts, and collaboration with various stakeholders.

3. *Incident Response and Coordination**:*** Governments are typically responsible for coordinating responses to cybersecurity incidents, whether they are initiated by state-sponsored actors, criminal enterprises, or other malicious entities.

4. *International Collaboration**:*** Given the global nature of cyber threats, governments engage in international cooperation to share threat intelligence, harmonize cybersecurity standards, and collectively combat cybercrime.

5. *Capacity Building:* Governments invest in building cybersecurity capabilities, including the training of cybersecurity professionals,

[23] CSIS, available at https://www.csis.org/analysis/role-government-cybersecurity-governance, (last visited on Nov 22, 2023)

fostering research and development, and promoting awareness within the population.

By actively participating in these areas, governments lay the foundation for a resilient and secure digital environment.[24]

Private Enterprises

How Businesses Contribute to Cybersecurity Governance:

Private enterprises are on the front lines of cybersecurity defence, as they manage and operate most of the digital infrastructure. Their role is multifaceted, involving proactive measures to secure systems, collaboration with governments and other businesses, and adherence to industry standards. Key aspects of business contribution[25] include:

1. *Security Policies and Practices:* Businesses institute and uphold internal security policies, delineating optimal practices for employees, vendors, and partners. These encompass a range of measures such as implementing access controls, utilizing encryption, and devising comprehensive incident response plans.

2. *Investment in Technology:* Enterprises allocate investments in cybersecurity technologies to identify, prevent, and respond to threats. This involves the implementation of various tools such as firewalls, antivirus software, intrusion detection systems, and advanced threat intelligence solutions.

[24] Armstrong, Dean, et al. Cyber Security: Law and Practice. United Kingdom, LexisNexis, 2019.

[25] The Rising Role of Cybersecurity in ESG and How Companies Are Taking Action, available at: https://www.sustainability.com/thinking/the-rising-role-of-cybersecurity-in-esg-and-how-companies-are-taking action/#:~:text=Employee%20Training%20%26%20Culture%20%E2%80%93%20Training%20all,prevent%20cyberattacks%20at%20the%20source, (last visited on Nov 20, 2023)

3. *Compliance with Regulations:* Businesses adhere to cybersecurity regulations applicable to their industry and region. Compliance ensures that they meet legal standards, protecting both the organization and its clients.

4. *Collaboration with Government Agencies:* Private enterprises often collaborate with government agencies on matters of national security and critical infrastructure protection. This partnership enhances collective resilience against cyber threats.

5. *Employee Training and Awareness:* Acknowledging the crucial impact of human factors in cybersecurity, businesses regularly organize training sessions to educate employees on the latest threats, phishing tactics, and best practices in security. This proactive approach is designed to elevate overall awareness and fortify resilience within the organizational cybersecurity framework.

By actively engaging in these activities, private enterprises contribute to the overall cybersecurity posture of the digital ecosystem.[26]

Individual Responsibilities

The Role of Individuals in Maintaining Cybersecurity:

Individuals form the final layer of cybersecurity defence. Whether at home, in the workplace, or public spaces, individuals contribute to overall cybersecurity resilience. Key aspects of individual responsibilities[27] include:

1. *Password Management:* Individuals are encouraged to adhere to best practices in crafting and managing strong, unique passwords.

[26] Cybersecurity And Legal-regulatory Aspects. Singapore, World Scientific Publishing Company, 2021.
[27] Cybersecurity Best Practices, available at: https://www.cisa.gov/topics/cybersecurity-best-practices, (last visited on Nov 20, 2023)

This proactive approach enhances overall cybersecurity by fortifying personal accounts against potential unauthorized access. Implementing this straightforward measure makes a significant contribution to safeguarding both personal and professional accounts.

2. *Awareness and Education:* Staying abreast of the latest cybersecurity threats and tactics empowers individuals to recognize and proactively avoid potential risks. This knowledge enhances their ability to navigate the digital landscape securely and safeguard their personal information. Regular education and awareness campaigns play a crucial role in this regard.

3. *Phishing Awareness:* Individuals must be cautious about phishing attempts, recognizing and avoiding deceptive emails, messages, or calls that may lead to unauthorized access or data breaches.

4. *Device Security:* Maintaining the security of personal devices, including computers, smartphones, and IoT devices, is essential. This involves keeping software up to date, using security tools, and securing devices with strong passwords.

5. *Report Suspicious Activity:* Individuals should promptly report any suspicious activity to relevant authorities or IT departments. Timely reporting can aid in the identification and mitigation of potential cyber threats.

6. *Privacy Practices:* Individuals should be mindful of their online privacy practices, understanding the implications of sharing personal information and taking steps to protect their digital identity.

By embracing these individual responsibilities, people become active contributors to the collective effort of maintaining a secure digital environment.

The achievement of effective cybersecurity governance is a joint endeavour that necessitates active engagement from governments, private enterprises, and individuals. Each stakeholder group holds a distinctive role in shaping a resilient and secure digital ecosystem capable of navigating the challenges presented by the ever-evolving cyber landscape. Through their collective efforts, these stakeholders contribute to fortifying the overall cybersecurity posture and ensuring the integrity of the interconnected digital environment.[28]

Ethical Implications of Cybersecurity Regulations: Striking the Balance Between Security and Privacy

In the digital age, where the imperative to safeguard sensitive information is paramount, the ethical dimensions of cybersecurity[29] regulations come into sharp focus. In the face of the ever-evolving threat landscape, governments, businesses, and individuals contend with ethical considerations that are pivotal in determining the suitability of security measures. Two key ethical dimensions that demand careful examination are privacy concerns and the implications of increased surveillance measures.

Privacy Concerns: Balancing Security Needs with Individual Privacy

Data Collection and Consent: Ethical considerations in cybersecurity are the collection of personal data. Striking a balance between the necessity of acquiring information for threat detection and the preservation of individual privacy rights is a complex challenge. Ethical regulations must ensure that data

[28] Charlotte A. Tschider, International Cybersecurity and Privacy Law in Practice. Netherlands, Wolters Kluwer, 2023.
[29] Juris Centre, "Examining the Legal and Ethical Implications of Data Privacy and Cybersecurity Laws", SEP 17, (2023)

is collected transparently, with clear and informed consent mechanisms in place.

Transparency and Accountability: Ethical cybersecurity regulations should prioritize transparency in the collection and utilization of personal data. Individuals have the right to be informed about how their information is being used and protected. Establishing accountability for entities handling sensitive information is crucial for maintaining public trust.

Proportional Use of Data: The principle of proportionality is vital in ethical cybersecurity practices. While data collection is necessary for security, it must be proportional to the potential threat. Ethical regulations should prevent indiscriminate and excessive data collection, mitigating the risk of privacy infringements.

Data Minimization: Ethical cybersecurity regulations should promote the concept of data minimization, advocating for the collection of only the information necessary for a specific purpose. This approach reduces the potential for misuse and protects individuals from unwarranted invasions of privacy.

Individual Rights and Due Process: Ensuring a balance between security and privacy requires ethical regulations that safeguard individual rights. Due process mechanisms should be in place to address situations where privacy rights might be encroached upon, fostering an environment of fairness and accountability.

Surveillance and Accountability: The Ethical Considerations of Increased Surveillance Measures

Ethical considerations concerning heightened surveillance measures occupy a central role in discussions focused on striking a delicate balance between

security imperatives and individual freedoms.[30] This section delves into the nuanced aspects of surveillance and underscores the pivotal concept of accountability in this context: -

Privacy Rights and Civil Liberties: The expansion of surveillance measures raises concerns about potential infringements on privacy rights and civil liberties. Citizens are rightfully protective of their personal information, and extensive surveillance may be perceived as an intrusion into private lives.

Proportionality and Justifiability: Ethical considerations revolve around the principle of proportionality – whether the level of surveillance is justified by the perceived threats. Striking a balance between protecting national security and avoiding disproportionate measures is essential for ethical surveillance practices.

Government Transparency and Accountability: The ethical foundation of surveillance rests on government transparency and accountability. Citizens have a right to know the extent of surveillance activities, the purposes behind them, and the safeguards in place to prevent misuse.

Potential for Abuse of Power: Increased surveillance introduces the risk of abuse of power by governmental or authoritative entities. Unauthorized access to personal data or the misuse of surveillance tools for political or personal gain raises ethical concerns and demands robust checks and balances.

Impact on Freedom of Expression: Surveillance has the potential to chill freedom of expression, as individuals may curtail their opinions or activities due to the fear of being under constant scrutiny. This has implications for democratic societies that value open discourse and diverse perspectives.

[30] Charlotte A. Tschider, International Cybersecurity and Privacy Law in Practice. Netherlands, Wolters Kluwer, 2023.

Biases in Surveillance Systems: Ethical concerns arise when surveillance systems exhibit biases, disproportionately targeting certain demographic groups. This can result in discriminatory outcomes and exacerbate existing social inequalities.

Consent and Informed Decision-Making: Respecting individuals' autonomy involves obtaining informed consent for surveillance activities. Ethical surveillance practices entail transparent communication about the extent of monitoring and the purposes it serves, allowing individuals to make informed decisions.

Long-term Social Impacts: Ethical considerations extend to the potential long-term impacts of pervasive surveillance on societal trust and cohesion. Constant surveillance may erode the social contract if citizens perceive a breach of trust between the government and the governed.

International Human Rights Standards: Surveillance measures should align with international human rights standards. Ethical surveillance practices respect the principles outlined in international agreements, ensuring that fundamental rights are upheld irrespective of geographic location.

Accountability Mechanisms and Oversight: Establishing robust accountability mechanisms and independent oversight bodies is crucial for ethical surveillance. Regular audits, judicial review, and mechanisms for reporting abuses contribute to a system of checks and balances.

Navigating the ethical implications of cybersecurity regulations requires a careful equilibrium between security imperatives and the preservation of individual privacy rights. A thoughtful and inclusive approach, grounded in principles of transparency, proportionality, and accountability, is crucial for constructing a cybersecurity framework that not only defends against digital

threats but also upholds the ethical principles essential for a just and democratic society.[31]

Global Perspectives: Regional Challenges and International Cooperation in Cybersecurity

In the dynamic landscape of cybersecurity, understanding regional challenges and fostering international cooperation are pivotal for developing effective strategies against global cyber threats. Each region faces unique challenges shaped by cultural, economic, and geopolitical factors.[32] Simultaneously, the interconnected nature of the digital realm mandates collaborative efforts to fortify cybersecurity on a global scale.

Regional Challenges: Analysing Cybersecurity Challenges Unique to Different Regions

Regional challenges in cybersecurity highlight the nuanced nature of threats and vulnerabilities that vary across different parts of the world. Analysing these challenges provides insights into the diverse factors influencing the cybersecurity landscape in specific regions. Several key regions exhibit unique cybersecurity challenges[33]:

North America: The North American region, particularly the United States[34] and Canada, faces challenges associated with its advanced technological infrastructure. Issues such as sophisticated cybercrime, state-sponsored attacks, and the protection of critical infrastructure pose ongoing challenges. Balancing

[31] Ishaani Priyadarshini, and Chase Cotton, Cybersecurity: Ethics, Legal, Risks, and Policies. United Kingdom, Apple Academic Press, 2022.
[32] CyberBRICS: Cybersecurity Regulations in the BRICS Countries. Germany, Springer International Publishing, 2021.
[33] Positive technologies, "Cybersecurity threats cape of Asia: 2022–2023", September 12, 2023
[34] Jeff Kosseff, Cybersecurity Law. United Kingdom, Wiley, 2019.

security with privacy concerns is a nuanced challenge, especially given the extensive use of technology in daily life.

Europe: In Europe, the challenges include navigating the diverse regulatory landscape, with each country implementing its interpretation of cybersecurity laws. The European Union's GDPR sets a high standard for data protection, but harmonizing approaches across member states remains a complex endeavour. Additionally, the region contends with the rise of cyber espionage and disinformation campaigns.

Asia-Pacific: The Asia-Pacific region grapples with a broad spectrum of challenges, from advanced persistent threats (APTs) to issues related to rapidly evolving technology. Countries such as China and South Korea are at the forefront of technological advancements but face significant cyber threats. Developing nations in the region may encounter challenges related to building robust cybersecurity frameworks and addressing the digital divide.

Middle East: In the Middle East, geopolitical tensions contribute to a unique set of challenges. Cybersecurity concerns are intertwined with regional conflicts, and state-sponsored cyber activities play a prominent role. Countries in the region are working to enhance their cybersecurity capabilities while navigating complex political landscapes.

International Cooperation: The Importance of Collaboration in Addressing Global Cyber Threats

International cooperation is paramount in addressing the ever-growing and complex landscape of global cyber threats[35]. The interconnected nature of the digital world transcends national borders, making collaborative efforts essential

[35] International cooperation on cybersecurity matters, available at: https://www.unodc.org/e4j/en/cybercrime/module-8/key-issues/international-cooperation-on-cybersecurity-matters.html, (last visited on Nov 20, 2023)

for effective cybersecurity. Several key aspects underscore the importance of international cooperation:

Information Sharing: International cooperation in cybersecurity relies significantly on information sharing. Nations, irrespective of geopolitical differences, must collaborate to exchange threat intelligence, share best practices, and jointly respond to cyber incidents. Initiatives such as the Budapest Convention on Cybercrime facilitate and formalize such cooperation.

Joint Cybersecurity Exercises: To enhance preparedness and coordination, joint cybersecurity exercises are crucial. These exercises, involving multiple nations, simulate cyberattacks and responses, fostering a collaborative environment and improving the collective ability to address sophisticated threats.

Global Standards and Norms: The establishment of global standards and norms is crucial for crafting a unified cybersecurity framework. Organizations such as the International Telecommunication Union (ITU) and the International Organization for Standardization (ISO) assume pivotal roles in formulating standards that can be universally embraced.

Public-Private Partnerships: Collaboration between governments and the private sector is integral to global cybersecurity efforts. Private enterprises often possess valuable threat intelligence, and governments can provide regulatory frameworks and support. Public-private partnerships enhance the overall resilience of the digital ecosystem.

