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FOREWORD

"Research is to see what everybody else has seen and to think what nobody else has thought."

- Albert Szent-Gyorgyi

It is with immense pleasure that this University introduces "Lexcellence" – our very own student-established E-Journal of School of Excellence in Law, Tamil Nadu Dr. Ambedkar Law University (TNDALU), Chennai. It is an extreme pride to see the students of this University taking up such unique initiatives, promoting legal research and dispensing quality knowledge through a medium that is easily accessible to all. This provides a platform for all students, academicians, legal practitioners, scholars and other eminent personalities of the legal fraternity, to showcase and pen down a piece of their minds by way of writing articles, case comments, book reviews and papers.

Having established an editorial team of students, supported by a highly distinguished advisory committee, the articles submitted to the journal are subjected to a double-blind peer review. Selected by the students themselves, with guidance and support provided by the faculties, this journal is setting an example of a finer caliber of fresh legal research that is preferred by the readers these days. There will be a lot more promising works of paramount quality compiled together, presented at regular intervals through this online platform. This is yet another unique characteristic of this journal – to make knowledge easily and freely accessible to everyone.

Since the journal is open to receiving submissions from law students all over the country, I am sure that every upcoming issue will be a pleasant and informative read because of the journal's acceptance of papers throughout India. So the topics covered in every issue will be from various branches of law that are not tapped into very often by the legal fraternity. The process by which these articles are reviewed is of supreme importance at all costs and it is good to see students working and spending time contributing towards the betterment of legal research as a whole.

The students and the faculty members who are a part of the Lexcellence team have been working for the past few months in making this first issue a success. It is noteworthy and highly commendable that the journal is accessible online. Students have ensured that the quality of this issue is at its very best by spending time curating, reviewing and editing the format of it. And finally, they have done a magnificent job in successfully releasing their first issue.

I congratulate the students actively involved in this journal and the faculty members providing their constant support in bringing the dream that was Lexcellence, into reality. The team has been working extremely hard for their review process and have finally selected a number of submissions that have been compiled together and presented to you, fellow readers. I hope the first issue lives up to all your expectations and I wish all the very best to the team in their upcoming endeavours.

Prof. (Dr) N. S. Santhosh Kumar
Vice Chancellor,
The Tamil Nadu Dr. Ambedkar Law University, Chennai

EDITOR'S NOTE

"Education is a better safeguard of liberty than a standing army"

– Edward Everett

Education and knowledge are the bridge between any issue and its effective resolution. A sword may reach out to cut another down, but the pen reaches further to the ears of everyone around and far beyond. These inspiring words beautifully elucidate how what a whole army fails to do could be accomplished by one who wishes to equip himself with knowledge. It was Kofi Annan, the former Secretary-General of the United Nations who rightly articulated that *"Knowledge is power. Information is liberating. Education is the premise of progress, in every society, in every family."* What is better than knowledge, is when that knowledge is free and easily accessible to every person who have a desire to further their scholarly pursuits. This was the main objective behind this new venture of the students of School of Excellence, TNDALU, Chennai. With the advent of superior technology and the ever-changing virtual space, this has become simplified like never before. Armed with the benefits of technology and a drive to carry wisdom to all interested parties, the students set out to make their dreams come true – we present to you the first e-journal of the Tamil Nadu Dr. Ambedkar Law University, Chennai.

On behalf of the Editorial Board, I am excited to introduce Lexcellence, the E-Journal of the Tamil Nadu Dr. Ambedkar Law University, Chennai. This journal is the fruit of the efforts of a group of people who strongly believed in the words of Jonas Salk that *"Hope lies in dreams, in imagination, and in the courage of those who dare to make dreams into reality".* When the students approached the University with the idea of starting TNDALU's very own E-journal, we were met with warm welcome and enthusiastic encouragement. We pursued the small spark we had and watched it grow into a glowing fire, which we hope would blaze brightly for the years to come as a guiding light. The idea was to make knowledge of superior quality available to one and all sans any barriers. This, coupled with an overwhelming desire to give back to the society filled with young, bright minds and the University which has given us so much in a short time, prompted us to come up with the idea of an E-journal. In order to maintain the richness of the content, the manuscripts go through an intensive double-blind review process.

The final list of articles are chosen through peer review by eminent personalities in the legal field.

The maiden issue of Lexcellence received a warm welcome from the legal community and received over a hundred submissions. From this, twelve articles covering varied topics and views have been chosen for publication in this debut issue. The authors have presented us with fresh perspectives and thought-provoking content. This issue comprises a range of research papers, articles and case comment, keeping the readers' captivated until the very end. The lucid and succinct way the articles have been written while not compromising on valuable facts and opinions will surely be a delightful and informative read. We strongly believe that this journal would instil a newfound love for learning in its readers.

The first issue has received a collection of research papers. We start out with the first paper; *A Critical Study of the Reasonable Exercise of Administrative Discretion and its Limitations* by authors Isha Lodha and Sanjeesha Agarwal, both students of the National Gujarat Law University. The paper begins by critically examining what administrative discretion by theory is and its limitations, particularly in the use of administrative power at the time of power conferment to an individual. It further examines the need for constraints, restrictions in exercising administrative power and suggestions on striking a balance in the use of administrative discretion and its limitations. This is followed by the research undertaken by Syed Zainul Hasan Rizvi, a students of Unity P.G. and Law College. This bold topic titled *Love Jihad Law – Is it a step ahead or backward as a Nation?,* examines the history and constitutional validity of the recently introduced Love Jihad law such as the U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020. It explores the consequences of unconstitutional and violative interference of the state in matters of personal laws such as marriage, religion, personal liberty, right to privacy and etc in the light of appropriate laws to constitutionally deal with the same existing. The next paper titled *The Indian Voluntary Sector: Lacunas In The Regulatory Framework (Registration & Taxation)* by Harsh of Hidayatullah National Law University is a research paper report that explores the status of the regulatory framework in existence presently, governing the various voluntary sector works. It does so on the basis of a few hypotheses. In addition to this it concludes by drafting a few recommendations to streamline the regulations for the voluntary sector in accordance with the *National Policy on Voluntary Sector (2007).*

The next paper is by Kanika Aggarwal, PhD Research Scholar of O.P Jindal University by the title *Epistemic Disconnect between Science and Law.* It examines the helpfulness of scientific and forensic methods of establishing evidence as well as supporting stances taken in court cases. It further examines the lacuna of other scientific branches and methods to aid in judicial processes. The paper consists of three parts, the first detailing the current laws regulating the extent and method of use of the specified forensic evidences permissible in courts, the second part deals with exploring the "epistomatic" (as the author purports) disconnect of science and law and the last part deals with "the perfunctory manners in which judicial gatekeeping function is being performed by making reference to judicial decisions" as the author once again purports. It concludes with the reviewing of recommendations and suggestions put forth by academicians among other legal scholars and practitioners. The next paper is an old friend of legal enthusiasts. This paper titled *"Changing Contours Of Legitimate Expectations: Analysing The Public-Private Dichotomy In Application Of The Doctrine"* is authored by Omkar Upadhyay, a student of the Maharashtra National Law University It analyses the doctrine legitimate expectation, tracing its origin and contemplates its current application by the Indian judiciary. This is followed up with a paper that focuses on the trading scenario in the country. Authored by Vyshnavi Praveen and Ananya Soni, students of the Tamil Nadu National Law University, *"Insider Trading: What Is It And Understanding The Evolution"* is an intellectually engaging article that details upon insider trading the role of SEBI. The paper goes on to compare Indian law with the American law, concluding with the authors innovative suggestions to pave the way for the future. The final research paper by Pooja S, a student of VIT Law School, would interest all readers as it has been one of the most talked about topics in recent times. *"Abortion Rights of Women"* delves into abortion rights worldwide followed up with an analysis of the most recent landmark judgement of Roe v. Wade. The paper pays special attention to the present scenario in India and the various connected issues. The authors have concluded with their suggestions to bridge the gap in the legal field pertaining to this issue.

The research papers are followed up with the article section, with the first article by Ashutosh Singh and Saurabh Kumar, students of Chanakya Law University, titled *"The Proposed Ban*

On Cryptocurrency: A Step In The Right Direction?". It is a descriptive one that examines the various facets of the Indian Government illegalising the use and circulation of cryptocurrency as a form of digital currency. It begins by detailing what cryptocurrency is, its' presence and recognition in various other nations, its' illegal and unethical uses, the consequences of its' ban in India and finally the rationale as to why cryptocurrency should be regulated and legalized as an inevitable need in a world where digital financial transactions are only to increase. The next article by Pranav Kumar, a student of NLSIU, Bangalore, is an enthralling critic on the Groundwater Conservation Bill, 2016 *(Right Direction, Wrong Timing? Critiquing The Groundwater (Conservation) Bill, 2016).* A glance at the article reveals the deep research that has been undertaken by its author in detailing the background of the bill, followed up by the details of the latest bill. The shortcomings of the bill has been elucidated with an easy coherence that draws the readers in. The final article, *Gaming Vs. Gambling: The Seemingly Innocent World Of Real-Money Gaming,* by D Donna Gadiel, Rithu T, students of our own university, the Tamil Nadu Dr. Ambedkar Law University, is a breeze of fresh air. This article analyses the blurring line between online gaming involving real money and gambling. It contextualises the merits of online games to Indian economy, while also detailing the other side of the coin and covers its ill-effects. It concludes by highlighting the lacunae in law in dealing with the new advancements in the gaming scenario and suggests plausible measures to keep in pace with the changing times. Lastly, we have a case comment by Ashwin Singh of Symbiosis Law School, Pune, titled *Case Analysis (Irac Method) On Sahara India Real Estate Corporation Limited & Ors. Vs. Securities And Exchange Board Of India And Ors.* This piece has delved deep into the nuances of law and critically analyses the landmark case. It also explains in detail the effects of its judgment on the Indian investment market and the Indian investors, providing us with a broader outlook on the judgement.