Capacity Building: Supporting capacity-building initiatives is crucial, especially in regions where cybersecurity capabilities are still developing. By providing resources, training programs, and technological assistance, more nations can actively contribute to the global fight against cyber threats.

Addressing global cyber threats requires a nuanced understanding of regional challenges and a commitment to international cooperation. By fostering collaboration, sharing information, and developing common standards, nations can collectively build a more resilient and secure digital future. As cyber threats evolve, the ability to adapt and collaborate on a global scale becomes increasingly imperative for the stability and security of the interconnected world.[36]

Conclusion: Ensuring a Secure Digital Future

As we navigate the complexities of the digital age, the evolution of cybersecurity laws stands as a testament to the ongoing battle between innovation and threat. The landscape has transformed from the early stages of basic protection to the current intricacies of addressing sophisticated cyber threats. Throughout this journey, international standards, regional variations, major cybersecurity laws, and the involvement of stakeholders have shaped the foundation of a global cybersecurity framework.

The historical context reveals the resilience of cybersecurity regulations in adapting to emerging challenges. From the foundational Computer Fraud and Abuse Act to contemporary regulations like the GDPR and China's Cybersecurity Law, nations have continually refined their legal frameworks to protect against evolving threats.

Key international standards provide a common language for nations to collaborate, yet regional variations underscore the nuanced approaches necessitated by diverse cultural, economic, and political landscapes. Major cybersecurity laws in key countries showcase the global effort to fortify

[36] Routledge Handbook of International Cybersecurity. United Kingdom, Taylor & Francis, 2020.

defences against cyber threats, acknowledging the interconnected nature of the digital ecosystem.

Stakeholders, from governments and private enterprises to individuals, each play a vital role in cybersecurity governance. Governments shape laws, private enterprises implement protective measures, and individuals contribute to the collective defence. The ethical considerations surrounding cybersecurity regulations, particularly in the realms of privacy and surveillance, emphasize the imperative to maintain a nuanced equilibrium between security imperatives and individual rights. This delicate balance requires thoughtful and transparent approaches to ensure that security measures are ethically sound and respectful of fundamental freedoms.

Recommendations for the Future

1. *Continuous Adaptation*: The future of cybersecurity laws must embrace a mindset of continuous adaptation. Given the rapid pace of technological evolution, regulations should be flexible enough to accommodate emerging threats and technologies.
2. *International Collaboration*: Cyber threats transcend borders, necessitating increased international collaboration. Nations should work together to harmonize standards, share threat intelligence, and collectively respond to global cyber challenges.
3. *Ethical Governance*: Striking the right balance between security and privacy is an ongoing ethical challenge. Future regulations should prioritize ethical considerations, emphasizing transparency, accountability, and the protection of individual rights.
4. *Investment in Education*: Cybersecurity education and awareness programs should be a priority at all levels, from individuals to

businesses and governments. A well-informed populace is better equipped to contribute to a secure digital environment.

5. *Innovation in Technology*: In charting the future of cybersecurity, a proactive approach involves substantial investments in research and development by governments and businesses. Staying ahead of cyber threats necessitates the utilization of cutting-edge technologies, including artificial intelligence, machine learning, and encryption methods resistant to quantum computing. This strategic integration of innovative technologies is vital for enhancing the resilience of cybersecurity measures and effectively addressing the evolving landscape of digital threats.

6. *Public-Private Partnerships*: Strengthening public-private partnerships is essential. Collaboration between governments and private enterprises enhances collective cybersecurity capabilities and fosters a more robust defence against cyber threats.

7. *Global Governance Framework*: As digital technologies become increasingly globalized, there is a need for a collaborative and inclusive global governance framework for cybersecurity. This could involve the creation of international agreements and organizations dedicated to addressing cyber threats on a global scale.

In conclusion, the future of cybersecurity laws hinges on the ability to adapt, collaborate, and innovate. By embracing these principles, we can lay the groundwork for a future of digital security, mitigating risks, protecting individual privacy, and fostering a resilient global digital ecosystem. Only through collective effort and forward-thinking strategies can we navigate the ever-evolving landscape of cybersecurity and ensure a secure and prosperous digital future for generations to come.

"OUT WITH THE OLD, IN WITH THE NEW?" ACQUIHIRE TRANSACTIONS: WITH SPECIAL REFERENCE TO BYJU'S EXIT STRATEGY

Akshay Bohra*

Abstract

This article investigates the application and effect of Silicon Top start-up acquisition as a part of their hiring strategy popularly termed as Acqui-Hiring. In comparison with the traditional acquisition that generally took place in the business. Using the recent happening and data from the Indian and United States census, it is concluded that the acqui-hired being the master having ace over their work exhibits higher turnover compared to the regular recruitments. It has been seen that most of the employees lack a voice in the acquisition transaction which resultantly creates organizational mismatch and decreases the turnover.

This paper also provides a suggestive framework for a recently not-so-good ed-tech venture Byju's story. It will provide insightful ways to exit from any corporate calamity. Acqui-hire can be a boom for thousands of employees and instrumental assets that it acquired over the years. This win-win strategy of saving the drowning boat is also part of this research. The trend of buying new startups is the new age trend. The moto behind such acquisitions is catching up the modern and updated human resources.

Keywords: *Merger and Acquisition, Byju's, Acquire to Hire, Start-up Companies. Talent Management.*

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The Concept: Acquihire M&A

Acqui-hire is a new buzzword in the market. People are talking about this buzz, but a few portions of the masses only come to an understanding concerning it and fewer amongst them hold a deeper understanding of whether to decide on Acqui-hire or not, considering the risk and benefits attached to this. This research will provide a detailed analysis from all four corners of the Acqui-hire including what it is, what are parties attached to it and others. Procedure manner and position of different participants involved in it and more importantly what caution one has to take before entering into this transaction. This type of acquisition means the Purchase of controlling interest in the share capital or assets and liabilities of the target company.

The Byjus Saga

Byju Raveendran and Divya Gokulnath, a husband-and-wife duo created a fortune ed-tech startup named “Byju’s”. Decades after its beginning it led through a huge financial constraint. It was at its peak in the year 2020 and turned out to be the star value of edtech staggering $22 billion.

Later, aggressive accounting practice inflated the problem majorly caused by a deviated revenue entry and pseudo valuation due to adaptation of not-so-in-practice Accounting Standards (AS). It also delayed the publication of a book of accounts. All these led to the downfall of the company, at present it has more than 50 thousand employees across the nation ranging from different profiles including faculties, IT experts, collateral staff and others. Apart from human resources it has spent several millions of dollars on infrastructure, digital gazettes, accessories, leased locations and imperative collaborations with giant ventures such as WhiteHat Jr, Aakash and numerous other national international networks running in Singapore, the USA and other countries.

The reason behind such a draw was the liquidity crunch and cash flow of the loan. The company borrowed large loans from sources such as banks, VCs and private equity firms. It failed to generate rotation on 300 $ from Rosewood Global Investment, a Singapore-based fund. Later renegotiated another 500 dollar million from Rosewood global investment but failed to pay in 2022.

Thereafter company advances from Davidson Kempner Capital Management, a US investment firm. Recently existing promoters sold out their houses to avail amount of salary for their employees.

Acqui-Hire [Acquisition for hiring]

As the name suggests Acqui-Hire transactions, it is not related to the 'aqua' world but are more around the companies and competition era.

'Acqui' is a portmanteau taken from 'Acquisition' which is known amongst many. Merger and Acquisition is a popular practice in the corporate field. Businesses and companies merge into one another, amalgamate to make them one or take over, and acquire other businesses. This transaction is also one of them.

'Hire', is another term associated with this. Hire is the general contextual meaning, taken for hiring, and recruitment of employees, human assets and resources.

The entire transaction means conducting an acquisition through which one can complete the hiring process or acquire the pre-hired employees of the targeted venture.

Need

In the increasingly competitive market demand for highly sought-after talent is rising alarmingly. Because of a limitation of available talented human

resources, companies are opting for innovative pathways to hire them. One of the new innovative approaches to hiring talent is "Acqui-hire" transactions.[1]

The need for an acqui-hire transaction arises from several key objectives. Firstly, it allows companies to swiftly and efficiently acquire specialized talent, often in competitive industries like technology, education where hiring skilled individuals can be challenging, staff acquainted with the functioning of E-board, handing classes, efficient faculties having a complete understanding of students and curriculum can be a saviour of years of struggle to build a venture. Acqui-hires also provide a means for companies to access new skills and expertise that align with their strategic goals, which can accelerate innovation and development. Additionally, in cases where a target company like Byju's may be struggling financially or facing uncertain prospects, an acqui-hire can offer a viable exit strategy for both the company and its employees, ensuring continuity of employment while providing the acquiring company with fresh talent to drive its growth and innovation initiatives. Overall, acqui-hire transactions enable companies to strategically bolster their workforce and capabilities in a rapidly changing business landscape.

Difference between Acqui-hire and Ordinary Investment, Acquisition

Acqui-hire is a more specified and objectified transaction in the market. Here not the wholesome business is necessarily acquired or anything apart from this is done in entirety. It generally governs through a series of acquisitions with limitations. This will provide an opportunity to filter out problems such as accounting and auditing in target companies and complete selective transactions concerning useful asset classes only.

[1] Coyle & Polsky, "SSRN Electronic Journal" (2012).

In an acqui-hire, the main target is the talent pool of the company being acquired. The acquiring company is interested in hiring employees, often including key executives, engineers, designers, and other skilled individuals. Whereas the target company remains independent and continues its operations. The investor seeks to support the target company's growth, profitability, or other financial objectives.[2]

While looking at the outcome of the transaction in an ordinary transaction it comes down to the fact that the acquired company's operations and products may be shut down or deprioritized. The primary goal is to assimilate the acquired talent into the acquiring company to boost its capabilities and growth. The motive in ordinary investment is to acquire the venture for the purpose of the existing venture it will assimilate the two with a focus on the acquirer's operation. This will cause a waste of the talent acquired by the seller in all those prolonged years. The purpose of employees intended to seek opportunities for specific work-related tasks will go in vain.[3]

Here in acquihire, the investor typically has a minority or majority ownership stake in the target company but may not have direct control over its operations. The goal is to benefit financially from the target company's success.

Ordinary Investment or Acquisition acquires the entire market of the target firm and not any specific portion of it. It subsumes the subsidiary company and gives it a new way.[4]

[2] Abrar, P. (2021, July 30). Byju's on an acquisition spree buys Great Learning for $600 mn. Business Standard.
[3] Bhalla, K. (2021, April 29). BYJU'S close to becoming highest valued Indian startup; Plans Great Learning, Gradeup acquisitions. Inc42.
[4] Obliopas et al, "Talent Management: a Philippine State University Graduate School Experience"- Indian Journal of Science and Technology (2019)

Unlike ordinary investment, an acquisition requires a Shareholders' Subscription Agreement (SSA), Shareholders Purchase Agreement (SPA), Term sheets and other disclosure requirements. Acqui-hire is less formal compared to this which doesn't generally require that lengthy system.[5]

Deal Structure in the Acqui-Hire

In dealing relating to these following transactions are targeted.

1. Asset purchase of tech-related assets in the target company including domain, and websites.
2. Intellectual property, work produced by the team which is to be acquired.
3. There may be joining bonuses, and ESOPs for the team as a mode of compensation.
4. There can be a lumpsum amount paid to the promoters hence they are not getting much for the transactions and often employees are getting much in these transactions.
5. Several employment contracts are being performed in this transaction. Such as non-compete clause, minimum period of employment other conditions relating to bond or others.
6. There can be a cash deal or founders agree to run as a subsidiary to the big business houses.[6]

Therefore, we can come to an understanding of the deal structure that such deal structure of an acqui-hire typically involves the valuation and purchase of a target company based on its talent pool, with a focus on retaining key employees, and faculties. It includes individual employment contracts, asset

[5] Rajan, Thomason. (2022). The Unusual Case of BYJU's: Creating One of the World's Most Valued Educational Technology Companies from India. Indian Journal of Marketing, 52, 8-23.
[6] Kim, "Predictable Exodus: Startup Acquisitions and Employee Departures", SSRN Electronic Journal (2018).

transfers (if necessary), non-compete and non-disclosure agreements, and a detailed transition plan for the smooth integration of talent into the acquiring company. Due diligence is conducted to assess skills, and legal compliance and clear communication are essential. The deal aims to acquire expertise rather than traditional assets, and the terms can vary depending on the specific companies and talent involved.

Companies suitable for Acqui-hire

This transaction is more popular among tech companies. Whether an established business leading company or a new tech start-up, almost all of them are using such techniques to get the best available in the market.

Acqui-Hire transaction in essence is a Merger & Acquisition transaction with the prime objective to hire the core talented team of the target startup or novice private company. Unlike the traditional objective of acquiring assets or business of a new firm. This is a smart way to access the talent via an indirect generous acquisition offer for a purchase price. As such the support of investors and talent is required. Hence, it is in the interest of both the parties.[7]

The same for Byju's could be done by a company functioning with a similar objective such as unacademic or another venture having a collateral business such as Udemy, or Coursera. There is no restriction on the giant business leaders to acquire them such as Ambani, Tata or Adani group to lead such acquihire. This smart acquisition will be beneficial for all the parties to attain the talent and run simultaneous business for the firm.

It is a bundle of risk and reward, in a simple hiring decision. Presently such Merger and Acquisition Transactions are coupled with ample risk too as apart

[7] "The Status of Business History at the Stanford Graduate School of Business Coman" Business History Review (1946)

from a single objective of talent acquisition the entire transaction also attracts other unattractive attributes, Liabilities, Obligations and other not-so-wanted asset classes. This transaction inherently includes all that Byju's business provides.[8]

Examples of Acqui-hire

- Facebook giant acquired a payment service company 'China Space' which has specific skills to work using block technology. This acqui-hire aids in attaining skilled staff.
- The year 2019 saw an acqui-hire transaction in the Indian Market between 'Swiggy' and 'Kinit.io' in which Kint.io received the premium business ecosystem of swiggy and gave swiggy entrepreneurial team that swiggy didn't need to create from scratch. Hence, this became a win-win situation for both parties.
- Google acqui-hired Superpod a startup built by its ex-employee for better accessibility to Google Assistant.