We, the students of the School of Excellence in Law, have planted a seed today. The seed was lovingly nurtured and watered by our faculties, well-wishers and supporters, giving us our very first issue. We hope to watch it grow further into a strong tree, standing steadfast for the years to come. I would like to thank everyone who have been involved in the process from the very beginning. We are extremely thankful to our Hon'ble Vice Chancellor Prod. Dr. N.S. Santhosh Kumar for the freedom and faith entrusted in us. We are indebted to Dr. Haritha Devi R, Director i/c, Research, Publications & Academic Affairs and HoD i/c Department of Environmental Law and Legal Affairs., for her constant support from the start until now. She welcomed the students initiative and provided them with an opportunity to take it forward. We

are indebted to our wonderful faculty advisors Dr. M. Sunil Gladson and Dr. P. Brinda for their wisdom and patience in guiding us. They have been true pillars in this process. We also extend our warm gratitude to the Honorary Board of Advisors for their support. I thank my fellow students who extended their support for the initiative and signed off on the proposal. This journey had been a testament to the words of Helen Keller that *"Alone we can do so little; together we can do so much."*

We hope that this journal meets the expectations of our readers and that it would be grand success. The topics dealt with in this issue are varied and challenges the limits of our legal research. These topics are by no means the entirety of the nuances in law. We hope to explore other untouched arenas in our upcoming issues, continuing the exploration of knowledge and the different perspectives of fellow scholars. Progression is achieved only through intellectual discussions and debates. We hope that this journal plays a small role in bringing about such a change and makes its mark in the legal sphere, for its our thoughts that live beyond our time. We would like to conclude with Swami Vivekananda's words, which has been quoted time and again by people all over the world, including our very own Justice Anuj Aggarwal;

"We are what our thought have made us; so take care about what you think. Words are secondary. Thoughts live, they travel far."

M. K. MRUDULA
Editor-in-Chief
Lexcellence – TNDALU E-Journal, 2021-2022.

RESEARCH PAPERS

A CRITICAL STUDY OF REASONABLE EXERCISE OF ADMINISTRATIVE DISCRETION AND ITS LIMITATIONS

Isha Lodha, Sanjeesha Agarwal

ABSTRACT

Administrative discretion is an unregulated unilateral conduct that is not protected by the safeguards implicit in the constructed framework. Administrative discretion issues are complicated. It is indisputable that under any intense governmental system, authorities must use certain discretion in order for the administration to work. However, it is also undeniable that total discretion is a false idol. It is profoundly detrimental to liberty than any other human innovation. It might be deduced that use of discretionary authority by administrative agencies is critical for the performance of their tasks, but this discretionary authority must not be extraneous and unregulated. It must be constrained by some reasonableness such that it does not become indiscriminate and, as a result, contradict the administration agency's acts. Such authority can be managed either at the time of administrative power conferment or at the time of execution of such authority. The purpose of this study is to critically examine the concept of Administrative Discretion and the limitations on the use of administrative power at the stage of power conferment. It analyses how constraints on the exercise of administrative authority are required, as well as how such power might be managed and restrained. In addition, the authors make proposals for striking a suitable balance between administrative discretion and its limitations.

Keywords: *Administrative discretion, Reasonability, Fundamental rights, Judicial review, Limitations*

1. INTRODUCTION

Administrative decisions can be categorised as ministerial or discretionary in nature[1]. A ministerial role is one in which the administration has an obligation to perform something in a certain way. Such activities, however, are rare. Majorly in all administrative activities, the

[1]Khare and Shubham Manoj, "Administrative Discretion & Limitation on Administrative Discretion By Article 14 & 16 of the Indian Constitution" , available *at:*https://ssrn.com/abstract=1465519 (last visited on 11 November 2021).

bureaucratic agency has the authority to act or not act in one way or another. Discretionary power refers to the ability to act or not act in one manner or another.[2]

Administrative discretion allows for creativity in administrative areas as well as public authority acts.[3] In most circumstances, discretion is granted by the legislator in order to accomplish a certain goal. However, the rise of authority is seen with mistrust as a promoter of arbitrary nature. It is the intersection between discretion and the concepts of limitations, scrutiny, and responsibility.

A common current practice in modern democracies is to delegate a considerable discretion to administrative bodies. The majority of the abilities presently bestowed are deployable at the discretion of the concerned authority. In most situations, legislation imposing responsibilities upon the Executive is rather vaguely written and does not state plainly and unequivocally the situations and occasions under which, and the standards with regard to which, the Executive is to employ the authorities bestowed on it[4]. This is a concerning phenomenon since when the Executive is given total authority, judicial control erodes.

This paper seeks to analyse the concept of Administrative Discretion and the limitation on the exercise of administrative power at the stage of conferment of power. It examines why limitations on the exercise of the administrative power is necessary and what are the methods by such power can be controlled and limited. The authors also provide recommendations to strike a reasonable balance between administrative discretion and its limitations.

2. MEANING

Administrative discretion is selecting among existing possibilities based on norms of reason and fairness rather than a person's own preferences and likes. This practice should not be ambiguous, distorted, or whimsical, but rather lawful and consistent.[5] Administrative

[2] *Ibid.*
[3] Marcelo Figuereido, "Administrative Discretion: A Comparative Analysis", *IACL-AIDC BLOG*,*available at:* https://blog-iacl-aidc.org/blog/2018/5/17/administrative-discretion-a-comparative-analysis (last visited on 11 November 2021).
[4] M. PJain,"Administrative Discretion and Fundamental Rights in India", *Journal of the Indian Law I*nstitute, vol. 1, no. 2, Indian Law Institute, 1959, pp. 223–50.
[5] *Sharp v Wakefield*, 1891 AC 173.

discretion is an unregulated unilateral conduct that is not protected by the safeguards implicit in the constructed framework.[6]

The West Encyclopedia of American Law has defined Administrative Discretion as "*The exercise of professional expertise and judgment, as opposed to strict adherence to regulations or statutes, in making a decision or performing official acts or duties. It is something informal and therefore unprotected by safeguards inherent in formal procedures. It is a freedom to make a choice among potential course of action*."[7]

One of the most widely accepted definitions of 'administrative discretion' is given by Professor Freund in the following words: *'When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of consideration not entirely susceptible of proof or disproof.... It may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination*."[8]

Prof Julius Grey in his book 'Discretion in Administrative Law' has defined it as "*it is a power to make a decision that cannot be determined to be right or wrong in any objective way*."[9]

Lord Diplock in Secretary of *State for Education & Science v. Tameride Metroborough Council*[10] has defined it as "*the very concept of Administrative Discretion involves a right to choose between more than one possible courses of action upon which there is a room for reasonable people to hold differing opinion as to what may be preferred."*

3. HISTORY AND BACKGROUND

The concept of administrative discretion may be traced back to the time of the well-known Greek philosopher Socrates, who was attempting to create the groundwork for philosophical ethics. Socrates devised a broad classification of "universal morals" in an attempt to put altogether a standard that may be used to decide the best path of conduct to adopt in every

[6] Deepali Kir, "Administrative Discretion: Meaning and Grounds of Control", *LAWBHOOMI*, *available at*https://lawbhoomi.com/grounds-of-control-on-administrative-discretion/(last visited on 10 November 2021).
[7]Jeffrey Lehman and Shirelle Phelps, *West's Encyclopedia Of American Law*, 2nd edn 2005.
[8]"Judicial Control and Exercise of Discretion", *available at:* https://www.lawteacher.net/free-law-essays/constitutional-law/judicial-control-and-exercise-of-discretion-constitutional-law-essay.php?vref=1 (Last visited on 12 November 2021).
[9]Grey, J. H., "Discretion in Administrative Law", *Osgoode Hall Law Journal* 17.1 (1979) 107-132.
[10]*State for Education & Science v. Tameride Metroborough Council* [1976] 3 All ER 665.

given scenario.[11] He gave value ordering along with specific "means to ends" which will identify morally philosophical generalization choices[12] .

In this setting, the range of reasonableness is fairly broad and diversified. The lawful notion of reasonableness was substantially developed in the UK, initially appearing in *Rooke's case*[13] in 1598 and subsequently clarified in the *Wednesbury judgment*[14] in 1948, from which it became widely renowned and was accepted in the common law systems of numerous nations globally.

3.1. Doctrine of reasonableness in Administrative discretion

3.1.1. Irrationality and Wednesbury Unreasonableness

Lord Diplock created the idea of "Wednesbury unreasonableness" in the case of *Associated Picture House v. Wednesbury Corporation*[15], where he compared it along with irrationality[16]. It merely indicates that administrative discretion should be used in a prudent manner. As a result, an individual delegated with discretion must exercise good legal judgement. He should draw his awareness to issues that he is obligated to examine. He should reject from his attention any issues that are unrelated to the topic at hand. If somebody does not follow the rules, he is considered to be being unreasonable[17].