It can be assessed in all these acqui-hire transactions larger business enterprises are taking start-ups or other comparatively small companies which leads them to acquire a lot of lack specific skill sets, in turn, the startup gets the funding they require for their business and do the most equitable benefit to its employees by landing them into the top brand in the market.[9]

Legal Risk Involved in the Said Transaction

[8] Palliyalil, Sruthi, & Mukherjee, Sangeeta. (2020). Byju's The Learning App: An Investigative Study On The Transformation From Traditional Learning To Technology Based Personalized Learning. International Journal of Scientific & Technology Research, 9, 5054-5059.
[9] Agarwal et al, "What Do I Take With Me? The Mediating Effect of Spin-out Team Size and Tenure on the Founder–Firm Performance Relationship"- Academy of Management Journal (2016).

In line with all the M&A transactions, a legal perspective is also required while comparing the Acquihire with other takeover strategies. In the said transaction also various legal loopholes and conditions must be strictly looked upon. Failure of the same may lead to loss-driven acquisition. These risks are not attached only to the buyer but Byju's may also hold opportunistic costs. The analysis of the same needs to be done considering various factors, employee benefits, and the interests of corporations and society in general. Legal conditions, technicalities, due diligence, and compliance must be checked ignorance of these may lead to loss at times.[10]

'Buyer's' Risk Handbook

It is not only a good transaction for a buyer. Even though he is the steering holder of the entire transaction most of the decisions are taken by him. However, at times even after a detailed analysis buyer has to buy an unfavourable call.

A) Bundle of Assets & Liabilities

Acquisition is generally of the entire business of the seller. Here in this transaction buyer after perusal targeted business buys it completely consisting of Rights, Assets, Resources, Employees and others but also consists of Obligation, liability, not-so-useful business operations and units.

- Winding-Up obligations
- Filtering out Employees
- Open Contracts and Liabilities
- Accounting irregularities.

[10] Sinha, A. B. (Year of publication). From Zenith to Nadir: The Case of BYJU's Corporate Governance Fiasco.

After an acquisition, it becomes the duty of a buyer to wind up or tackle the filtering process to avoid a burning hole in his pocket i.e., leakage costs which is not advantageous, and the buyer is ignorant about it.

Therefore, it includes acquiring certain operations or business of hardware product selling in byjus and not having any auditing firm in collaborations that are continued in Byju Raveendran and Divya Gokulnath business and buyer buys that with an obligation to wind down such operations or businesses.[11]

This transaction also includes several other requisites such as the retrenchment of employees who are not becoming part of the new owner several of them have already obtained offers from other companies. Intended faculties may continue with the new leadership or may intend to exit from the same.

Terminating or varying all the other third-party contracts, leases, licences etc. Therefore, here though the buyer's interest is limited to acquiring Byju's employees it has to face difficulties relating to acquisition diligence and others involved in traditional M&A transactions etc.

B) Legal Consequences & Penalty

The acqui-hire transaction is more focused and seeks only key employees consisting of a core talent team, in such circumstances the buyer needs to analyse the separate obligations relating to the termination of those employees who are not in the buyer's interest after the closing this can add extra transaction cost to the buyer. This exists a risk to both parties relating to wrongful termination or retrenchment subject to labour laws, employee's compensation acts and others. Also to face the music of existing lawsuits filed against byjus in Singapore high court, Indian courts and Enforcement tribunals.

[11] Foarta & Sugaya, "The Cost of a Bad Hire: On the Optimality of Pay to Quit Programs", SSRN Electronic Journal (2018).

Buyer's risks in an acqui-hire transaction include the potential loss of key talent post-acquisition, challenges in integrating employees from a different company, the risk of overvaluation, difficulties in enforcing non-compete agreements, negative impacts on employee morale and company culture, limited due diligence on acquired talent, uncertainty about achieving expected synergies, challenges in measuring post-acquisition performance, legal and regulatory compliance complexities, and the financial investment required, which may not yield the desired returns. Mitigating these risks requires thorough planning, due diligence, and ongoing management.

Seller's Caution to be taken

The seller, here known as the targeted company for the M&A transaction deals with various problems. The exposure to these problems often plays the decisive points which are to be known from the Byju's itself. The caution to be taken while considering the Acqui-hire transaction is as above. M&A laws are often ignorant about these points.

- Control Takeover
- Satisfaction of Different Parties
- Dependency and Sustainability

Byju's company in such transactions often deal with issues in the context of change-in-control. This brings a major up-down in Byju's business. It has not remained with all the availability as it holds earlier to tackle all the expected and unexpected problems.

During such a transaction the satisfaction of all the parties is important mostly of 1) Byju's 2) the Buyer's and 3) Byju's investors. This has to be made in a way that caters for the interests of all the three above.

Such transactions must be independently sustained and auto-defensible and not remain simply a hiring tool through acquisition.[12]

To limit the buyer's exposure to liabilities and obligations, acqui-hire transactions are often structured in the form of assets purchase mechanism rather than a purchase of stock. Such a transaction gives the advantage to buyers to take assistance of interest and leave liabilities which they don't wish to take on and take only those which it is prepared to tackle.[13]

Byju's risks in an acqui-hire transaction primarily revolve around the potential loss of control over their company and its assets, as well as uncertainties regarding the future direction and treatment of their employees by the acquiring company. There's a risk that the acquiring company may not honour retention agreements or employment terms, potentially leading to employee departures. Additionally, Byju's shareholders Think & Learn Pvt Ltd. and Span Thoughtworks Pvt. Ltd, Byjus Investment Pvt. Ltd. and potentially other investors may not receive the expected financial return, and the overall success of the acquired talent in the new organization is uncertain. Byju's risks also include potential reputational damage if the transition is not smooth or if the acquiring company does not meet expectations.

The Legal Landscape in Acqui-Hire

All such M&A transactions are always in a loop with different sets of laws and regulations. Compliances with these laws must be in every set of transactions. Acquisition for talent i.e. in an Acquihire M&A transaction also one has to keep a wide landscape eye- view around the different sets of legal compliance, Due diligence and regulations. One has to comply with the corporate laws,

[12] Zaychenko et al. "Digital transformation of business: approaches and definitions", Economics and Environmental Management (2020).
[13] Sebastian, M., Byju's: The unravelling of India's most valued start-up. BBC News.

provisions of the Companies Act of 1956, Intellectual Property Rights consisting of the Copyright Act, Trademark, Patent and Industrial Design acts, and Indian Taxation laws including both direct and indirect tax compliance.[14] All this does not end here, often companies have to go through the Insolvency and Bankruptcy Code, the Winding up and liquidation process of the Companies Act, and other laws.

- Tax on the Transaction
- Liquidation
- Indemnification and completion of residue operations.
- Uncertainty of Human Resources.
- Fiduciary issues

- The other lookout is keeping this "Tax-Free" or capital gain transaction. Both the parties, the acquiring company and Byju's investors want to structure this transaction to keep this transaction away from the tax regime. They consider the possibility of a double taxation system and taxation coming with the acquisitions of assets. Therefore, Byju's prefers to acquire by way of a merger or stock purchase.[15]
- In the case of Assets Sale, a selling company such as Byju's remains in existence after the closing of the deal, and Byju's is responsible for formal liquidation as per the procedure prescribed under the Companies Act and other status. This task includes getting trustees to look after creditors and other's claims after the liquidation in Byju's case the Singapore-based investing firm and a couple of other creditors will be looked after.

[14] Tripathy, S., & Suman, D. (2020). Emerging trend set by startups on Indian online education system: A case of Byju's. Journal of Public Affairs, 21.
[15] Latukha et al, "Talent Management Practices and Absorptive Capacity of Russian Companies" Russian Management Journal (2019)

- Complexity in such transaction exists as the Byjus's required to keep the investors' distribution on hold, as Byju's required to make a contingency liabilities reserve, and also to discharge other claims after the sale. Whereas the buyer requires the Byju's to remain in existence to be answerable to indemnify, claims by the buyer. Such a tussle may 'lock up' the proceeds of the sale and keep the investor's return on hold. In another mode of Merger and Acquisition the Byju's in its entirety absorbed and becomes a subsidiary to the potential buyer.[16]
- Acqui-hire transaction buyers also remain with the risk in the inherent acquisition such as talent not staying or shifting to another company, sending a resignation or not working as hoped, and expected output not arising which in the end render the entire transaction more expensive and turn out to be a poor hiring decision.
- In such a transaction Byju's is involved in getting acqui-hire transaction done and the management of Byju's is under obligation to examine the offered sale and whether it is in the best interest of the stakeholders also along with the talent.

In these changes in control scenario, the board comprising Byju Raveendran, Divya Gokulnath and his brother need to carefully analyse all possible transactions consisting of fiduciary duties. Here significant consideration can be paid to employees, then the company's investors or shareholders. The board must analyse that care must be taken to avoid possible conflicts exist or could come into the picture.[17]

[16] Ganco et al, "Internal Vs External Markets: How the Assembly of Initial Spin-Out Teams Impacts Spin-Out Survival" Academy of Management Proceedings (2016)
[17] Gupta, M., & Pratik, Mr. (2023). A study of impact of EdTech companies on education with special reference to BYJU'S and Vedantu. Journal Title, 23, 33-38.

The possibility of conflict between directors, investors and other management can also play a significant role. Interested directors may also navigate carefully through the conflict zone.

The interest of management and investors is also sufficient. It may cause companies to rescue themselves in the deliberations. To avoid such circumstances, one is advised to take the assistance of skilled counsel and advisors. The Board of Byju's is required to carefully go through the potential areas of conflict. Such sales require approvals and clarifications from the investors and shareholders.

Patent Related Compliance

This transaction generally tends to underplay the utility of intellectual property specifically the patents. Patent facilitate organising team production, including by way of increasing the cost of leaving members of the team. Comparatively larger firms cannot acquire patent-related intellectual rights by simply hiring its talent, instead they have to buy the start-up itself.

Patent law is a partial driver of the choice to pursue an acquihire since it enables the buyer to obtain assets. Byju's has obtained coursework and other material including its copyright study material, software designed to run in its edtech business, also recorded lectures, test series and other relevant data. Buyers generally before acquiring new talent examine whether to bring the resource inside the firm or access aid externally. This would be a choice between focusing on the individual or the firms.

Buyer generally works with talent to put in place a post-sale retention of bonus, incentive, and compensation plans. There are similar to the transaction taking place in the Merger and Amalgamation process, Acqui-Hire ensures a significant percentage of the total payment is made by the buyer.

The selling company may have tension relating to the distribution of the proceeds or allocation of the total deal. Talent may be employed with the buyer for such time which may raise taxes and issues relating to books.[18]

Advisory in Acquihire M&A transactions for Lawyers & Entrepreneur

Byju's board should act in the best interest of the company, investors and shareholders. Thus, after timely consideration and fair analysis, he has to determine what is best in the interest of all the stakeholders. Byju's board should ideally ask its Legal Counsel to do a "market check" to consider potential buying and selling opportunities and consider favourable alternatives to a sale.

The goal of acqui-hire is not only focused on the talent group but it should also work in the structure available in their mind. It must be attractive enough to assure the interest of the buyer, Byju's and other parties attached to it. Not only focus on the Employees but also the investors.[19] It should be a win-win game for both of them.

There may be a situation in which the talent can choose to not move forward with the transaction and join the buyer in any event and leave the Byju's at risk of losing its important assets.[20]

A Corporate acquisition can be a complex structure presenting more risk than simple hiring. Acqui-hire should be carefully constructed and executed with guidance and advice to maximize the expected beneficial outcome.

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[18] Dixit et al, "Relationship between Team Learning Process and Team Performance with Mediating Effect of Relationship Conflict" IIMS Journal of Management Science – (2017)

19 Foarta & Sugaya "The management of talent: Optimal contracting for selection and incentives" The RAND Journal of Economics – (2021)

[20] Anute, N. (2021). Strategic analysis of emerging online tutoring platforms in India. Journal Title, 12, 309-315

Process of getting Acqui-hired

If you are owning a startup to retain high talent there can be various exit strategies which can be wind down for unfavourable outcomes. It can be proceeded in the following way-

1. Create a list of target companies.
2. Trim by focusing on the most promising targets.
3. Build a pitch and reach out to check the waters.
4. Get approvals done with the Directors and Board.
5. Clear out all the liabilities and outstanding.
6. Be personalised for each hire.

All these can be best utilised by a person having expertise in the above field with a large volume of past Mergers and Acquisitions. Young Entrepreneurs can also follow these steps to conduct any successful acquihire transaction.

One has to keep a check on points relating to the financial books and accounts of the targeted company. Legal documentation of the young firm including MoA, AoA target objectives, capital allocation and existing work. Present Debt, corporate structure and compliance situation to evaluate the depth of risk proposed to be taken. Also, it includes Checking existing employment agreements, ESOPs, bond periods or promises forming part of the agreement.

Although it is limited as not the entire company is acquired the deal only hires, employees of the target firm.[21]

Advantages

21 Spence, Prof. (Andrew) Michael, Philip H. Knight Professor of Management, and Dean, Graduate School of Business, Stanford University, 1990–99, now Professor Emeritus; William R. Berkley Professor in Economics and Business, Stern Business School, New York University, since 2010 Who's Who – 2007

All such transactions carry a bundle of benefits for them. This prepared resource provides them with a humongous benefit concerning cost which the acquirer saves upon. Certain core advantages of the acqui-hire transaction can be understood as part of the below-

- Skilled Talents are acquired.
- No need to conduct training.
- Well-versed with the latest technology to work on.
- Ready to add value to the company.
- Gets the Market intelligence and IP created.

There are other benefits too that come along with it. Some of them are acquisition of the market intelligence and the IP created by the young startup which can be a game changer in the long run. Also, this helps in reducing the time taken to develop a product or run the market.

The Advantage for the target company is having the benefit as they are getting access to the resources and the capital required for the initiation of the business. In terms of the Entrepreneurs, it gives them a safe exit to look out for other opportunities to seek better things. This will give them a boost by providing them capital for future startups or ventures.[22]

Case Study: Online food industry and acquihire.

1) Swiggy & Kint.io

India has witnessed a great acqui-hire transaction between Swiggy and Kint.io. These are two broadly based food delivery; the startup has raised $ 1 billion in this transaction by raising the funding. Swiggy has received an AI platform

[22] Top management team (TMT) tenure diversity and firm performance Tanikawa & Jung – "International Journal of Organizational Analysis" (2016)

which enables convenience to the clients. Historically, Swiggy has been hiring professionals to develop the AI platform in their area. This leads to giving them an edge over each other in their area.[23]

Position Holders Pavitra and Jagannathan stated in a press, *"We were impressed by the team's razor-focused mindset to bring ingenious solutions for problems unique to India."*

This shows the uniqueness of such a blended system in this field. There are other people also who help each other by giving them an edge over one another.

Resultant of this transaction last year Swiggy as well as Zomato has received growth results from the acquired company.

2) Zomato & TechEagle Innovations

Unicorn Zomato entered into an acquihire transaction with TecbEagle Innovation to upskill their assets and increase the market arena available. The attraction of this acquisition is the requirement of Zomato to enable itself to work on drone technology, which can cater for hub-to-hub deliveries.[24]

Deepinder Goyal, CEO of Zomato stated they are the new future of using drones to deliver online food. This technology will enhance the skillset and delivery system available in the country.

In these two case studies the prime motive of acquisition, benefit of the parties, proper utilisation of the talent, and access of credit to the entrepreneurs can be seen. This new age concept of acqui-hire serves what is

[23] Amis, A., Chawla, M., & Tulpule, Dr. (2021). A comparative study of online food delivery start-ups in the food industry. International Journal of Current Research, 13, 17540-17549.
[24] Peerzada, A. (2018, December 5). Zomato acquires drone delivery start-up TechEagle, The Hindu

best in the market. This work enables the reach of resources to the most suitable one. work to enable the reach of resources to the most suitable one.

Conclusion

Acqui-hire from the frame of a start-up we need to look around the deal by understanding the importance of partial acquisition. It is noted in this transaction that one such transaction is required in India by considering the most available option for the acquisition. Understanding the other available options acqui-hire is new, trending and best fit for this purpose.

Start-ups such as Byju's have to face such situations at times when dealing with a large volume. The rise and fall of corporations are irrevocable events. Damage control is in the hands of the legal realm best and modern merger & acquisition techniques can be suggested in such a scenario. Indian corporate market can handle these issues with the best exit strategy considering all the stakeholders including thousands of employees, investors, students, creditors and others.

Indian start-up arena believes itself to be on the most sophisticated side. Not much integration has happened. Many of the acqui-hired firms are preventing losing their teams and keeping to accommodate the least. There were instances in the Indian start-up arena where such integration was found hard and happened at a bare minimum level. Due to no precedents of such merger companies are sceptic to adopt them. This sounds to be the duty of legal experts in the industry to acquaint themselves with such strategies and suggest the best world practices to the Board members.

Lawyers now need to learn how to structure these deals to raise the most efficient results in these transactions. There is a requirement for efficiency in this field. Which includes networking and interviewing the demands and making efficient use of the given technology.

INDIA'S MODEL BILATERAL INVESTMENT TREATY: A SAFE ENDEAVOUR BY INDIA

Jhalak Nandwani* & Ayush Tandon**

ABSTRACT

India has entered more than 80 BIT's with several countries. Besides BIT's India has also signed numerous free trade investments with several nations till now, this piece of writing will focus on better suggestions for decision-making strategies to enter better Investment treaties. These treaties provide a legal framework for foreign investors to make investments in India and for Indian investors to invest in other countries. India's Model Bilateral Investment Treaty (BIT) represents a strategic shift in the nation's approach to international investment agreements. This abstract explores the key facets of this evolution, focusing on the safety and prudence inherent in India's recalibrated stance on foreign investments. India's Model BIT, crafted in line with its changing economic and regulatory landscape, underscores its commitment to safeguarding its sovereignty while promoting foreign investments. This paper will focus on India's Bilateral Investment treaties of India till date as well as the correct due diligence and appropriate compliance that will be particularly needed for executing any Bilateral Investment Treaties and examining the possible adequate investments that India can come up with which will be beneficial for the economic condition of the country.

Keywords: *Bilateral Investment Treaty, Trade,*

Introduction

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With the advent of globalization, the world has witnessed a rapid increase in cross-border trade and investment activities. This has led to nations expanding beyond their domestic market, which necessarily involves substantial risks and demands the need to have a more organized and regulated global platform. During the nineteenth century, with the growth of technology, investors started investing in other nation's markets. At that time, it was only Public International law that could govern the situation, and Public International Law did not give equal status to foreign investors as that of nationals. Foreign investors were given no legal status and hence were left remediless or with little remedy by the foreign courts. Thus, a need was felt to protect and regulate foreign investors and so to govern and regulate the same, and to mitigate such risks, nations started making rules and regulations regarding their international trade and investment regime. Such rulemaking took place at the bilateral, regional, inter-regional and multilateral levels. Nations started entering formal arrangements with other nations to protect investors and facilitate trade and investment activities between them. International Investment law originated through the FCN treaties (Friendship, Commerce and Navigation Treaties). They developed foreign investor's trading rights and rights over property and helped promote international trade. FCN later started granting similar status to foreign and domestic investors. This formed the basis of modern-day Bilateral Investment Treaties (BITs).

Since the past few years, bilateral investment treaties (BITs) have become fundamental for international investment activities taking place between nations. In 2000, the United Nations Conference on Trade and Development (UNCTAD) highlighted the significance of BITs in according to protection to

foreign investors.[1] BITs are entered into between two countries to protect and regulate foreign investments and foreign investors. Bilateral investment treaties (**BITs**) are international instruments entered into legally between sovereign states that lay down reciprocal obligations upon contracting parties to accord adequate protection to foreign investment in their respective territories.[2] Over the years, there has been a rapid increase in the number of BITs being entered into between countries; from around 385 BITs existing by the end of the 1980s to around 2830 BITs till the end of 2022[3]. These treaties have been effective in regulating the behaviour of the host states and protecting rights of the foreign investors by including provisions for fair and equitable treatment of foreign investors, protection against expropriation, free capital transfers and dispute settlement mechanisms between contracting parties.

Historical Background

Since independence, India has never opposed foreign investments. It was always open to foreign investment and trade but had its focus mainly on promoting domestic industries and substituting them with rising imports. It was then only in the mid-1970s when India saw stagnant economic growth that it became resistant to foreign investments. It limited liberalisation in the mid-1970s and started deregulation in the 1980s.[4] This protectionist move of India could not help the country much. it only added to its debts and so by 1991, India had to adopt the liberalisation and globalisation policy. Hence initiated its new investment treaty regime.[5] In 1994, India entered its very first BIT with

[1] Dhar, Biswajit, Reji Joseph, and T. C. James. "India's Bilateral Investment Agreements: Time to Review." *Economic and Political Weekly* (2012): 113-122.
[2] Ranjan, Prabhash. "Non-precluded measures in Indian International Investment Agreements and India's regulatory power as a host nation." *Asian Journal of International Law* 2.1 (2012): 21-58.
[3] Johnson, Lise, Lisa Sachs, and Jesse Coleman. "International investment agreements, 2014: a review of trends and new approaches." *World* 7 (2015): 107.
[4] A. Panagariya, 'Growth and Reforms During 1980s and 1990s', Economic and Political Weekly 39(25): 2581, 2003.

the United Kingdom.[6] The provisions of this model treaty between India and UK were entirely based on the treaties signed between the developed countries. These treaties were investor-friendly and focused mainly on the protection of foreign investors and had no provision for granting and regulating the powers to the host state. While contracting further BITs with other nations, India used the India-UK BIT model without making many a close resemblance to the India-UK BIT. It was only in 2011 that India faced a major legal battle and realised the need to change its extremely investor-friendly approach.

India faced its first BIT arbitration in 2004 in the Dabhol Power Company case[7] . Here, three companies entered a joint venture to generate electric power in Maharashtra. They signed an agreement with the Maharashtra State Electricity Board under which the state electricity board would purchase power solely from the Dabhol Power Company. Later, due to huge costs and changes in the political environment, the Maharashtra State Electricity Board revoked the agreement and hence Dabhol Power Plant initiated plant-initiated arbitration proceedings against the board. India- Mauritius BIT was invoked. But later, the matter was settled, and India was saved from a huge dispute.

After that, another issue with respect to BIT arbitration arose in 2011 in the White Industries Case[8]. Here, White, an Australian company contracted with Coal India regarding a mining project. Coal India claimed White's services to be of poor quality and so denied payments. Hence White initiated an arbitration dispute against the latter under ICC arbitration rules. The ICC tribunal ruled in

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[5] Supra, note 1.

[6] Coleman, Jesse, and Kanika Gupta. "*India's Revised Model BIT: Two Steps Forward, One Step Back?." Investment Claims, October 4, 2017* (2017).

[7] Tandon, Anjali, and Geethanjali Nataraj. "The New BIT: Is It a Game of Equals?." *Energy, Environment and Globalization: Recent Trends, Opportunities and Challenges in India* (2020): 249-264.

[8] Kachwaha, Sumeet. "The White Industries Australia Limited–India bit Award: a Critical Assessment." *Arbitration International* 29.2 (2013): 275-294.

favour of White, but Coal India refused to enforce the said award. Petitions were filed before multiple courts. White had to incur huge losses due to delays on the part of the Indian judiciary. Finally, White invoked the arbitration clause as per the India-Australia BIT wherein the decision was awarded in favour of White as India failed to provide effective means to the foreign investor for enforcing its rights. Such a clause did not exist in the India- Australia BIT, rather it was taken from the India-Korea BIT by virtue of the Most Favoured Nation (MFN) clause.

Thereafter, India started receiving numerous requests for similar kinds of arbitration under other international investment instruments. By 2016, more than 15 cases involving investment treaties were pending against India. It was then India realised the need to renew its old model BIT and to adopt a regime that helps ensure a balance between the investor's rights on one hand, and regulatory powers and obligations of the state on the other. In 2012, a working committee was constituted to review the entire treaty regime and thereafter India changed its approach towards foreign investments.

India was forced to terminate around 57 BITs so as to restructure its entire international investment regime. India also considered reviewing its existing Model BIT and forming a new structured BIT that would form the basis for negotiating investment treaties with other nations. By attempting to create a new model BIT, India tried to fill in the loopholes that existed in the earlier treaty, so as to re-enter into treaties with other nations. India has attempted to take into consideration all the criticisms relating to international investment treaties. A new draft of BIT was published in 2015 for public consideration and received mixed opinions. The Law Commission of India also analysed the draft and submitted its comments. All of this was considered and finally, the Government of India came up with a new Model BIT in 2015.

A brief outline of the new model is provided hereunder:

Unlike the earlier model BIT, the new model strikes a balance between protecting foreign investor's interests on one hand and reserving regulating power with the host state on the other. Resolution of Investor-State disputes has been the primary focus of restructuring the existing BIT. It lays down the obligations of the investor. However, the new BIT is extremely confined towards the treatment, protection and settlement of investment disputes.

Articles 1 and 2: The provision of the model starts with the definition, scope and coverage of the BIT. Important terminologies like foreign investors, foreign investments, etc have been defined exclusively, with specific exclusions to avoid any ambiguity.

Article 3-7: It lays down provisions for the protection of parties by prescribing obligations on the part of investors and on the part of the host state to ensure equal treatment to them. It also prescribes guidelines and measures for expropriation.

Articles 8-13: It prescribes certain obligations on the part of the investor like obligation against corruption, an obligation to disclose complete information, etc and to comply with tax laws and other specific laws of the host state.

Article 14: It is one of the most crucial and lengthiest provisions of the treaty. It deals with the settlement of disputes between the host state or any party of the host state and the investor. It also lays down certain procedural obligations on the part of the investor like the investor needs to exhaust all the existing local remedies before he initiates arbitration. It also prescribes detailed rules regarding the appointment of arbitrators, the constitution of the arbitral tribunal, governing laws of arbitration, etc.

Article 16-8: It provides for certain exceptions which can be invoked by the host state on the grounds of security of the state.

Articles 19-23: These articles cover miscellaneous and ancillary matters.

Article 24: It prescribes that the duration of the treaty would be ten years, subject to renewal and termination.

Analysis of the Changes Introduced Vide the 2016 Model

The previous model BIT of 2003 was replaced by the 2016 model BIT, wherein a number of changes were brought in, particularly to protect the host state's interests and to shift from the pro-investor approach.

i. Defining "Investment"

Article 1.4 of the model BIT 2016 defines investment to include both enterprises as well as the assets of that enterprise, possessing the features of investment such as:

a. The existence of a certain amount of capital
b. Investment to be made for a certain duration
c. Assumption of profits
d. Existence of risks
e. Significance in the development of the country.[9]

If we compare the new definition with the ones existing under the earlier model of 2003, we can witness a shift from an asset-based approach to an enterprise-based approach, which particularly was introduced with the aim of limiting the ambit of protection that is granted to investments, so as to eventually reduce the number of claims and disputes being brought up against India.

[9] Ranjan, Prabhash, and Pushkar Anand. "The 2016 model Indian bilateral investment treaty: a critical deconstruction." *Nw. J. Int'l L. & Bus.* 38 (2017): 1.