Lord Diplock defines "wednesbury unreasonableness" as "*a concept which pertains to a conclusion which is so absurd in its rejection of reason or established ethical norms that almost no logical individual who dedicated his intellect to the subject at hand would reach at it.*"[18]

Clearly, the idea of Wednesbury unreasonableness is exceedingly ambiguous and incapable of scientific appraisal. As a result, Wednesbury unreasonableness cannot be described in terms of universally applicable testing methods.

The doctrine of reasonability in administrative discretion stipulates that there should be a plausible relationship seen between anticipated outcome and the procedures chosen to achieve that outcome. As a result, the act taken should not be grossly unequal to the court's awareness,

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[11] Ferenc Hörcher, "Universal Morality: Contemporary Socio-Political and Philosophical Stakes, IS A UNIVERSAL MORALITY POSSIBLE?"*available at:* https://core.ac.uk/download/pdf/42941942.pdf (last visited on 12 November 2021).

[12]Leys, Wayne A. R. "Ethics and Administrative Discretion", *Public Administration Review.*(Winter 1943)

[13]*Rooke's case* A.D. 1598.

[14]*Associated Picture House v. Wednesbury Corporation*(1947) 2 All ER 680 (CA).

[15]*ibid*

[16]*Council of Civil Service Unions. v. Minister for the Civil Services* (1984) 3 All ER 935, pp. 950, 951

[17]"The Exercise of Discretion" (1936) *The Police Journal*, 9(2), pp. 235–244.

[18]*Supra* at 16.

and the conduct also can be contested through judicial review[19]. This requirement for rationality and how it aids in the configuration and evaluation of legislation has resulted in the development of the notion of reasonableness in administrative law[20].

In administrative law, the doctrine of reasonableness is often used as a substantial norm to assess the subject matter and substance of bureaucratic activity, providing instructions to government authorities in administrative tasks. Each and every action made by the government might be regarded irrational if it does not objectively reflect all of the legal and practically applicable aspects. Individuals assume and depend on governmental activities and legislation because they adhere to rationality.

3.2. Doctrine of Reasonableness: As a standard for legitimacy

The foremost contention for the reasonability of any legislation or regulation enacted by the administration is its legitimacy. Legitimacy implies compliance with laws and standards that could be justified logically.[21] Law's reasoning is founded on logic, and every law or regulation that is supported by correct reason has minimal issues and a higher percentage of acceptance and adherence. As a result, legitimacy is asserted via reasonability.

3.3. Doctrine of Reasonableness: As a standard for Statutory Interpretation

The goal of every statutory interpretation seems to obtain a reasonable understanding of the legislation. Compliance to reasonableness is accomplished by maintaining a close eye on two variables viz avoiding unreasonable or ludicrous consequences and contextual reasoning[22]. It is well known that the assumption underlying law creation is not to consider leaving them open to dubious inference.

Contextual reasoning refers to in what way the legislation is written and what it implies[23]. When engaging with contextual reasoning, there are two components of law - making powers that must be comprehended: activist law making and dynamic law making.[24] When a previously existing or community driven proposal is picked up and transformed into

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[1919] Pragya Dixit, "Doctrine of Reasonableness in Administrative Law", *Lawbhoomi*, *available at:* https://lawbhoomi.com/doctrine-of-reasonableness-administrative-law/ (last visited on 10 November 2021).

[20]M.P. Jainand S.NJain., *Principles Of Administrative Law*, 38 (Wadhwa & Company, Nagpur, 2011).

[21] Peter, Fabienne, "Political Legitimacy", *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), Edward N. Zalta (ed.), *available at:* https://plato.stanford.edu/archives/sum2017/entries/legitimacy/ (last visited on 11 November 2021).

[22] Ajoy P.B, "Administrative Action and the Doctrine of Proportionality in India", *JHSS*, Volume 1, Issue 6 (Sep-Oct. 2012), pp 16-23.

[23] Frederick J. De Sloovere, "Contextual Interpretation of Statutes", *5 Fordham L. Rev*. 219 (1936).

[24]*Supra* at 19.

legislation, this is referred to as activist law making. Dynamic law making entails the establishment of a notion on which public agreement has not yet been attained, which is subsequently transformed into a statute and spread. In both cases, the phrase reasonable is critical. Legislators and legal scholars utilize reasonableness as a measure for drafting, enforcing, and applying laws.

3.4. Doctrine of Reasonableness: As a standard for Judicial Review

The doctrine of reasonableness is particularly significant and relevant in the framework of Judicial Review. Since this is the subject of the analysis, administrative actions can be nullified if they are found irrational. Administrative action has been allowed unlimited independence on one side, but its choices are evaluated on the merits of the judgment on the other.

How much authority may the court exert in the guise of reasonability is a critical subject, and it's been proposed as a solution that administrative independence and discretion are permitted and must not be removed unduly when implementing rationality[25]. In the judgment of *Wednesbury Corporation,* Lord Greene M.R. held that the judiciary will not intervene in the decision of administrative authorities, provided that:-

- The authorities have taken account of all the necessary things which it should have taken.
- The authorities did not take into account the things which it should not have taken.
- The decision is not unreasonable (something which no reasonable authority will take).

Following the court's judgment, we can allude to an interpretation of reasonableness in two aspects: narrow, which examines the aforementioned direction that no rational body may undertake such an activity, and broad, which analyses all the aforementioned directions issued in that instance.

It is deemed important to take into account and pursue the broader interpretation of reasonableness since it can accomplish two purposes in administrative review viz it can establish the extent for government authority's expertise and, if the authority is skilled sufficiently, it can delegate its discretion.

[25]I.PMassey., *Administrative Law*, 5th edn., (Eastern Book Company, Lucknow, 2001).

4. DISCRETION INEVITABLE

The government cannot function without the administrative authorities being given discretionary powers. The following factors can be cited for the increase of discretionary power being given, like the government's welfare concept and the adoption of other development initiatives, mechanisms for environmental control, a lack of technical competence on the side of the legislation, as well as a demand for professional counsel, and any unforeseen circumstances. The administrative authorities face a wide range of issues due to the complexity of the subject matter, for which deploying discretion becomes necessary.

Administrative discretion is unavoidable for the reasons outlined above and because it is used to achieve specific goals. These functions can be broadly classified as follows:

• When enacting a law, lawmakers leave some gaps and ambiguities in the legislation. On a case-by-case basis, administrative powers will be used to fill in the gaps and uncertainties.

• Determination of people's rights and interests, which is subject to the authorities' discretion.

• Using administrative discretion, the policy objectives are hoped to be broadened.

• Discretion is employed while dealing with unforeseen circumstances.

• It is used to deal with issues that require technical expertise, as personnel in a technical department are better equipped to deal with such issues than legislators.

In his classic treatise on constitutional law[26], Dicey criticized such discretionary power. Discretion, according to Dicey, was the basis of inequity, prejudice, and arbitrary conduct. As a result, it was a violation of the rule of law. According to Dicey, the rule of law ensured total predictability of administrative action[27].

5. DISCRETION AND LEGALITY

The efficient exercise of discretionary power in accordance with and within the bounds of the law that vests it is critical to administrative law authorities. The conferment of it has increased as the state's tasks have expanded and gotten more complex. The courts face a difficult problem in providing administrative authorities greatest freedom but still allowing them to carry out the act's aim without acting arbitrarily.

The Judicial Review System has grown in tandem with the state's increasingly complicated regulatory tasks. In the *Wednusbury case*[28], the English courts abandoned the judicial

[26]Av Dicey, *Law Of The Constitution*(Macmillan).
[27]I.PMassey,*Administrative Law*, 65-66 (2008).
[28]*Associated Provincial Pictures Ltd. v Wednesbury Corp*., (1948) 1 KB 223.

restrictions of the war[29] and post-war[30] years and established the standard to be fulfilled for the exercise of discretionary power, as well as the proportionality test that came in through the door of the European Convention on Human Rights[31].

The Indian courts have taken a similar path, with the exception that, due to constitutional provisions, the proportionality test is a part of the Indian system. An administrative action is subject to scrutiny at both the stage of awarding discretionary power and the stage of exercising discretion. Articles 14[32] and 16[33] of the Constitution function as discretionary authority regulators at the moment of conferral. If an act of the legislature or the administration goes beyond the limits of the constitution, it is not constitutionally valid[34].

6. LIMITATION IMPOSED AT THE STAGE OF CONFERMENT OF DISCRETIONARY POWER

There is a need to check or limit such a discretionary power when the legislature writes a law in such a way that it is more likely to be abused, that is, if the legislation may be conveniently misused or exploited and the rights and interests of the people are compromised. As a result, in such instances, Article 14[35] and Article 19[36] of the constitution serve as check and balances on such power grants.

Administrative discretion can be challenged on the grounds that it violates constitutionally guaranteed fundamental rights. Administrative discretion, for example, can be used to treat different people differently without justification, or to render major freedoms of association, speech, and expression reliant on the good will of the administrative authorities. If the power granted is unchecked and there is a risk of discrimination, the law granting the discretion may be found unlawful for violating the fundamental rights protected by the Constitution by virtue of articles 14[37] and 19[38] of the Constitution, and such a law will be deemed to be an unreasonable restriction on those rights[39].