Though, at first instance, it seems that the new definition is quite comprehensive and understandable, considering the specific requirements that it strives to lay down. But in reality, this definition and the list of features that any investment must possess, as provided in the article, is quite vague and uncertain. For instance, the second feature states that for an investment to come within the purview of Article 1.4, it must be held for a 'certain' duration. However, how should one interpret 'certain', is something that is left undefined? It does not mention how long an enterprise should hold an asset in order for it to be qualified as an 'investment'. Hence, this would give rise to a number of disputes, particularly on the issue of deciding the duration of investments falling within the purview of this definition.

Further, the last feature provides that an investment must be something that holds a significant value in the development of the country. The aim was to ensure that only assets contributing to the nation's development shall be given protection under the BIT. However, there exists no intimation as to determine what amounts to significant contribution to the development of the country.[10]

Therefore, the definition of investment can be categorised as vague and arbitrary which, instead of favouring the host state, would lead to a number of disputes being filed against the state itself.

ii. The Most Favoured Nation (MFN) Clause:

MFN principle ensures that no member shall be given less favourable treatment with respect to any like-product. It aims to prohibit the host state from discriminating between investors of different nations. However, it is pertinent to note that no such provision exists in the 2016 Model BIT. This exclusion of the MFN Clause from the new model can be understood to be a direct reaction

[10] Jandhyala, Srividya. *Bringing the state back in: India's 2015 model BIT*. No. 154. Columbia FDI Perspectives, 2015.

to the White Industries Case[11], wherein they invoked the MFN Clause to borrow the dispute resolution clause from the Indian-Kuwait BIT, as no such clause existed under the Indian-Australian BIT. Therefore, the MFN Clause was excluded from the Indian Model BIT, stating it has shaken the very reason behind negotiating and entering into separate treaties with different nations. Such an exclusion would avoid instances of treaty shopping wherein investors borrow certain provisions and clauses from other BITs and use them for their advantage.

Although this exclusion favours India (the host state), at the same time it exposes foreign investors to the risk of discriminatory or differential treatment, undermining their interests in dealing with the host state. A suggestion that can be posed in this regard is that instead of completely removing the MFN Clause, the state could limit the use of this clause by either limiting the application of this clause to certain situations or prescribing for certain conditions, the fulfilment of which would entitle the investors to take benefit of the MFN clause. [12]

iii. Fair and Equitable Treatment (FET)

The principle of FET ensures that all investors are accorded equal treatment and that no arbitrary or discriminatory practices are carried on by the host state. The 2016 Model BIT has not incorporated the FET provision either. However, there is a separate provision that ensures that foreign investors are not accorded with any treatment that is in violation of the customary international laws. A provision 'Treatment of Investors' is inserted in the new model BIT which aims to inherently prohibit denial of justice, breach of due process and discrimination and abusive treatment of foreign investors.[13] However, the problem lies in the

[11]Hanessian, Grant, and Kabir Duggal. "The 2015 Indian model BIT: is this change the world wishes to see?." *ICSID Review-Foreign Investment Law Journal* 30.3 (2015): 729-740.
[12] *Id.*

fact that although various stems of protection have been sought to be granted to foreign investors in order to protect their interests, the standards set for claiming such protection or for filing a claim before the ISDS (Investor-State dispute settlement) Tribunal are quite vague and unreasonable. For instance, as per Art. 3.1, for a foreign investor to bring up an ISDS claim, he will have to prove before the court that the dispute involves a 'fundamental' breach of due process or the discrimination that they face shall be 'manifestly unjustified', or the treatment accorded to them should be 'manifestly abusive'. But what could be categorised as 'fundamental breach' or 'manifestly abusive or unjustified' conduct is quite vague and ambiguous. Also, unless such high thresholds are met, no claim can be brought by the foreign investor before the Tribunal.

This seems just to be an attempt to include the international normative standards of protection without giving the benefit of fair and equitable treatment to foreign investors. Another reason for such non-inclusion could be to avoid the concept of legitimate expectations and not to have any obligation towards future investors. Hence, the non-inclusion of the FET provision leaves a gap in the protection regime of India's BIT.

iv. Dispute Resolution Mechanism

India decided to include a specific chapter for dispute settlement as a reaction to the plethora of cases that were filed against India after the White Industries case. Only those investment-related disputes between the foreign investor and the state, that deal with obligations of the parties as per the model BIT could be brought under the ambit of dispute resolution. Also, as per the model BIT, the foreign investor can resort to dispute resolution against the host state only in a certain limited number of cases. Foreign investors can approach an arbitral

[13] Jennings, Mark. "The international investment regime and investor-state dispute settlement: states bear the primary responsibility for legitimacy." *Bus. L. Int'l* 17 (2016): 127.

tribunal only if the dispute has arisen solely on the basis of a breach of BIT.[14] Claims arising out of breach of contract could not be brought before the tribunal for dispute resolution. Contractual claims are settled by domestic courts. The model BIT also excludes certain kinds of disputes completely from being resolved under the ISDS clause, like in cases where there is an element of misrepresentation, fraud, corruption, money laundering and abuse of process on the part of foreign investors. Such provision on the one hand limits the scope for the foreign investor to raise claims, but on the other hand, it also makes it difficult for the tribunal to determine the scope of jurisdiction. The new model BIT also imposes certain jurisdiction of the ISDS tribunal, in a way that the tribunal cannot review or sit on appeals on the rulings of Indian courts.

When it comes to foreign investors' right to resort to arbitration in case of dispute, the model BIT has imposed certain restrictions as per article 14[15], the foreign investor is required to exhaust all the available local remedies for at least five years before resorting to arbitration. After exhausting all the local remedies available to him, he must prove that there is no such remedy left that could provide him adequate relief and pursuing any domestic remedy further would only be ineffective. It is also mandated that the foreign investor needs to file a suit in the domestic courts or tribunal within an year from the day the foreign investor got to know about the loss or the breach.[16] This provision is highly criticised as the time of loss suffered by the foreign investor could be different from the time, he comes to know about it. This could create confusion and ambiguity and could in turn affect the rights of the investor. Even after this,

[14] Hanessian, Grant, and Kabir Duggal. "The 2015 Indian model BIT: is this change the world wishes to see?." *ICSID Review-Foreign Investment Law Journal* 30.3 (2015): 729-740.
[15] Raju, Deepak. "General exceptions in the Indian model BIT: Is the "necessity" test workable?." *Jindal Global Law Review* 7.2 (2016): 227-243.

[16] United Nations Conference on Trade and Development, Bilateral Investment treaties 1995–2006: Trends in investment rulemaking (United Nations Publications 2007), p. 39.

the parties cannot directly resort to arbitration. Though the aggrieved party can send a notice of dispute to the other, they are expected to attempt to solve the dispute amicably through mutual settlement or negotiation for six months. In case the foreign investor fails to comply with any of the above-mentioned conditions, he would be disabled from pursuing arbitration to solve the dispute.

After witnessing multiple arbitration claims, India is trying all possible measures to include arbitration under the BIT, but at the same time also does not give much room to the foreign investors to set up an arbitration claim against the host state. Interestingly, the India-Brazil BIT signed in 2020 does not have any provision for dispute settlement. India is leaving no chance to make arbitration almost impossible for foreign investors. The timelines prescribed by it are excessive. In a country where there are already a large number of cases pending before the courts, making a provision for the foreign investor requiring him to approach domestic courts first only adds to the burden of the judiciary and leads to the denial of proper justice to the foreign investor.

India's New Approach Towards Bilateral Investment Treaties: The Current Developments

The Model BIT of 1993, as updated in 2003, served as the basis for the Bilateral Investment Treaties (BITs) that India had signed with 83 nations and regions as of 2015. Six of the 83 BITs were still in effect even though 74 of them had already been ratified and notice of termination had been sent to 68 other nations or areas asking them to renegotiate using the Model BIT 2015. India has signed four agreements since the model BIT of 2015 was passed, of which two are currently in effect. The Ministry of External Affairs has actively supported investment treaty discussions. For the BIT discussions, the ministry has been collaborating with various departments and ministries of the Indian government as well as foreign governments and diplomatic representations. The Standing

Committee of External Affairs Report's several recommendations regarding India's participation in BITs have been taken into consideration by the ministry. In order to establish a regional office in India, the government and the Permanent Court of Arbitration (PCA) have signed a host country agreement. In order to build internal competence to deal with issues relating to investment treaties, UNCITRAL, the PCA, and other matters linked to international arbitration, the ministry has also established an arbitration cell under the economic diplomacy division.

Role of Local Government

The ambit of the 2016 India Model Bilateral Investment Treaty excludes local government actions. Urban, local, and rural entities make up local governments. India has a quasi-federal system, which gives provincial governments and local entities (urban and rural) a high degree of autonomy. In accordance with Indian constitutional law, local administrations are under the control of the "State". Public international law permits the State to be held accountable for the activities of local governments as well. Therefore, local governments are shielded from having to satisfy commitments made by the host State under the Bilateral Investment Treaty if their activities are not included within the scope of the 2016 Model.

As part of its general plan of economic liberalisation, which was approved in 1991, India began signing BITs in the early 1990s with the explicit goal of attracting foreign investments. The Economic Reforms Programme launched in 1991 led to the liberalisation of the Government’s foreign investment policy and negotiations were started with a number of nations to enter into bilateral investment promotion and protection agreements (BIPAs) for promoting and protecting the investment of the investors, on a reciprocal basis, according to

the Ministry of Finance.[17]

The declarations made by many Indian finance ministers between 1994 and 2011 in "compendiums" of Indian BITs also clearly reflect this strategic goal. Finance Minister P. Chidambaram stated in the first volume, which was published in 1996–1997, that India started the process of signing BITs after adopting liberal economic policies in 1991 in order to boost foreign investors' confidence and draw in more foreign investment.[18] Different finance ministers from various administrations have reiterated this viewpoint in all subsequent volumes. The media reports that India made after entering into BITs with various states further show that the primary aim of BITs is to protect foreign investment with the intention of boosting it.

BITs - Shaping Countries Around the World's Investment Regime

The developing world implemented a variety of reforms and efforts during the post-World War II era to restore the economic order and encourage global commerce and investment. Since that time, policymakers and other stakeholders in the participating countries have begun to frame their policies in a way that encourages foreign investment, seeing BIT to be a crucial tool for both internal and outward foreign investment. Let's examine how BITs have influenced the economies of some of the participating nations.

1. **United Kingdom-** India and the United Kingdom signed their first BIT in 1994. Foreign investment was more strongly protected in this BIT's provisions than the government's regulatory authority was. This BIT

[17] Ministry of Finance (2011). Also see the ‘Forewords’ written by various Indian Finance Ministers on the BIT programme available in Ministry of Finance, Government of India Compendiums on BIPAs (Finance Ministry 1996-2011).
[18] P Chidambaram, ‘Foreword’ in Government of India (ed), India’s Bilateral Investment Promotion and Protection Agreements, (New Delhi: Ministry of Finance, India: Volume I: 1997).

established the framework for upcoming bilateral discussions and served as a point of reference for India. In reality, there are many similarities between the 1994 BIT with the UK and the 2003 Indian Model BIT.

A major issue with the UK's foreign investment policy is the BIT model. With 105 BITs, the second highest in the EU, the United Kingdom is regarded as a major actor in the global development scene. The UK BIT model gives the investor the option to sue the government if they believe that a change in policy would harm their interests as a shareholder. 8% of all lawsuits worldwide are the fault of the UK. Many people contend that the UK BITs contain a number of terms that may cause harm and have unintended consequences. The wording of the treaty's articles is ambiguous, opening the door for a very broad interpretation by the arbitrators.

2. **France-** FCN agreements became one of the primary types of intergovernmental contracts used for the assurance and advancement of FDI in emerging countries during World War II, as the United States tried to promote and stimulate private worldwide investment through FCN deals with more than two dozen nations.

   Currently, 96 of the 121 BITs that France has signed are in effect. In opposition to free trade agreements, France has focused on signing investment treaties. The international BIT network of France has expanded through the use of several negotiation techniques. It is essential to adopt several models in order to better understand the current policy landscape as well as the new and forthcoming economic and diplomatic policies. The most recent text is the 2006 Model BIT. It

outlines investors, covered investments, the extent of the agreement, how to apply it, etc.

3. **Japan-** Japan has broadened its investment locations by including the Middle East, Eastern Europe, and Africa in light of the fierce rivalry for energy and natural resources on a global scale. Japan has divided the world's nations into two groups in order to start talks. First, countries with high investment risk, such as those with poor transparency or unstable governments. Only if at least one of the following conditions is met will negotiations with such nations be based:

    A. a sizeable amount of Japanese investment stock already exists.
    B. The potential for future expansion.
    C. Produces resources including oil, gas, and rare metals.
    D. Can serve as a gateway to places like South America and Africa.

Second, nations with a favourable posture require relatively little effort to establish a high-quality agreement. In order to choose new targets for discussions, the government also takes requests from the industry into account.

The Japanese BIT regime places a strong emphasis on "Improvement of the Business Environment" and has established a committee to make it easier for investors and the government to collaborate and enhance the business environment. Investors and government representatives can speak face-to-face about their concerns. Infrastructure, administrative processes, intellectual property rights, public safety, and other pertinent topics may be covered in these debates.

Challenges With the New BIT and the Future

India’s stand on the adoption of the new Bilateral Investment Treaty model is applaudable, particularly with respect to the escalating discussion about

ensuring a fair balance between the protection of investors and the authority of the host state to regulate the same. India discovered that broad and ambiguous investment protection requirements might be interpreted in ways wherein priority is given to the protection of investors, rather than the power of the host state to regulate when international investors filed a suit against India under various Bilateral Investment Treaties. India, unlike South Africa and other Latin American nations, has continued to engage with the ISDS system as seen by the adoption of a new Bilateral Investment Treaty model that maintains the right for foreign investors to question India's regulatory policies under the Bilateral Investment Treaty. However, India has dramatically changed this engagement's parameters.