[29] *Liversidge v Anderson* [1942] AC 206.
[30] *Nakkuda Ali v Jayratne* [1951] AC 66.
[31] HCR Wade and CF Forsyth, *Administrative Law*, 181-218 (2000).
[32] The Constitution of India, art. 14.
[33] The Constitution of India, art. 16.
[34] S.PSathe., *Administrative Law,* 387 (2004).
[35] *Supra* at 7.
[36] The Constitution of India, art. 19.
[37] *Supra* at 7.
[38] *Supra* at 11.
[39] *Supra* at 34.

6.1. Limitation on Grant of Discretionary Power vis-à-vis Article 14-

The conferral of discretionary powers is subject to several limitations under Article 14[40] of the Indian Constitution. It guarantees citizens of India the fundamental rights of equality before the law and equal protection under the law. Any law that discriminates between people or groups of people is unconstitutional. When it comes to determining the validity of administrative authorities' discretionary powers, a similar approach has been used.

The Supreme Court highlighted the above-mentioned point in *Ram Krishna v Justice Tendulkar*[41], holding that the Court would look to see if the act contained any policies or principles for directing the government's exercise of discretion in matters of selection or categorization, and if it didn't, the statute would be struck down because it gave the government arbitrary and uncontrolled power.In another instance, The Passports Act, 1967 was in dispute *Satwant Singh v Assistant Passport Officer*[42]. The act was ruled to be unconstitutional because it gave the passport officer the discretion to grant or deny a passport without defining the scope of that power. The court urged Parliament to establish guidelines on how the passport officer should exercise his discretion.

In Re The Special Courts Bill 1978[43]**,** The Supreme Court upheld the special courts bill, which created special tribunals to investigate crimes committed by those in high political positions during Indira Gandhi's 1975 emergency. The bill gave the government the power to refer these cases to special courts. The discretionary grant was upheld by the Court because it was governed by the Act's policy. The provision of authority to send any case involving abuse of power to special courts during the emergency period was valid, according to the Court, and it constituted a class of cases.The Court decided in *R Patnakar Rao v Andhra Pradesh*[44]**,** that if there are built-in constraints against its misuse, such as:

1. If the power is given to a senior official or authority;
2. If there are regulations mandating that administrative discretion be preceded by a quasi-judicial inquiry,

Then the discretion is not unguided, unanalyzed, or arbitrary.

6.1.1. Discretion Given to a High Official

[40] *Supra* at 7.
[41] *Ram Krishna v Justice Tendulkar* AIR 1958 SC 538.
[42] *Satwant Singh v Assistant Passport Officer* AIR 1976 SC 1836.
[43] *Re The Special Courts Bill* (1979) 1 SCC 380.
[44] *R Patnakar Rao v Andhra Pradesh* (1996) 5 SCC 359.

The Supreme Court upheld a provision of discretion to the CAG granted by Section 7(2) of the India Audit and Accounts Departments (Subordinate Accounts and Subordinate Railway Audit Services) Service Rules 1974 in the matter of *Accountant General v S Doraiswamy*[45]. The CAG was viewed as a high-ranking constitutional authority who should act in accordance with the needs of the service and not arbitrarily. Furthermore, there was an assumption that public officials would carry out their responsibilities honestly and in line with the law[46].

6.1.2. Power to be Exercised By a Quasi- Judicial Authority-

In the case of *Digambar v Pune Municipal Corporation*[47], The power granted to the government under the Maharashtra Regional and Town Planning Act, 1966, to cancel or alter a license issued was determined to be not unguided because it could only be exercised after the person affected was given an opportunity to be heard. As there were no grounds for appeal, the challenged statute could not be deemed unconstitutional.

6.2. Limitation on Grant of Discretionary Power vis-à-vis Article 19-

Article 19[48] of the Constitution guarantees the right to freedom of speech and expression, as well as a host of other rights. When a person uses this right, others are obligated not to infringe on or limit those rights. As a result, any discretionary power granted to the government that hinders or restricts citizens' fundamental rights is ruled null and void. As a result, Art 19 operates as a check on the exercise of discretionary power.

If any discretionary power is granted that violates the rights of others, that discretionary power gets invalidated. However, the state might limit the above-mentioned rights in accordance with Art 19 (2) to (6). The Court decides whether the restrictions are acceptable[49]. The premise guiding the determination of a restriction's reasonableness is that executive power provided by law should not be arbitrary and uncontrolled, and it should not be left without any check and supervision by the above authorities[50].

6.2.1. Freedom of Speech, Assembly and Expression

[45] *Accountant General v S Doraiswamy* (1981) 4 SCC 93.
[46] *Chinta Lingam v India*, (19790) 3 SCC 768.
[47] *Digambar v Pune Municipal Corporation* AIR 1987 Bom. 297.
[48] *Supra* at 11.
[49] *Chintaman Rao v Madhya Pradesh*, AIR 1951 SC 118.
[50] *Dwarka Prasad v Uttar Pradesh*, AIR 1954 SC 224.

In *PrabhakarPandurang v Maharashtra*[51], a detainee sought permission from the Maharashtra government under r 39(1) (b) of the Defence of India Rules, 1962 to send the manuscripts of his book, which was purely of scientific interest, out of jail to his wife for publication. The State government was found to have acted illegally by refusing to send the manuscript. In *Madras v V.G. Rao*[52], The Supreme Court threw down a legislation that permitted an administrative authority to declare an association unlawful based on its subjective belief that the association was engaging in subversive activity, as a violation and undue restriction on the fundamental right to freedom of association.The law did not specify the basis for establishing such limits, which may be tested in a court of law. The Court went on to say that a democracy's lifeblood is the right to associate.

6.2.2. Freedom to Acquire Property

Raghuvir v. Wards Court[53], A law that sought to deprive a person of his property for an incredible duration based simply on an Officer's subjective satisfaction was ruled to be unconstitutional. In *Jagannath v Orissa*[54], a law authorising the executive to frame a scheme of management and administration of an endowed property without judicial intervention at any stage was held to be invalid as an unreasonable restriction on the right to property.

6.2.3. Freedom of Business

In *Uttar Pradesh v. Dwarka Prasad*[55], the Supreme Court ruled that requiring a licence to stock, trade, or store for sale an important commodity like coal was not unconstitutional. Provisions granting or refusing to grant, renewing or refusing to renew, suspending, revoke, cancelling, or amending any licence without the presence of any norms, principles, or rules to control the authority were deemed unconstitutional as breaching fundamental rights. Also in the case of *M/s Diwan Sugar Mills Co. Ltd. v. India*[56], The Sugar (control) Order 1955's Sections 4 & 5, which required companies to sell sugar at a set price, was upheld. The prices set were neither arbitrary nor below the cost of production. The enabling Act was upheld as well, because it included sufficient protections against misuse of power.

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[51] *Prabhakar Pandurang v Maharashtra* AIR 1966 SC 424.
[52] *Madras v V.G. Rao* AIR 1952 SC 196.
[53] *Raghuvir v. Wards Court* AIR 1953 SC 373.
[54] *Jagannath v Orissa* AIR 1954 SC 400.
[55] *Uttar Pradesh v. Dwarka Prasad* AIR 1954 SC 224.
[56] *M/s Diwan Sugar Mills Co. Ltd. v. India* AIR 1959 SC 626.

7. ABUSE OF ADMINISTRATIVE DISCRETION

Simply expressed, the term "abuse of administrative discretion" refers to circumstances in which an administrative authority has used its discretion in an unjustified or improper manner. In such instances, the court may intervene and give the case the necessary direction.
The following are the grounds for seeking judicial review of an alleged abuse of administrative discretion:

a. An administrative authority acts in a domain over which it has no legal authority and the authority goes beyond what the legislature has granted it permission to do.
b. The authority has attempted to accomplish what it is not permitted to do directly, namely, the colourable use of power, in an indirect manner.
c. Irrelevant concerns were taken into account by the authority when making a judgement, but vital issues were ignored.
d. The authority's action is arbitrary and the authority acted in an ill-intentioned manner.
e. Failure to follow natural justice principles and Unreasonableness.

In the case of *Express Newspaper (P) Ltd. v. Union of India*[57], The Indian Express newspaper received a notification of re-entry upon forfeiture from the government. The warning was false, according to the publication, and was based on a spurious factor - the Indian Express' negative comments on the Congress government. The claims were not denied by the administration, but they were dismissed as irrelevant. The notice was invalidated because it was false, and the Court also stated that it is up to the Court to decide what is relevant and what is not. It is forbidden for the parties to discuss it.
Lastly in the case of *J.K Aggarwal v. Haryana Seeds Development Corporation*[58], A Company Secretary contested the validity of an investigation into his conduct that led to his dismissal, arguing that he was denied legal representation despite the fact that the company's presenting officer was a legally qualified person, and that this was a violation of natural justice.The Supreme Court of India accepted the reasons and ruled that the investigation was handled in breach of natural justice principles since the appellant was denied legal representation, denying him a fair chance to present his case against a qualified prosecutor in the best possible way.

8. RECOMMENDATIONS

[57] *Express Newspaper (P) Ltd. v. Union of India* 8th January 1958.
[58] *J.K Aggarwal v. Haryana Seeds Development Corporation* 1991 AIR 1221.

It is recommended that, in order for the rule of law to exist in a modern welfare state, a stable balance is to be struck between the conferment of administrative discretion that the State grants to the executive and the people's fundamental rights and freedoms. It is only then can India be supposed to become the ideal democratic republic that the Indian Constitution envisions. Although the judiciary has sadly damaged the spirit of the rule of law in many instances by affirming the constitutionality of some vague clauses that, in effect, put unrestrained discretionary power on the administrative authorities, it is recommended that these ramifications be addressed and the spirit of rule of law be upheld.

The modern welfare state's framework necessitates that administrative officials be given discretionary powers to assist them in doing their duties properly. Administrative discretion creates a variety of possibilities for interaction between administrative discretion and fundamental rights, whether in conflict or convergence. However, it must be admitted that the Indian judiciary has done an outstanding job in repeatedly attempting to strike down clauses that gave administrative officials unrestricted and uncanalised power. This approach of the Supreme Court is commendable and consistent with the founders of the Indian Constitution's vision of the Indian republic.

9. CONCLUSION

Administrative discretion is an important aspect of the administrative authorities' rule-making process. It empowers them to enact rules and regulations that the legislature has failed to implement for a variety of reasons. Administrative discretion in effect is the foundation on which the administrative authorities' operations are based; without which, effective acts are impossible to be carried out. The concept of administrative discretion however, is like a double-edged sword, where on the one hand, the importance of administrative power is well understood, and administrative discretion can never be eliminated, as long as it is not arbitrary; on the other hand, this discretionary power carries the risk of the authorities exercising it being unreasonable and arbitrary, and acting against the people's interests. It even poses the risk of undermining the rule of law.

The underlying premise of discretionary power's legality is that it must be exerted on reasonable grounds and supported by justification. Any power that is exercised based on the whims and fancies of the authority, using it risks it becoming unguided, uncontrolled, and in

violation of citizens' rights. As a result, any discretionary power that appears to be arbitrary and unguided should be checked at the time of conferment. Fundamental Rights under Articles 14[59] and 19[60] of the Constitution are used to accomplish this. Any rule or statute that gives authorities discretionary power and is violative of fundamental rights is null and void.

Thus, in conclusion, the modern welfare state's structure necessitates the grant of discretionary powers to administrative agencies in order for them to properly perform their tasks. Although, it is this discretion that must be granted with care, with appropriate checks and balances in place, in order to achieve the goal for which such powers were granted in the first place.

[59] *supra* at 7.
[60] *supra* at 11.

LOVE JIHAD LAW – IS IT A STEP AHEAD OR BACKWARD AS A NATION?

Syed Zainul Hasan Rizvi

ABSTRACT

Marriage is purely a personal matter and the state's intervention in such cases victimizes the couples, as there are adequate laws which deal with marriages. As per Human Rights Watch, "A woman can be harassed by (individuals within) her family for a variety of reasons, including refusing to enter into an arranged marriage, being a victim of sexual assault, seeking a divorce even from an abusive husband, or (allegedly) committing adultery." The simple suspicion that a woman has acted in a manner that "dishonours" her family is enough to bring about a life-threatening assault. Therefore, in this research paper, the authors would be analyzing various factors, ranging from the history of the legislation to its constitutional validity. In a country where even age-old practices and gender-biased laws like homosexuality and adultery are being held to be unconstitutional as they violate fundamental rights like the right to privacy, right to life, right to equality, right against discrimination etc. guaranteed under "art. 14, 15 & 21 of the C.O.I," legislation like love jihad is discriminatory not only on the basis of religion but also gender, given the common perception of male influence in a patriarchal society. The gender bias is evident from the fact that most of the cases filed under anti-conversion laws are against male members of society. This law is nothing but following the path of social evils that were practiced before Independence in India for a very long period of time in order to curb the voice of women in society. The act goes right to the heart of the legally guaranteed right to privacy.

1. INTRODUCTION

In the words of *Immanuel Kant, German Philosopher*, "Religion is the acceptance of all our roles as divine commands[1].A secular state is described as one in which no official religion is practised. It also ensures that the state has no religion of its own and that all citizens of the world are similarly entitled to religious rights, including the freedom to profess, observe, and spread any religion.[2] Secularism was defined in ***S.R. Bommai Case*** [3] where it was determined that secularism is a fundamental characteristic of the Indian Constitution. In the Indian Constitution, the principle of secularism is omnipresent. Political democracy will not survive

[1] Immanuel Kant: Philosophy of Religion https://iep.utm.edu/kant-rel/,
[2] Indra V. Rajnarayan 1975, AIR, SC 2299.
[3] S.R. Bommai v. Union of India., AIR 1994 SC 1918.

long unless it is supported by social democracy. "A way of life that embraces liberty, equality, and solidarity as life's values" is what social democracy entails. - *Dr B.R. Ambedkar*. Though the legislature claims that ***Anti-conversion Laws*** *like the* ***U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020*** is for the protection of women belonging to backward communities, the realities prove otherwise. Few contend that anti-conversion or Love Jihad laws implemented under the BJP's rule have been abused and are causing confusion and disharmony in society by targeting a certain community and gender. The question is whether in a country where even age-old practices and gender-biased laws like homosexuality and adultery are being held to be unconstitutional or unlawful as they violate fundamental rights like the right to privacy, right to equality, right against discrimination, right to life, etc., guaranteed under the Constitution, such legislation is not only discriminatory on the basis of religion but also gender, given the common perception of male influence in a patriarchal society. According to Human Rights Watch's definition, "a woman can be exploited by (individuals within) her family for a variety of reasons, including refusing to enter into an arranged marriage, being a victim of sexual assault, seeking a divorce despite an abusive husband, or (allegedly) committing adultery." The mere thought that a woman has acted in a way that "dishonours" her family can lead to a life-threatening assault. In nations where such practises are still practised, love jihad laws pose a threat to the couple's life[4]. The ***UP Prohibition of Unlawful Conversion of Religion Ordinance 2020***[5] is focused on patriarchal society. This act aims to lower the status of Hindu girls as well as silence the voices of Hindu women in the state of Uttar Pradesh. The oldest male member of the household, as ***Henry Maine*** pointed out, is the family's head and has full influence over the family.[6] Similarly, this act portrays the male dominance over women and is trying to restrain their freedom of choice.

2. HISTORY BEHIND LOVE JIHAD LAWS

Love jihad laws are nothing but they are on the path of social evils that were practiced before Independence in India for a very long period of time in order to curb the voice of women in society. The Arya Samaj launched the Shuddhi (purification) movement in 1920, led by Swami Dayanand Sarawati, whose main goal was to reintroduce Hindus to their religion after they had adapted other religions. The sections mentioned in Loving Jihad Laws are a reflection of the

[4]Venkatesan, Over 1,000 'honour killings' take place every year, THE HINDU, https://www.thehindu.com/news/national/Over-1000-lsquohonour-killings-take-place-every-year-Report/article16192236.ece

[5] U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020.

[6] Dr. N.Y. Paranjape, studies in jurisprudence and legal theory 8th edition.

Arya Samaj movement because the 1920s were marked by a spurt of competitive communalism, which provided fundamentalist propaganda machineries a germane ground to flourish. Banners and slogans with communal titles were being distributed in the markets by the members of the Arya Samaj in present the country has witnessed that there are organizations such as Anti Romeo squads established in the state of UP have humiliated and targeted many married couples also and girls number of times.[7] Not only in India has such discriminatory laws and evil practises been practised on a number of occasions in society, but in the world's history, particularly in the United States, there was a time when discriminatory anti-miscegenation laws prohibited women from marrying people of different races in order to prevent interracial marriage, and such laws resulted in the prohibition of marriage between Native Americans and African Americans in Louisiana way back in 1400.8 Even Nazi laws forbade inter-racial marriage and granted the right to marry and have children to "men and women of full age without any limitation due to race, nationality, or religion." "Equal rights are guaranteed both during and after marriage."

According to Dr. B.R. Ambedkar, endogamy provided the basic foundation for the caste system by prohibiting intermarriage and was also responsible for women's inferior status through caste groups. As a result, the Hindu Code Bill, one of his most ardent works since independence, scrapped caste and sub-caste laws in sanctifying Hindu marriages, ensuring that all Hindu marriages, regardless of the castes to which the couples belong, would have the same sacramental and legal rights. The Bill's removal of caste restrictions weakened the Brahmanical patriarchy's structural ties between caste, kinship, and property, and recognized the politically equal Indian woman citizen as a person, not only as the bearer of her family's, kinship's, and community's honour. Monogamy, divorce, and an equitable share of property for women were all included in the bill. Hindu orthodoxy vehemently opposed the resolution, calling it a "manifesto of unrestricted rights and equality for women." Ambedkar, on the other hand, remained steadfast in his determination to see the bill through and resigned in protest of the government's and parliament's lukewarm support. A diluted version of the bill was eventually approved. Unfortunately, the yoke of Brahmanical patriarchy still binds Indian society. Most marriages are arranged, and those who defy caste or religious boundaries face varying degrees of social wrath. The UP ordinance takes advantage of society's tyranny. The law is an

[7] https://www.newindianexpress.com/nation/2017/mar/23/particular-castes-being-targetted-by-anti-romeo-squads-in-uttar-pradesh-says-opposition-mp-1585066.html\

[8]Martin, Byron Curti," Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation", pp. 1026, 1033–4, 1062–3, 1136–7.

aggregated version of the laws prohibiting inter-caste marriages, which Dr. B.R. Ambedkar strongly opposed in-toto. Also, the bare feet of love jihad can be traced from the history of the world where in the past such laws were implemented, but they were not able to maintain their sustainability as they were discriminatory in nature and were flourished out.