India asserts that the purpose of the modification is to achieve a balance between the rights of the host state to regulate and investment protections. The debate in the article demonstrates that, except for the Model Bilateral Investment Treaty, no other agreement has been able to balance the rights of the host state to regulate the interests of foreign investors. The Model BIT comprises a limited definition of investment and a very limited FET-type provision, and it specifically excludes the MFN clause and taxation measures from its scope.

Various aspects need to be accounted for before considering the new Bilateral Investment Treaty model. First, the attraction of more foreign investments is the primary aim for our country and Make In India is one such initiative. As this paper has argued, India’s model Bilateral Investment Treaty has proved to be fruitful in attracting foreign investments. Furthermore, various studies—even on a worldwide scale—indicate a favourable correlation between BITs and FDI inflows. Secondly, BITs have also gained fundamental importance for foreign investors due to India’s greater objective of ensuring good governance and reinforcement of the rule of law. Foreign investors are of

the opinion that there exists ease of doing business in India and international law could act as a safeguard against excessive regulatory requirements that have improved India's BIT regime and have given it a balanced approach.

Conclusion

India renewed its model BIT in 2016 after it witnessed a huge wave of cases being filed against the country, with the primary purpose of giving regulatory powers to the state. The current regime can be appreciable in the sense that the previous model did not suit the capital-importing nature of our economy. There was always an ongoing dilemma between the regulatory powers of the state and the protection of foreign investors. For instance, in the cases of *Metaclad Corp v. Mexico*[19] and *S.D. Myers Inc. v. Canada*[20], a dispute arose because the investors could not dispose-off their industrial waste as they could not seek necessary governmental permits. And also, the landmark Dahol power plant case, all of which triggered the country to have a state-centric approach. Although after a series of disputes arose against India, it ought to have taken a balanced approach, giving sufficient regulatory powers to the state, and at the same time, not compromising with the investor's interests. However, the new model resulted in it being a very state-centric and protectionist approach. Such a protectionist approach could give rise to three major problems: firstly, it would compromise with the aim of investor protection; secondly, it would also affect investor's confidence in India being a favourable country to park their investments; and thirdly, BIT being a bilateral agreement, would make Indian investors being regulated or treated in the same way it treats investors coming to India. The reciprocal foreign country would also treat the Indian investors the same, resulting in Indian investors facing excessive regulatory powers of

[19] Dodge, William S. "International Decision: Metalclad Corp. v. Mexico." (2001).
[20] Weiler, T. "Judgment in SD Myers, Inc v Canada." *Oil, Gas & Energy Law* 2.1 (2004).

the foreign state too. Also, many nations have criticized this new model on the grounds that it compromises the protection of foreign investors

Despite various drawbacks, certain aspects of the model BIT were lauded as well. The provisions for dispute resolution have retained the ISDS system, ensuring compliance with international law. Although a number of provisions and requirements have been introduced, such as exhaustion of local remedies, transparency, denial for frivolous claims, determination of what is a purely contractual dispute, etc. These requirements do not take away the essence or purpose of the ISDS model. In fact, the requirement to exhaust local remedies is an essential element of customary international law, and although investors are required to first seek redressal before the domestic courts, there exist certain exceptions wherein this requirement can be circumvented.

Hence, despite various requirements and safeguards being added to the new Bilateral Investment Treaty model, it is not unfair from the point of view of investor protection as well. What is required is that investors be well aware of the provisions of the new model and the limitations and challenges it can pose.

BLOCKCHAIN AND INTELLECTUAL PROPERTY RIGHTS: A COMPREHENSIVE ANALYSIS OF TWO-WAY PARTNERSHIPS, IMPLEMENTATION CHALLENGES, AND LEGAL LANDSCAPES IN INDIA AND THE US

Akshat Mehta & Nancy Saroha*

Abstract

This research explores the intricate relationship between blockchain technology and intellectual property rights (IPR). It highlights the dual role of this partnership: how IPR safeguards the integrity of blockchain while blockchain enhances various aspects of the IPR ecosystem. The research begins by emphasizing the growing importance of blockchain in innovation and how IPR will play a pivotal role in ensuring a secure environment for its growth. It highlights key applications, such as smart contracts for IP management and combating counterfeit goods, showcasing how blockchain can revolutionize the IP life cycle.

The focus then shifts to India's Patent Office (IPO), which is leveraging blockchain to streamline patent management, enhance transparency, and optimize human resources allocation. The IPO's initiative underscores the potential of blockchain in improving government processes.

The research delves into challenges, acknowledging that while blockchain promises to transform the IP landscape, it faces hurdles such as legal recognition in court, speed, energy consumption, and global IP directory integration. Despite these challenges, the research remains optimistic about blockchain's potential to reshape the IP sector, drawing parallels with its impact on fintech.

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It also discusses the patenting of blockchain services in India, explaining the legal nuances and evolution of patent eligibility criteria. The research highlights ongoing patent filings in the US and India, despite uncertainties surrounding blockchain's patentability.

The US legal landscape, influenced by the Alice judgment, requires blockchain-related patent claims to demonstrate technological advancements beyond abstract concepts. In contrast, India's approach, influenced by the Ericsson case, allows patents for innovations that provide technological solutions.

The research underscores the consequences of patenting blockchain, including concerns about patent trolls, stiffening innovation, and potential patent wars. However, it also mentions collaborative efforts, such as patent pools and non-aggression agreements, as countermeasures. Finally, the research advocates for clear guidelines from patent offices to assess and grant patents for blockchain-based applications that offer substantial technological enhancements.

Keywords: *Blockchain Technology, IPR, IPO, Patent*

A two-way partnership between blockchain and intellectual property rights

"When everything else is lost, parents stand"[1]

-Kalyan C. Kankanala

Intellectual Property Rights and Blockchain technology have a two-way relationship in which IPR protects Blockchain and Blockchain helps to

[1] Kalyan C. Kankanala, Fun IP: Fundamentals of Int822 F.3d 1327 (Fed. Cir. 2016) Intellectual Property, (Asia Law House, 2012)

strengthen the present IP framework. With the globe recognizing the vast opportunities and benefits of Blockchain and tapping into previously untapped fields of innovation, IPR will play a critical role in ensuring a safe atmosphere for the new technology's future growth. On the other side of the road, Blockchain's integrity, consistency, and protection could be used to enhance every stage of the Intellectual property rights life cycle, like settling title conflicts, establishing distribution deals through blockchain smart contracts, identifying fake goods, or just creating an IP register for documenting and maintaining tracks for all of the forms of intellectual property.

We dug a little deeper and discovered that this might not be a matter of the far future. Some young ones appear to have already begun providing their resources in this regard. For instance, Agrello, an Estonian corporation, is developing a smart contract framework that is legally enforceable. Bernstein provides blockchain-based IP management services. Bonded is a different entity that records artworks, creates a timestamp, and serves as copyright evidence.

Implementing Blockchain system in the Indian Patent Office

Many nations throughout the world have begun to understand blockchain's promise, and India continues to follow suit with comparable growth in incidence. For instance, the European Patent Office (EPO), has been examining the use of blockchain to improve the patent system. Blockchain could be employed to timestamp documents, ensuring the integrity and immutability of patent-related information and China National Intellectual Property Administration (CNIPA), has shown interest in blockchain technology for intellectual property (IP) management. CNIPA has been exploring the use of blockchain to enhance the efficiency and transparency of its patent processes. United States Patent and Trademark Office (USPTO) has explored the usage

of blockchain for intellectual property protection. The Intellectual Property Office of Singapore (IPOS) has been an early adopter of blockchain technology. IPOS launched a blockchain-based platform called "IP Ledger" to facilitate the protection and management of intellectual property assets, including patents.

The IPO also wants to keep up with technical advances by combining all of the advantages that a decentralized ledger can bring to enhance patent application management and the operation and maintenance of Intellectual Property rights given to individuals or companies.

The IPO hopes to be able to predict schedules for members in relation to various measures that the office will take. A workload-based allocation of patent claims to officials, done scientifically, would allow the best use of human capital accessible. Computerized checks against specified standards such as application forms, attachments to be uploaded and so on will decrease the amount of manual involvement required and speed up the workflow. Minimal human intervention would also have a positive impact on transparency and accountability processes.

To accomplish all of this, the IPO is establishing a regulatory system for a Blockchain-based IP database to secure and commercialize smart ideas[2]. The IPO wishes that the blockchain-based IP platform will make the process of obtaining a patent easier for inventors. On the commercialization side, once a patent has been approved by the appropriate officials, it can be made accessible to stakeholders via an in-built auction mechanism that creates a centralized and credible marketplace for inventors to attract the attention of tech titans.[3]

[2] The Patent Office Journal [2021] No. 12/2021 Dated 19/03/2021.
[3] Journal of Intellectual Property Rights, pp 41-44, Vol 24, January-March 2019,

The IPO's latest bid, labelled "Expression of Interest for Making Use of Artificial Intelligence, Blockchain, IoT, and Other Latest Innovations in IPO's Patent Processing Framework,"[4] gives a hint of the Block-chained-AI-IP program's stage-by-stage understanding, which uses machine learning and blockchain to streamline and speed up all phases of patent application management. The next move will be to apply it to the rest of the IP system[5] giving a hint of the Block-chained-AI-IP program's stage-by-stage understanding, which uses machine learning and blockchain to streamline and speed up all phases of patent application management. The next move will be to apply it to the rest of the IP system.

Unleashing the Barrier of Blockchain and Intellectual Property

Blockchain technology is a decentralized and distributed ledger system that enables secure and transparent record-keeping. It was originally designed to support cryptocurrencies like Bitcoin, but its applications extend far beyond digital currencies.

Blockchain technology fundamentally operates on the principles of decentralization, transforming the traditional centralized structure of databases. Blockchain, as opposed to traditional databases, which are maintained in a single location or managed by a single institution, is decentralized and dispersed among a network of computers known as nodes. Each node has a copy of the complete blockchain and works together to validate and record transactions. Information is organized into blocks, each containing a list of transactions, and once initiated, transactions are broadcasted to the network and grouped into blocks for enhanced organization and efficiency.

[4] E-requests for Expression of interest for Making use of Artificial Intelligence, Blockchain, IoT and other latest technologies in patent processing system of IPO No. IPO/POD/EOI/2018/1

Cryptography is integral to blockchain security, with each block containing a unique hash generated through a cryptographic hash function, linking it securely to the previous block. Consensus mechanisms, such as Proof of Work (PoW), ensure agreement among nodes on the blockchain's contents by having them compete to validate transactions and create new blocks. The immutability of the ledger, stemming from cryptographic links and the distributed nature of the network, enhances the security and integrity of the data. Smart contracts, self-executing agreements with terms encoded in code, further automate and enforce predefined conditions, with Ethereum being a notable platform supporting them.

Blockchain's versatility is evident in both permissionless blockchains like Bitcoin, open to anyone for participation, and permissioned blockchains, common in enterprise applications, which restrict access to known entities. Beyond cryptocurrencies, blockchain is being used in a variety of industries, including banking, supply chains, and healthcare, to provide benefits like as enhanced transparency, reduced fraud, and streamlined procedures. Blockchain technology is a system of distributed ledgers which permits the safe and transparent recording of transactions over a network of computers. The underlying idea behind blockchain is to use a consensus process to build a tamper-resistant and irreversible record of data. Beyond cryptocurrencies, blockchain technology has uses in supply chain management, healthcare, banking, and other fields. The data is organized into blocks, with each block including a list of transactions. Transactions represent any form of data transfer, such as the transfer of cryptocurrency in the case of Bitcoin. Each block has a unique identifier called a cryptographic hash. This hash is generated using a mathematical algorithm that takes the block's data as input. If someone alters the data in a block, the hash changes, alerting the network to the tampering. Blocks connect in a chain logically and sequentially. Each block includes its

hash as well as the preceding block's hash. This linkage protects the blockchain's overall integrity.

While the concept of decentralized untouchable control has the potential to transform the existing IP ecosystem, there are currently many obstacles to a Blockchain-only IP ecosystem.

Blockchain implementation faces several roadblocks that hinder its widespread adoption. Scalability issues, manifested in slower transaction processing and increased costs as networks grow, pose a significant challenge. Lack of interoperability between different blockchain platforms impedes seamless communication and data exchange.

Regulatory uncertainty and varying frameworks globally create hurdles for businesses, causing concerns about legal compliance. Privacy challenges arise as blockchain's transparency clashes with the need to protect sensitive information. Energy consumption, especially in Proof of Work consensus mechanisms, raises environmental concerns, prompting the search for more sustainable alternatives. The absence of universal standards complicates integration and collaboration, while the complexity of blockchain technology and a lack of education hinder understanding and adoption. Security vulnerabilities, resistance to change, and uncertainties about costs and return on investment further contribute to the roadblocks. Overcoming these challenges requires concerted efforts, collaboration, regulatory clarity, and ongoing research and development to make blockchain a more feasible and widely accepted technology.

Top of Form

After all, Blockchain can be viewed as a decisive aid to the IP sector, providing advantages in the form of patent filings as well as being a key component in

streamlining the control system. In the end, it is anticipated to be more successful for the IP sector than it has been for Fintech. The difficulty is determining the best technology implementation course.

The IPO has begun to lay the groundwork for making the connection between blockchain technology and the IP environment. Without any doubt, the route will entail resolving the aforementioned roadblocks before we can see the improvement it seeks to deliver, but as the saying goes, the first move is always the most important.

Furthermore, this is just the tip of the iceberg. If the IPO gets a handle on things, it will move on to more advanced Blockchain applications in IP, such as ledger administration, as well as other innovative WIPO ideas, including a governing entity to regulate the utilization of IP assets in the marketplace and implementing that data to enact regulatory compliance, like as license monitoring and patent functioning, to name a few.