3. WHY ARE THESE LAWS OPPOSED?

The primary duty of the government is to maintain law and order in its state. In the words of Locke, “wherever law ends, tyranny begins”[9] The imminent breakdown of public order and the rule of law, by placing the lives and liberties of ordinary people in jeopardy, has the potential to erode citizens' confidence in their democracy and undermine its authority. Large-scale violence and destruction will jeopardise a country's social stability, jeopardise national security, and derail economic progress and development prospects. Whether there is a breakdown of public order, that is due to the legislature's and executive's inadequacies. In Ram ***Manohar Lohia Case***[10] The five-judge bench emphasized the difference between public order and law and order situations. The Hon’ble SC decided that in the case of "public order," a specific activity must have an impact on the community or the general public because it "embraces more of the community than 'law and order,' which only affects a few individuals." Also, the said act, i.e., "UP Prohibition of Unlawful Conversion of Religion Ordinance 2020," motivates communally divisive agendas and has a negative impact on societal peace and harmony. Section 3 of the challenged ordinance states that "re-conversion" to a person's former faith is not prohibited, even though it is tainted by deceit, coercion, misrepresentation, or any other means. Through this peculiar provision, the law seems to contradict its own vicious theories of forceful conversions and breach of public order. "It is yet another attempt, in a string of communally charged initiatives, aimed at reaping electoral dividends and eventually leads to a law breach of law and order because this act is targeting two communities and is trying to create hatred between them, which leads to a breach of law and order."

4. CONSTITUTIONAL VALIDITY AND VIOLATION OF FUNDAMENTAL RIGHT

"Denying people access to marriage ...it’s denying them the status and dignity of being ordinary citizens in society."

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[9] Book II, JOHN LOCKE, Two Treatises of Government that even magistrates must abide by the law. Chap. XVIII Of Tyranny, Section 202.
[10] Ram Manohar Lohia v. State of Bihar, AIR 19996 SC 740.

- *Justice Albie Sachs South Africa*

When any legislation has been made the primary requirement to be satisfied is that it should be constitutionally valid. The Love Jihad laws are against the fundamental right guaranteed under ***Article 14[11], 15(3)[12] and 21[13] of the constitution***. The Right to Equality[14] being the magnificent cornerstone of Indian Democracy.[15] The Apex Court in ***Onkar Lal Bajaj* Case**,[16] opined that the inability to apply one's mind is a facet of subjective power exercise. In the lack of a valid classification, the equals' right to equality cannot be ignored unilaterally.[17] Where the definition is based on the assumption that women are frail, a Hon'ble Constitutional Court, such as this one, shall reject such arguments.[18]

The Hon'ble SC in ***Sabarimala judgement,***[19] by Chandrachud J., held that: "The postulate of equality is that human beings are created equal. The postulate is not that all men are created equal but that all individuals are created equal. To exclude women from worship by allowing the right to worship to men is to place women in a position of subordination. The Constitution should not become an instrument for the perpetuation of patriarchy. The freedom to believe, the freedom to be a person of faith and the freedom of worship, are attributes of human liberty".[20] In its gendered state, discrimination is still based on sex. The courts have been able to separate sex from gender and uphold overtly patriarchal laws due to the inclusion of the term "only" in this Article.[21]

In ***Vasantha Case,***[22] a clause of a law excluding women from working in factories at night was declared illegal because it discriminated solely on the basis of sex by the Madras HC. Even in ***Joseph Shine case.***[23] the SC stated that "considering a free man as the property of another is anathema to the ideal of dignity. "It was stated that ***Article 15(3)***[24] is an empowering provision that permits the state to create laws that protect and empower women and children. ***Article 15***

[11] INDIA CONST. art. 14.
[12] INDIA CONST. art. 15 cl. 3.
[13] INDIA CONST. art. 21.
[14]Supra note at 10.
[15] Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477.
[16] (2003) 2 S.C.C. 673.
[17]Virendra Krishna Mishra v. Union of India, (2015) 2 S.C.C. 712.
[18] Indian Young Lawyers Association v. The State of Kerala, W.P. (Civil) No. 373 of 2006.
[19] *Id.*
[20] *Id.*
[21] Jaising, I., "Gender Justice and the Supreme Court" in Kirpal, B.N. et al (eds.), Supreme But Not Infallible: Essays in Honour of the Supreme Court of India, Oxford India Paperbacks, 2000, p. 294.
[22] Vasantha R v Union of India, 2001 II LLJ 843.
[23] Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.
[24] Supra note at 11.

clause (3)[25] is ineligible to be considered beneficial law. The right to privacy and personal liberty, on the other hand, is not unlimited; it is susceptible to reasonable constraints when the public good is at issue. Right, the limits of personal liberty are impossible to define in black and white; additionally, such liberty must serve the general good. ***Article 21*** does not protect a married couple's right to have a consenting sexual relationship outside of marriage. "In view of Article 21, a legal infringement of privacy must be justified by a statute that is both fair and legal," the court said.

Art. 14 has been declared as the Basic Structure of the C.O.I. by the Hon'ble S.C. of India.[26] Further, Art. 14 only permits Reasonable Classification for achieving specific ends and forbids class legislation.[27] As per ***Art. 14***[28], any legislation that is racial in nature must have an intelligible differentia and a logical connection to the goal that is being pursued. If the object itself is discriminatory, then the explanation that the classification is reasonable is immaterial.[29]The expression *"intelligible differentia"* means a distinction that can be comprehended.[30] An element that separates or places someone in a particular state or class from another and can be understood. Under ***Art. 15***[31] discrimination on the basis of faith, ethnicity, caste, sex, or birthplace is illegal.[32] In ***Art. 15***, the term "discrimination" implies an aspect of unfavourable prejudice.[33] The state is not prohibited from making any "special allowance" for female members, according to ***Art. 15(3)***.[34]

The proportionality doctrine has its origins in Europe. The proportionality test is a "heuristic tool" for determining whether a restriction on a basic right is legal.[35] It requires that a rights-limiting action be taken for a good reason, with suitable and sufficient methods, and a proper balance created between the value of accomplishing the goal and the harm caused by restricting the right to do so.[36] Proportionality has become the gold standard for judging the legitimacy of restrictions on individual rights provided by the constitution and by international human rights

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[25] *Id.*
[26] M Nagaraj v. Union of India, A.I.R. 2007 S.C. 1.
[27]M.P. Jain, Indian Constitutional Law 1411 (Jasti Chelameswar & Dama Seshadri Naidu eds., LexisNexis 8th ed. 2018). at 910.
[28] Supra note at 10.
[29] Subramniam Swamy v. CBI, (2014) 8 S.C.C. 682.
[30]D.K.Srivastava, Intelligible Differentia in India, ASIAN ENCYCLOPEDIA OF LAW (Mar. 3, 2017), HTTPS://INDIA.LAWI.ASIA/INTELLIGIBLE-DIFFERENTIA/#TAB5.
[31] INDIA CONST. art. 15.
[32] *Id.*
[33] M.P. Jain, Indian Constitutional Law 1411 (Jasti Chelameswar & Dama Seshadri Naidu eds., LexisNexis 8th ed. 2018) at 969.
[34]Supra note at 11.
[35] Bank Mellat v HM Treasury (No 2) [2014] AC 700, 790-91 (UK Supreme Court).
[36] Aharon Barak, Constitutional Rights and Their Limits (CUP 2012) 3.

courts.[37] In ***Chintaman Rao case***, the Apex Court stated that a measure that restricts freedom must be equal to the right.[38] ***Om Kumar case[39]*** was a lawsuit filed by a plaintiff against the Indian government. The term "proportionality" was defined as follows in light of regulatory rules: "Proportionality" means that the legislator or administrator employed the most appropriate or least restrictive methods to fulfil the legislative or administrative order's purpose in a reasonable manner. According to this perspective, the court would ensure that legislative and regulatory authorities strike a careful balance between the potential negative impact of laws or administrative decisions on people's rights, freedoms, and interests, while also remembering why they were passed in the first place. Legislative and regulatory agencies are granted discretion or a variety of alternatives, but it is up to the court to determine if the choice made violates those rights. That is what the term "proportionality" means.

As stated in ***Puttaswamy Case***,[40] such an invasion must satisfy three requirements: (i) legitimacy, which presupposes the presence of law; (ii) necessity, which is established in terms of a valid State interest; and feasibility, which is defined as the ability to carry out the invasion and (iii) proportionality, which guarantees that the object and the means used are in a rational relationship. In a greater degree of review, the court considers not only whether the statute represents a valid purpose, but also whether the goal is important enough to justify the violation of a constitutional right.[41]

As per the ***Black's Law Dictionary,*** the right to privacy refers to a person's right to privacy, which includes the right to be free of unwelcome intrusion. Individual sovereignty of the body and mind is preserved thanks to privacy. Individual autonomy refers to a person's ability to make important life decisions. Privacy is a value, a cultural state, or a situation aimed at individuals seeking mutual self-realization, and it differs by culture. The right to privacy was viewed as a representation of an inviolate individuality, a source of freedom and liberty against which the human being had to be protected. The need to be alone has been justified by the right to privacy.[42] ***Article 21*** allows a person to choose their choices in a variety of areas of life, such as whether and how they eat, how they wear, what religion they follow, and a slew of other areas where liberty and self-determination necessitate a decision to be taken in the privacy of

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[37] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 73, 161; David Beatty, The Ultimate Rule of Law (OUP 2004) 159-88; David Law, 'Generic Constitutional Law' (2005) 89 Minnesota Law Review 652.