Patenting of blockchain services in India

Blockchain, which was first released as a form of Cryptocurrency, has since proved to be a very important technology in a variety of sectors, with large companies utilizing it for cross-border payment methods, digital distribution networks, mobile medical records, and other consumer facilities[6] utilizing it for cross-border payment methods, digital distribution networks, mobile medical records, and other consumer facilities.[7]

As businesses decide to patent a blockchain-based application, however, they are faced with many problems because it includes the use of software applications and encryption because blockchain licenses are similar to software patents. It has been suggested that such technologies might not be patentable

[6] Crosby, M., 'Blockchain Technology: Beyond Bitcoin' (2016) 2 Applied Innovation 71.
[7] (2020) NITI Aayog India. [Web Archive]

because most of these technologies simply repurpose an existing concept (blockchain technology).[8]

Even so, it's worth noting that patents for blockchain-based software are rapidly being issued around the globe, especially in the United States and China Smart Contracts, Supply Chain and Logistics, Patents related to Decentralized Autonomous Organizations (DAOs) etc. with several of them going to banking and financial implementations. Within the framework of this study, the causes for this pattern are discussed by analyzing the present legal situation in the United States and India.[9]

Scenario in the US before the Alice judgement

Before the *Alice Corp. v. CLS Bank International*[10] decision in 2014, there was a lack of clarity regarding the patent eligibility of certain types of inventions, particularly those related to software and business methods. The U.S. patent law, as defined in Section 101 of the United States Code, broadly allows for the patenting of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." However, this broad language led to uncertainty and differing interpretations.

In the years leading up to the Alice decision, there was a notable increase in the issuance of patents related to software and business methods. Many of these patents were criticized for being overly broad and covering abstract ideas without providing substantial innovation. This led to concerns about the potential stifling of innovation, the granting of patents for trivial inventions, and the emergence of patent trolls—entities that acquire patents not to create products or services but to assert them against others.

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[8] Published in Landslide, Vol. 10, No. 4, March/April 2018, by the American Bar Association.

[9] https://www.bitlaw.com/blockchain/blockchainpatents.html#:~:text=For%20example%2C%20Microsoft's%20US%20Patent,contracts%2C%20residing%20on%20another%20blockchain . (last visited December 16, 2023).

[10] US Circuit Court 2014 134 2347

The lack of clear guidelines on what constituted patent-eligible subject matter, especially in the context of software and business methods, contributed to legal challenges and inconsistencies in patent examination and litigation. Some patents were granted for innovations that critics argued were too abstract or fundamental to be eligible for patent protection.

The *Alice v. CLS Bank International*[11] case addressed the issue of patent eligibility for abstract ideas implemented on a computer.

Scenario in the US after the Alice judgement

The US Patent Act defines patentable innovations as "any new and useful method, system, manufacture, or composition of matter, or any new and useful improvement," according to Section 101.[12] "Abstract theories, laws of nature, and natural phenomena" are lawfully accepted exemptions to these definitions. In *Alice v. CLS Bank*[13], the US SC established a two-step procedure to decide if computer-related innovations are patentable:

(1) Decide if the assertions are related to a principle that is not patentable.

(2) Decide if the claim's components represented an "inventive principle" that changed the essence of the claims into a patent-eligible submission, both separately and as an organized combination.

Patent rights will not be given to claims that only include guidance for 'generic computer implementation' or whose application is limited to 'a specific technical environment' in the 2nd step. It was claimed that statements on "building blocks of human imagination" must incorporate themselves into "something more" to guarantee that vague concepts are not monopolized. It

[11]US Circuit Court 2014 134 2347
[12] United States Code, 1926, 35 U.S. Code § 101
[13] US Circuit Court 2014 134 2347

was decided that the computer's functionality, or any software or technical area, needed to be improved. Though Alice has slowed the flood of patents issued to ambiguous software patents, the decision has been criticized for failing to define terms like "abstract ideas" and "something more."

Several Federal Court rulings from 2016 and 2017 have expanded on the Alice test's use. In *Enfish, LLC v. Microsoft*[14] ruling, for example, specified that the first phase of the Alice test must include an analysis of "if the statements are guided to an improvement in machine functionality versus being directed to an abstract idea." The capacity of the technology to operate on a general-purpose machine did not nullify the arguments, according to the Court. As a result, the arguments must be based on "unique claimed improvements in machine functionality," with the computer not being used solely as a tool.[15]

For computer-implemented inventions, the USPTO has provided guidance based on legal decisions such as Alice Corp. v. CLS Bank International (2014).

2014 Interim Guidance on Patent Subject Matter Eligibility (Alice/Mayo Guidance):

The USPTO issued interim guidelines in 2014 to assist examiners in determining subject matter eligibility under 35 U.S.C. § 101 given the Alice and Mayo decisions. These guidelines provided a two-step framework for analyzing claims involving abstract ideas, laws of nature, or natural phenomena.

2019 Revised Patent Subject Matter Eligibility Guidance:

The USPTO published revised guidelines in January 2019 to provide additional clarity on patent subject matter eligibility. These guidelines addressed the

[14] US Federal Circuit Court 2016 822 1327

[15] WIPO CONVERSATION ON INTELLECTUAL PROPERTY (IP) AND ARTIFICIAL INTELLIGENCE (AI), Geneva, November 4, 2020.

application of the Alice/Mayo framework and included examples to illustrate the analysis of various types of claims.

2021 Revised Patent Subject Matter Eligibility Guidance:

The USPTO issued further updates to the guidance in May 2021, addressing stakeholder feedback and providing additional examples to assist examiners and applicants in navigating the eligibility analysis.

Scenario in India: After the Ericsson case the 'per se' debate has been settled

Digital programs, per se, are not eligible to be patented in India, according to Sec. 3(k)[16] of the Patents Act. There has earlier been much discussion about how to view the word "per se." In *Telefonaktiebolaget Lm Ericsson v. Intex Technologies*[17], the Delhi High Court held that "any invention that has a technological contribution or effect and is not merely a computer program per se" is patentable. The Court based its judgment on the Alice case rule, which specifies that an innovation should provide more than an "abstract concept," and the *Vicom Systems, Inc. v. Commissioners of Customs & Excise*[18] which specifies that an innovation must conclude in a technological effect/contribution and considered the two tests to be identical. Even so, when the 2016 CRI[19] Regulations confirmed that "novel hardware" was among the conditions for patent protection of computer-related innovations, it caused some uncertainty. The dispute was then resolved by the updated CRI Regulations of 2017[20], which eliminated the criterion for "novel hardware" and clarified that such representations' "substance" must be investigated. The

[16] The Patents Act, 1970, Section 3(k)
[17] I.A. No. 6735/2014 in CS(OS) No.1045/ 2014
[18] Case 165/84, [1986] ECR 1899.
[19] Guidelines for examination of computer related Inventions (CRIs), 2016
[20] Revised Guidelines for examination of computer related Inventions (CRIs), 2017

Indian Patent Office has recently granted patents to computer-related innovations, indicating that they are protectable under Section 3(k) if they offer a technological solution to a technical problem by offering a practical implementation or an enhanced technical effect of the underlying software.[21]

"Barclays and Asadel Technologies have filed a few patent applications in India for blockchain-based innovations."[22] While the legal stances in the United States and India generally align, the submission of patent applications for blockchain-based software in India may encounter challenges. According to the 2017 CRI Regulations, a database is a "computer program per se," and thus is not patentable under Sec. 3 of the Copyright Act (k). But in *Ferid Allani v Union of India*[23], The Delhi High Court ruled on December 12, 2019, that if an innovation exhibits "technical effect," it is patentable and not banned under Section 3(k) of the Patents Act. Furthermore, the Hon'ble Court acknowledged that in today's world, it was uncommon to encounter an article that didn't depend on a computer program. The IPAB determined that, without considering the technical impact generated by the present invention, the mere employment of a computer program to carry out a portion of the present invention does not exclude patentability. Furthermore, the innovation must be analysed as a whole, and (a) the technical result accomplished by it, as well as (b) its technological contribution, should be considered when determining the patentability of such inventions. The IPAB's ruling in the Allani Ferid issue, dated July 20, 2020, is a crucial milestone for future patent applicants working on computer-related discoveries. With the proliferation of technology, particularly the application of artificial intelligence and blockchain

[21]https://www.managingip.com/article/2c70158hpascb1vwe248w/expert-analysis/special-focus/evolution-of-the-patenting-of-computer-related-inventions-in-india (last visited on December 16, 2023).

[22] Jagannath Chatterjee, "The Growing Impact of Cryptocurrency and Its Effect on The Indian Patent Regime", 2021.

[23] WP(C) 7 of 2014.

technologies in a variety of ways to numerous parts of everyday life, the IPAB ruling could not be timelier. As previously mentioned, blockchains are servers for holding payments. Since these Regulations are not legally enforceable and simply offer instructions to patent officials, I believe that blockchain-based applications will continue to be patentable in India. Often, since computer program patents and blockchain patents are similar, a patent application for a blockchain-based software must be issued if the allegations aren't aimed at the blockchain technology itself and it offers a "technical contribution" or "technical solution to a technological issue" because Computer Programs are not patentable, only Computer-related Inventions are patentable subject to CRI 2017.

Consequences of getting Blockchain technology patented:

Blockchain is built on fully accessible software applications, which allows new individuals to access current systems as well as other businesses to clone and build on the software. A lot of people assert that awarding patents to blockchain-based systems aids patent trolls, which are non-practising organizations that defend their competitive advantage by using these patents as weapons for limiting competition by small developers.[24] Patenting such products is often said to prevent businesses from using technology to develop new industrial uses, as well as contribute to patent wars between large corporations. That being said, initiatives like Hyperledger aim to create fully accessible blockchains and possible technologies. Hyperledger is an open-source collaborative effort hosted by the Linux Foundation that aims to advance cross-industry blockchain technologies. It serves as a hub for developers, organizations, and other stakeholders interested in developing and using enterprise-grade blockchain solutions. Hyperledger provides a modular

[24] Prarthana Patnaik, Patenting Blockchain Services in USA and India, June 20, 2018.

framework and tools to support different types of blockchain-based distributed ledgers., Patent pools, which make patented technologies available for cross-licensing to all participants of such bodies. A patent pool is a consortium of companies or individuals that agree to cross-license their patents to one another. This collaborative approach helps pool the intellectual property rights of multiple entities, often WTO promotes innovation reduces litigation, and fosters industry standards.[6] and non-aggression agreements signed among businesses are already addressing these issues. The blockchain group is also working on a project called the Blockchain Defensive Patent License, in which all licensees share their licenses and are prohibited from violating the patents of other license holders. of blockchain-based distributed ledgers., Patent pools, which make patented technologies available for cross-licensing to all participants of such bodies. A patent pool is a consortium of companies or individuals that agree to cross-license their patents to one another. This collaborative approach helps pool the intellectual property rights of multiple entities, often WTO promotes innovation, reduces litigation, and foster industry standards. and non-aggression agreements signed among businesses are already addressing these issues. The blockchain group is also working on a project called the Blockchain Defensive Patent License, in which all licensees share their licenses and are prohibited from violating the patents of other license holders.

Conclusion

Even so, the disturbing trend of granting overbroad patents that only meet basic blockchain functions should be taken into account. For example, the US Patent and Trademark Office recently approved a patent application for Northern Trust's system of using blockchain technology, specifically smart contracts, to create a permanent electronic record of sessions. The arguments explicitly show that there is no change to machine usability or underlying technologies

by using the Enfish ratios and a review of the report[25], as they simply use smart contract information to enable an "abstract concept" of producing digital meeting documents. As a result, the Patent Office must thoroughly investigate the arguments at hand. Perhaps the patent grant would have been sufficient in the above-described scenario if the software for generating a meeting record had simply been used and its workings noticeably enhanced.

As a result, a blockchain-based application could be deemed patent-eligible by the corresponding Patent Offices of the United States and India if, after careful consideration of the arguments, it provides a technological solution to an existing problem and substantially enhances the underlying technology. However, the Patent Offices of the United States and India must issue proper guidance to clarify how these developments are to be assessed and what type of blockchain-based applications can be awarded patents.

[25] Benedetta Cappiello, Gherardo Carullo, et al., Blockchain, Law and Governance, p. 261-263, (Springer International Publishing, 2020).

RE-EVALUATING THE REPRODUCTIVE RIGHTS: THE LEGAL COMPLEXITIES FROM *ROE TO DOBBS*

Ayesha Priyadarshini Mohanty*

ABSTRACT

Globally, liberal laws have guaranteed women access to reproductive rights.[1] Yet, the majority of the women continue to live in countries with restrictive laws that prohibit the quality and care of women's lives – particularly those from unsafe abortions.[2] In June of 2022, the U.S. Supreme Court ruled that Roe v. Wade was unconstitutional, leading to 21 states within the United States banning or restricting abortion access.[3] Reproductive rights have a long and complicated history within the United States and have inequitable repercussions on the lives of marginalized women. While the right to abortion was only subject to the rational basis review and not expressly enumerated in the Constitution, the unprecedented authority to regulate, restrict, and potentially prohibit abortion before viability raises questions on women's health autonomy. The author attempts to understand the legal intricacies of Roe v. Wade and thoroughly examines the broader concerns on the

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1 'The World Abortion Laws,' Center for Reproductive Rights, https://reproductiverights.org/maps/worlds-abortion-laws/ (accessed on Dec 31' 2023).

2 'Where do Abortion Rights Stand in the World in 2023, Focus 2030', https://focus2030.org/Where-do-abortion-rights-stand-in-the-world-in-2023 (accessed last pn Dec 31' 2023).

3 Nina Totenberg and Sarah McCammon, 'Supreme Court overturns Roe v. Wade, ending right to abortion upheld for decades,' (Jun 24, 2022) https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn

constitutional principles and subsequent erosion of reproductive rights in the wake of the Dobbs v. Jackson Case.