[38] Chintaman Rao v State of MP AIR 1951 SC 118.

[39] Om Kumar v. Union of India, (2001) 2 SCC 386.

[40] Justice K. S. Puttaswamy (Retd.) & Anr. v. UOI & Anr., (2017) 10 SCC 1: AIR 2017 SC 4161.

[41] R v Oakes, [1986] 1 SCR 103, 138 (Canadian Supreme Court); R v Big M Drug Mart Ltd, [1985] 1 SCR 295, 352.

[42] Dr. P.K. Rana, Right to Privacy in Indian Perspective, 2IJL 07(2016).

one's mind. Placing the Love jihad laws on a higher pedestal we find that the love jihad law is contrary with the basic articles of UDHR which states that men and women have the right to marry and have a family both having equal rights[43]

In the current "LOVE JIHAD" act ***Section 8(1)***[44], which makes it obligatory to obtain conversion consent two months in advance, is inherently arbitrary and infringes the "right to privacy." The state has no part in interfering with people's personal preferences because privacy is at the heart of the human identity and recognises each person's right to make choices and make decisions on things that are private and personal to them. The core elements of privacy are the security of intimate intimacy, the sanctity of family life, marriage procreation, the home, and sexual preference. The said act also requires family members of those who have converted to file a FIR under ***section 4***[45]**.** In contexts where interfaith marriage has willingly taken place, this part of the "Love Jihad" is used as a form of instrumental abuse.

The present Act when tested on the doctrine of proportionality violates ***Article 14***[46]***, 15(3)***[47] and ***21***[48]. ***Section 3***[49] ***of the U.P Ordinance Act, 2020*** makes it illegal for one citizen to change another's religion by marriage. ***Section 4***[50] which allows any family member of the alleged victim either related by blood or marriage or adoption can file an FIR leading to a non-bailable arrest warrant against the accused. ***Section 5***[51] aims to ban forced conversions by imposing a five-year jail sentence and a fine of Rs. 15,000 on someone who is found guilty of forced conversion. ***Section 6***[52] gives courts the power to nullify any marriage entered into solely with the aim of unlawful conversion or for the sole purpose of marriage. These laws, which give the government police authority over a citizen's choice of life partner or religion, go against ***Article 21.***[53]

5. JUDICIAL INTERPRETATION

That in the case of ***Gian Devi***[54], a three-judge bench ruled that if a girl is above the age of eighteen, no restrictions on where she can live or with whom she can live can be imposed. India

[43] UDHR. art. 16.
[44] U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020, Section 8(1).
[45] U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020, Section 4.
[46] Supra note at 10.
[47] Supra note at 11.
[48] Supra note at 12.
[49] U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020, Section 3.
[50]Supra note 44.
[51] U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020, Section 5.
[52] U.P Prohibition of Unlawful Conversion of Religion Ordinance Act, 2020, Section 6.
[53] Supra note at 47
[54] Gian Devi v Superintendent, Nari Niketan, Delhi 31.

is a democratic and free republic if a boy or girl doesn't agree of an inter-caste or inter-faith union, the best they can do is cut off social relations with the son or daughter; they also cannot intimidate, commit, or provoke acts of abuse, or offend the person involved in the marriage.[55] In the ***Lata Singh case***, the court also ordered that if a major boy or girl marries a major woman or man, the couple will not be abused by anyone, nor will they be threatened or subjected to acts of abuse, and that anyone who makes such threats, harasses, or commits acts of aggression, whether on his own or at his instigation, will be held accountable by the police, who will file criminal charges against them and take more harsh action as required by statute.

The Supreme Court in the case of ***Shafin Jahan case***[56] had condemned the practise of labelling a woman as "weak and vulnerable, capable of being abused in several respects" in the Hadiya case for moving against the tide of social acceptance. The Apex Court observed that "In determining if Shafin is a suitable partner for Hadiya, the High Court has strayed into forbidden territory. Since our decisions are ours, they are valued. Recognition of intimate personal choices is not based on social acceptance. Personal liberty is also protected by the Constitution from disapproving audiences. Our Constitution's strength comes from its appreciation of our culture's heterogeneity and diversity. Marriage's complexities, including private decisions on if one is willing or not willing to marry and how to marry, are beyond the state's influence. As upholders of constitutional liberties, courts shall ensure that these rights and freedoms are protected.

In ***Loving v Virginia***[57], the SC of the US struck down 16 remaining "anti-miscegenation" legislation related to interracial marriage in the United States. The marriage of Richard and Mildred Loving, a white man and Black woman was declared unlawful by the Virginia state Statute. The Court held that the Code of Virginia was solely based on racial discrimination and was trapping equal treatment and such restriction was in contravention with the 14th Amendment. ***Chief Justice Earl Warren*** observed that the state has no role in deciding upon the freedom of marriage of the individuals. This decision is often cited as a watershed movement in the dismantling of "Jim Crow race laws". The *Virginia Code (Sections 20-59)* had lengthy and broad clauses that prevented marriages notwithstanding explicit agreement, similar to the UP 'Love Jihad' ordinance. They were written in such a manner that they allowed intimidation of couples before marriage, similar to how the UP ordinance is being used even though no conversion is taking place.

[55] Lata Singh v. State of U.P., (2006) 5 SCC 475.
[56] Shafin Jahan v. K.M. Ashokan, AIR 2018 SC 357.
[57] Loving v Virginia, 388 U.S. 1 (1967).

Since dignity is impossible to imagine without choice, personal preference is inextricably linked to dignity. True, constitutional restraints apply, but no one, and we mean no one, has the authority to interfere with the fulfilment of the expressed decision in the absence of such a constraint. Human dignity has both intrinsic and practical value, and privacy is a vital component of integrity.[58] Human dignity is a legal right or a legally protected interest in and of itself as a natural attribute. Dignity and freedom are inextricably interwoven in their instrumental character, with one acting as a means of achieving the other. The term "privacy" describes a set of safeguarded rights. The protection of freedom protects citizens from unconstitutional government participation. It prohibits the government from discriminating against citizens. The state's destruction of sacred personal space, whether physical or emotional, is a violation of the pledge to avoid unconstitutional government intervention. When these safeguards collide with gender, a private zone emerges that incorporates all of the important aspects of gender identity. Home, sexuality, procreation, and sexual identity are all part of a person's dignity. Above all, the right to privacy recognizes the inalienable right to choose how one's liberty is practised.

It would be difficult to conceive of integrity in its full glory if one's freedom to express one's own choices was restricted. When two adults marry freely, they choose their own route; they marry because they believe it is their destiny and they have the moral authority to do so. People have this freedom, and any violation of it is a violation of the Constitution, it must be expressed unequivocally. When a person reaches the age of majority, he or she is no longer subject to the influence of others in making important decisions.[59]

In the ***Salamat Ansari Case***,[60] the Hon'ble HC of UP declared that "We don't see Priyanka Kharwar and Salamat as Hindus and Muslims, but rather as two mature people who have been living together and happily together for a year of their own free will. The courts, especially the Constitutional Courts, are obligated to protect an individual's right to life and liberty as provided by ***Article 21***." It also added that "the right to live with a person of one's choice, regardless of religion, is fundamental to one's right to life and personal liberty. Interference in a personal relationship would be a significant infringement of the two parties' right to freedom of choice."

6. CONCLUSION

[58] Supra 36.
[59] NandaKumar vs. State of Kerala., (2018)16 SCC 602.
[60] Salamat Ansari v. State of UP, Crl. Mis. Writ Petition No- 11367 of 2020.

Aristotle once said, "Government by-laws is superior to government by men" and it is time we bring laws into order. However, the current Love Jihad Act, which is being implemented in nearly 9 states in India, is a law that depicts patriarchal society, and thus it is a law that places government by men superior to government by law due to its discriminatory nature. That Marriage is a significant decision and a part of a person's life. It is a means for a person to express and exercise his or her personal freedom of choice. It is a blessing that the other spouse, family, and culture agree, but those who do not have the good fortune of winning the consent of their loved ones have the full right to have their decisions covered and valued. No one should be able to mess with a person's ability to choose a partner. It's sad the law allows for this kind of intervention. Articles 14, 19, and 21 have been dubbed the "golden triangle," and all of them are violated here.