I. The foundations for judicial development for *Roe v. Wade*

In the early 1960s, abortion was largely illegal within the United States. The legal landscape began shifting with the case of Griswold v. Connecticut[4], where the recognition of privacy rights laid the foundation for Roe v. Wade. In 1879, the Barnum Act banned contraception and the distribution of information to married couples.[5] Estelle Griswold challenged the Act and eventually struck it down when the Supreme Court asserted the Constitution's right to privacy. The Supreme Court continued to extend the rights of privacy matters to unmarried individuals in Eisenstadt v. Baird.[6] It significantly advanced the legal framework for reproductive autonomy by holding that the right to privacy includes the right of unmarried individuals to use contraception. According to Justice William J. Brennan, Jr., who authored the majority opinion, "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" is the essence of the right to privacy. The Supreme Court, in a crucial precursor of United States v. Vuitch, had also ruled that abortion in a legal district is necessary to protect mental or physical health.[7]

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[4] Griswold v. Connecticut, 381 U.S. 479 (1965)
[5] James Glasser and Benjamin M. Daniels, 'P.T. Barnum, Justice Harlan, and Connecticut's Role in the Development of the Right to Privacy,' Federal Bar Council Quarterly (2014), https://federalbarcouncilquarterly.org/?p=396 accessed on Dec 31, 2023.
[6] Eisenstadt v. Baird, 405 U.S. 438 (1972), https://supreme.justia.com/cases/federal/us/405/438/
[7] United States v. Vuitch, 402 YS 62 (1971)

However, in Texas, the near-total abortion laws were enforced since its inception in 1857 and remained essentially unchanged. It was rooted in its history as a Spanish colony and later as a part of independent Mexico, where abortion was earlier prohibited.[8] The laws passed, but they continued to criminalize performing or assisting in an abortion unless the same was necessary to protect the life of the pregnant patient. Even during the reforms to establish educational standards and improve the standing of doctors, a national campaign against midwives coincided with the efforts to tighten abortion. While legal battles ensued in the early 1900s, by 1907, the definition of abortion was added to a statute. With the rise of feminist movements across the United States, efforts were made to challenge abortion bans.[9]

Amidst this, struggling with drug and alcohol issues, Norma McCorvey (under the pseudonym of Jane Roe) found herself pregnant and unable to obtain a legal abortion in Texas; she filed a lawsuit against Henry Wade, challenging the Texas Law making abortion illegal except a doctor's orders to save a woman's life.[10] The U.S. District Court for the Northern District of Texas struck down Texas's abortion ban, finding it overbroad and locating the right to reproductive choice in the 9th and 14th Amendments of the U.S. Constitution.[11] However, the rights were not absolute, and the balance was to be maintained in

[8] Eleanor Klibanoff, 'Not 1925: Texas' law banning abortion dates to before the Civil Wars, Texas Tribune, https://www.texastribune.org/2022/08/17/texas-abortion-law-history/ accessed on Dec 31, 2023.
[9] Id.
[10] Roe v. Wade, 410 US, 113 (1973)
[11] Id.

protecting the women's health and prenatal life to the government's interest.

II. Post *Roe* World: Evaluating the Standard of Constitutional Apparatus

The verdict maintained by the Supreme Court ruled that the woman's right to privacy and her ability to have an abortion was protected by the Fourteenth Amendment's Due Process Clause. A statute that forbids abortion in general, regardless of the woman's stage of pregnancy or other considerations, is an infringement on her right. The right to privacy extends to pregnancy, and despite the State's claim that constitutional protections start at conception, the argument was not accepted. While the Court mentioned that the Constitution defines 'person,' the Court did not comment on 'adopting one theory of life' by one faith over the other. Using a strict scrutiny test, for the State, anyone 'born or naturalized' in the U.S. is covered by its safeguards, and it is not up to the State when life begins. The Supreme Court created a trimester-based framework balancing the State's interests with privacy rights. The first trimester allowed the women to decide on abortion with the consent of the physician. Following this, the State could regulate the procedures to protect maternal health, and with 'fetal viability,' the State could also prohibit when necessary to preserve the life and health of the mother. This watershed Act of judicial activism, preserving women's rights, was also challenged by critics as the Supreme Court did not explicitly address abortion. In subsequent cases, the Court expanded laws that restricted

abortion, such as requiring spousal consent for abortion, but also measured the unrestricted access to abortions by including a waiting period, parental consent without judicial bypass, and a ban on abortions outside of hospitals after the first trimester.

In 1992, in the case of *Planned Parenthood v. Casey*, the Court revisited Roe v. Wade. Here, Pennsylvania had amended its abortion statute and added certain restrictions.[12] While the viability standard was maintained, the trimester framework was replaced by the 'undue burden' standard. The Court in Casey held that: '*A finding of an undue burden'* is a succinct way of saying that a state regulation has the intention or effect of obstructing a woman from getting an abortion because the fetus is not viable. A statute for this aim is unconstitutional because the State's method of advancing the interest in potential life must be such that it informs, not interferes with, the woman's right to make her own decisions. Furthermore, a statute cannot be justified as a legitimate way of achieving its aims if it has the unintended consequence of seriously impeding a woman's right to make her own decisions even when it advances the interest in potential life or another legitimate state interest.[13] The new standard invalidated state abortion regulations if they obstruct a woman's choice to undergo an abortion in a significant fraction

[12] Among the restrictions was the requirement that the woman seeking an abortion give her informed permission before the procedure takes place. Second, she needs to know certain things at least 24 hours before the abortion is carried out. Thirdly, if a minor's parent wants an abortion, they must consent, and if the minor is unable or unwilling to agree, they may request a court bypass. Fourth, the married lady needs to sign a declaration attesting to the fact that she told her husband about the abortion, and fifth, the providers need to follow the guidelines for reporting. *Casey*, 505 US. At 844.

[13] *Casey*, 505 US at 877.

of relevant cases, replacing Roe's strict scrutiny with a more permissive standard that considers state interests.[14]

The critics of *Casey's* decision predicted, to a certain extent, the potential challenges in the implementation of the 'undue burden' standard. There was a failure to establish a clear and practical procedure for the 'undue burden' test, nor would the effect of the test lead to ambiguity in the standard. Certain inconsistencies led to lower courts bypassing factual analysis and its intended impact on inconsistent outcomes with a rise of abortion law challenges. There was broad judicial discretion provided to lower courts without specific guidance, and J. Scalia had expressed concerns about the imprecision of the standard that would result in subjective assessments by the judges, making the standard 'inherently manipulable.'

III. From *Casey to Dobbs*: The Aftermath on Reproductive Rights

The central issue with *Casey* was the use of 'undue burden' in a synchronic sense, addressing the laws that make abortion difficult at specific points. Dobbs [15]Upholding the fifteen-week ban in a diachronic sense (over time) under the fair opportunity reading contradicts Casey's 'before viability' rule, transforming the concept of undue burden and undermining the doctoral integrity of Casey and Roe.[16] Furthermore, the majority opinion in Dobbs's ruling for the interpretation of the Fourteenth

[14] Ruth Burdick, The Casey Undue Burden Standard: Problems Predicted and Encountered and the Split over the Salerno Test, Hastings Constitutional Law Quarterly, Vol. 23, (1996).
[15] Dobbs v. Jackson Women's Health Organisation,597 US 215 (2022)

Amendment holds that liberty does not extend to include the right to abortion. By applying the rational basis review, the Supreme Court moves from 'heightened scrutiny' in Roe to a deferential standard of judicial review that it believes is more appropriate for evaluating the bans and abortions. The dissenting opinion challenges the over-reliance on the historical analysis and the evolution of substantive liberty rights. The argument that is enforced on behalf of the dissent undermines women's equality and autonomy. The majority in overturning precedent acknowledges the high bar for overruling the decision. The dissent contends that stare decisis is essential for maintaining stability and predictability in the law, and departing from precedent undermines stability and jeopardizes individual rights and freedoms. Chief Justice J. Roberts favoured preserving a limited constitutional right to abortion through the 'viability line' but without specifying how far it would extend.

The challenge with the Supreme Court's decision is that the Court selectively draws from 19th-century history, despite the constitutional developments and implications for the gender-related cases illustrated with the gender-related cases. Post Dobbs, thirteen states have implemented or nearly implemented abortion bans with narrow exceptions that contribute to legal and healthcare challenges.[17] Anti-abortion leaders are restricting district attorneys, pre-empting local governments,

[16] Sherif Girgis, *Misreading and Transforming Casey for Dobbs,* The Georgetown Journal of Law & Public Policy, Vol, 20 (2022)

[17] Risa E. Kaufman and Katy Mayall. One Year Later: Dobbs v. Jackson Women's Health Organization in Global Context, American Bar Association (2023) (https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/one-year-later-dobbs-in-global-context/) accessed on December 9th 2023.

and altering ballot measure rules to limit reproductive rights. The legislators supporting progressive values face censure or expulsion, impacting gender-affirming care advocacy. In certain states, legal complexities make abortion practically unavailable. South Carolina's ban was temporarily blocked, and Utah and Wyoming enacted additional prohibitions.

IV. Conclusion

The Supreme Court's decision to overturn Roe v. Wade poses a threat to the health and well-being of pregnant women, particularly those experiencing obstetric emergencies. The significant gap between the rhetoric and actual support received by the states with abortion bans can be noticed with the sharp decline in the OB-GYN residency applications and states closing the pregnancy and delivery care units.[18] These implications have far-reaching consequences, even to the extent of impacting U.S. national security.[19] Justice Ginsburg, in Gonzales v. Carhart, emphasized that women must take their place as full and equal citizens, which means they must have control over their reproductive decisions. The reasoning presented by the Court in Dobbs was notably weak, lacking substantial legal basis. However, the prior judgments, marked by misunderstandings and open interpretations, set a precedent that gradually reduced the standard of scrutiny from Roe. This

[18] Kelly Baden, Anti-abortion politicians never intended to support women and children, The Hill (2023) https://thehill.com/opinion/healthcare/4038665-anti-abortion-politicians-never-intended-to-support-women-and-children/ accessed on Dec 31, 2023.

[19] Kyleanne M. Hunter et. Al., 'How the Dobbs Decision Could Affect the U.S. National Security,,' Rand Corporation (Sept 2022) https://www.rand.org/content/dam/rand/pubs/perspectives/PEA2200/PEA2227-1/RAND_PEA2227-1.pdf

shift ultimately contributed to the foreseeable outcome in Dobbs. The abortion debate implicates competing visions of women's sexuality and social roles, giving certain sections of society the power and preference that will likely have far-reaching consequences.

Book Review

Paul T. Babie, Neville G. Rochow QC, and Brett G. Scharffs (2020)

Freedom of Religion or Belief: Creating the Space for Fundamental Freedoms: Edward Elgar Publishing Limited. UK. x, 400 pp. ISBN 978-1-78897-779-1 (Hardbound)

Reviewed by: Dr. Priyanka Ghai*

In their thought-provoking scholarly work, **Freedom of Religion or Belief:** the editors Paul T. Babie, et. al. bring together insights from various contributors. The Book commemorates the 70th anniversary of the UDHR in 2018 and critically examines the issues connected for providing religious freedom which create space for fundamental freedoms or vice-versa. The book resorts analytical and comparative approach to assess the constitutional space to protect the first freedom.

The freedom of religion and belief is found in various national constitutional frameworks and international regimes. In the present situation 75 years after the proclamation of UDHR which enshrined the rights to freedom of religion or belief also non-discrimination on its basis, the issue remains very challenging. But the real challenge is the violence in the name of religion or belief reported numerous times worldwide.

The book is divided into two parts. In first part, the book presents a longstanding analysis of the conflict between the right to freedom of religion or belief and other fundamental rights. The first part investigates the scope and spirit of the notion of constitutional space for Freedom of Religion or Belief. The second part features the comparative regions.

The authors in the first part address an array of issues including same-sex marriage, the disputes that same-sex marriage created for religious adherents when it was legalized, how Australian courts interpreted freedom of religion, the need for constitutional protection for freedom of religion or belief, the grounds concerning the relationship between individual autonomy and religious liberty, the emergence of faith-based institutions, the struggle of defining religion and religious freedom, and the challenges presented to religious adherents in leading lives based on their faith.

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Carolyn Evans and Cate Read analyze the development of Australia's constitutional bill of rights. Given the validity of the concerns of others and the danger that religious freedom could lead to the victory of religion over other important rights, they contend that constitutional space for religious freedom is crucial.

Joel Harrison argues the Western notion of religious liberty, nevertheless, he believes that the government should protect moral communities and institutions that are crucial for daily existence.

Jeremy Patrick observes that within the current religious circumstances, where believers have an extensive spectrum of religious practices and beliefs to select from, it can be challenging for the vast majority to comprehend the religious freedom at the peripheral regions.

Alex Deagon explores the challenges and prospects connected to identifying freedom and religion.

Renae Barker examines the interpretation of religious freedom by Australian courts in light of the restricted opportunities for bringing up religious matters in court.

Joshua Forrester contends that there exists a lot of work to be done in navigating the boundaries between state and freedom while examining the affects of section 116 of the Australian Constitution.

Brett G. Scharffs presents a conceptual framework for the complex concept of reasonable accommodation. The three patterns of thought that have been mentioned are dominating and preeminent frameworks.

Neil Foster converses on how Australia's fundamental beliefs have shifted with the legalization of same-sex marriages.

Mark Fowler urges authorities to commit to comprehend and preserve the public personas and distinctive manifestations of civil society organizations, regardless of their beliefs.

The authors in the second part present an encompassing examination of the constitutional frameworks and rights of Iraq, India, China and Malaysia, as well as the European Convention on Human Rights.

The book unlocks interesting avenues for further analysis. It is anticipated that the upcoming issue shall address the watchlist in greater detail.

Global proponents of religious freedom will find the book captivating. Academicians, Jurists, researchers, scholars, experts, practitioners, and professionals in the field of religion and law as well as human rights can expect it to be a priceless guide. The book can be a welcome addition to the library of educational institutions, existing literature on law and religion and for those who want to know the convergence of law and religion.

Overall, the discussion and deliberation in the book provides valuable insights into the ongoing dialogue surrounding religious freedom and its intersection with constitutional rights.

The editorial board of ALR (Amity Law Review) along with the reviewer regards it the excellent piece of work.

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