In the words of Locke, "Wherever the law ends, tyranny begins." But in the present act, there is tyranny within the law and such tyranny is revolving in the states with the implementation of such acts and is degrading the status of women and uplifting the male-dominated society in these various states and giving unrestricted powers in the hands of the administration to intervene in the personal lives of the citizens. The harsh penalties imposed for violating the fictitious ordinance are contrary to penological jurisprudence. The Act particularly states that the reversal of the presumption of proof on the accused is in violation of both the Criminal Judicial System's doctrine and Section 106 of the Indian Evidence Act. This act also violates India's obligations under international law, including Part III of the Constitution, UDHR, ICCPR, CEDAW, etc. This act also takes away judicial discretion from the Family Court concerned to adjudicate on the issue of marriage and consent and gives the command that any such marriage would be void. These acts are creating a "Hostile Discrimination" between different sects of religious groups and such discrimination leads to violation of ***Art 14***.

As per the ***Special Marriage Act, 1994,***[61] the parties must file a Notice of Intended Marriage in the relevant form with the Marriage Registrar of the district in where at least one of the parties to the marriage has resided for the past 30 days. If no one has objected, the marriage may be solemnized once thirty days have passed from the day on which notice of an intended marriage was published. The couple may choose to have their marriage solemnized at the Marriage Office of their choice. ***Section 7 of the Special Marriage Act*** speaks about objections raised against such marriage[62] while ***Section 8*** mentions the Procedure on receipt of the

[61] Special Marriage Act, 1994.
[62] Special Marriage Act, 1994, S.7.

objection.[63] Marriage being a personal matter, religious conversion associated with marriage should only be challenged and made void in the cases where there is no belief or faith. For example, in ***Robasa Khanum v. Khodabad Irani***[64], the court held that "the conduct of the spouse who converts to Islam must be based on the rules of justice, equity and good conscience."

In the current Love Jihad act ***Section 8(1)***[65] makes it obligatory to obtain conversion consent two months in advance which further, might be a period of time where the couple might face pressure from the family or there might be a risk of honour killing. The said act also requires family members of those who have converted to file FIR under ***section 4***[66]**.** In contexts where interfaith marriage has willingly taken place, this part of the "Love Jihad" is used as a form of instrumental abuse. Moreover, when there is a Special Marriage Act, 1994, which exists for such marriages, then what was the necessity to implement Love Jihad laws? From the above-mentioned laws and case laws, it can be understood that marriage is a personal aspect of an individual's life and laws like these will lead to more chaos in a multi-religious and diverse country like India. As in our country, there are still cases of honour killing where it involves violence, generally, murder, perpetrated by male family members against female family members who are suspected of bringing shame or dishonour to the family name. Such a law will ultimately give rise to such crime against women, whereby also depriving them of their integral right.

[63] Special Marriage Act, 1994, S.8.
[64] Robasa Khanum v. Khodabad Irani., (1946) 48 BOMLR 864.
[65] Supra note at 43.
[66] Supra note at 44.

THE INDIAN VOLUNTARY SECTOR: LACUNAS IN THE REGULATORY FRAMEWORK (REGISTRATION & TAXATION)

Harsh

ABSTRACT

India is a nation with enormous philanthropic potential, and it is home to millions of registered NGOs. The present study is a report on the regulatory framework for Voluntary Organizations in the country. It is hypothesized that the primary factors plaguing the voluntary sector in India are *(a) excessive governmental oversight and bureaucratic requirements, and (b) ineffective tax compliance and incentive structure.* The analytical input for the study has been derived from the relevant studies conducted by *the Centre for Budget and Governance Accountability* (*CBGA*), the *Centre for Social Impact and Philanthropy (CSIP),* and other credible research centers. In addition to the private sector studies, policy statements and government reports have also been referred to constantly. The study is further enriched by a comparative analysis of relevant laws across countries. The recommendations made have been drafted keeping in mind the aspirations of the government as expressed in the *National Policy on Voluntary Sector (2007).*

Keywords: NGO, Voluntary Organization, Charity, Poverty, Tax Incentive, Regulation, Bureaucracy

1. REVIEW OF LITERATURE

The Voluntary Action Cell (2007) constituted by the (Planning Commission) published the "National Policy on the Voluntary Sector" in May 2007. The report starts with defining what comprises a voluntary organization. The characterization includes autonomy, well defined objectives, and non-distribution of profit to the directors. Moving on, the policy discusses certain problems that the Indian voluntary sector is faced with and proposes possible remedial measures. The first objective of the policy is to create "an enabling environment" for VOs. TO achieve this, several recommendations have been made pertaining to the simplification of procedures around registration and compliance. The document also stresses the need to establish a rational tax incentive system. Recognizing the role of foreign funding in the operation of VOs, the policy once again proposes liberalisation of the respective rules. Next,

the policy moves on to discuss the ways to develop better cooperation between the government and the VOs, but this lies outside of the scope of the current article.

Centre for Social Impact and Philanthropy (2021) has commissioned a study titled "Tax Incentives for Philanthropic Giving: A Study of Twelve Countries (2021)." The said report is a comparative study of the tax incentives offered in twelve different countries. A comprehensive analysis of data from 12 countries shows that India lies somewhere in the middle when it comes to the generosity of its tax incentives. The study mentioned above draws this conclusion by analyzing the data on all four factors mentioned above[1]. The following table serves as an illustration of this point. The report further declares the UK, France and Singapore as nations with the most generous tax incentive system. On the other hand, South Africa, Brazil and Mexico appear to lie on the other end of the spectrum (having the least generous incentive system). Many more observations made in the said report are mentioned in this research paper. The article concludes with several reform recommendations aimed toward creating a more incentivizing environment for donors and philanthropists.

Centre for Social Impact and Philanthropy (2020) published a study entitled "Regulatory Frameworks for India's Voluntary Sector: Global and Cross-sectoral Review of Initiatives and Practices." The research paper explores the existing regulatory frameworks and practices concerning Voluntary Organizations. The study strives to arrive at methods to boost public confidence, reduce regulatory burdens, and ensure that India's voluntary sector has autonomy and high levels of professionalism. The report also focusses on the tax regime, and offers a fair critique of the same. Some of its recommendations include- Introducing enabling and supportive policies and legal reform in consultation with VO stakeholders; Increasing the participation of umbrella organizations/intermediaries, significant donors, and VOs in sector-led initiatives; Endorsing projects by recognizing developed codes and standards and appointing accreditation institutions to certify complying VOs. The study has been referred to multiple times in the current article.

The Steering Commission (2002) published the "Report on Voluntary Sector" in the January of 2002. The document extensively highlights the significance of Voluntary Organizations at the national and the international level. For instance, it discusses the role played by VOs since ancient times. Hindus had *Maths* and *Ashrams*, Muslims had *Waqfs* and *Khanqahs*, while

[1] *i.e. (a) The Form of Incentive; (b) Existing Tax Rates; (c) the Rate of Incentive; and (d) the Incentive Ceiling.*

Sikhs had *Gurudwaras* and *Deras*. These institutions used to offer fooding, housing, and spiritual services to the needy. In the olden days, the king was seen as the guardian of his people. However, some people inevitably ended up impoverished and disenfranchised. Philanthropic institutions of the past used to help such ill-fated people. The report then discusses the way to promote government-VO partnership and methods of capacity-building for VOs. The last segment, therefore, lies outside of the scope of this article.

2. THE EXISTING REGULATORY FRAMEWORK: THE FLAWS

2.1. An Introduction to Voluntary Organizations

The National Policy on Voluntary Sector (2007)[2] defines Voluntary Organizations (VOs) as "organizations engaged in public service". Such organizations usually function around cultural, social, economic, ethical, religious, spiritual, philanthropic or scientific considerations. The policy further annexes some conditions to this definition. It mandates that VOs should be private organizations, and they should not return profits (generated) to their owners or directors. All associations [NGOs, Trusts, Charities, etc.] that fulfill the above conditions fall within the category of VOs. HelpAge India and CRY are two popular examples.

The 10th Five Year Plan is the most concrete expression of the government's vision on the role of VOs in Indian society. The policy statement, by all means, is a progressive one. It acknowledges the importance of VOs in building a thriving participatory democracy. Despite the recognition VOs have attained on paper, the philanthropic capital of India has remained underutilized. This paper looks at some of the issues plaguing the Voluntary Sector and suggests possible ameliorative measures. The fine print of the policy report reveals the target of creating an "enabling environment" for VOs and supporting their efficiency and autonomy. Other objectives of the said policy include: enabling VOs to mobilize financial resources (domestically and from abroad); improving transparency and management among VOs, and promoting public-VO partnerships.[3] We can understand the persistent problems around VOs by zeroing down on the abovementioned objectives individually. The first step toward creating an "enabling environment" would be to get the Voluntary Organization registered. The following section runs through what exactly this entails.

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[2] VOLUNTARY ACTION CELL (Planning Commission), NATIONAL POLICY ON VOLUNTARY SECTOR 1 (2007)

[3] NATIONAL POLICY ON VOLUNTARY SECTOR, supra note 1, at 2

2.2. Registration & Incorporation: The Core Issues

The story of a Voluntary Organization begins with its registration. These Organizations may get themselves registered as "societies, as charitable trusts, or as non-profit companies[4]" under Central or State laws. NGOs/Charities/Trusts fall in the concurrent list, and both the union and the states have the power to make laws for the registration and incorporation of VOs. Registration laws can also vary widely between two states. While some states have imported the Societies Registration Act (1860) into their law, others have either made extensive amendments or have enacted new laws altogether. Consequently, we have a multitude of acts like the Andhra Pradesh (Charitable and Religious Institutions and Endowments Act 1966) and the Tamil Nadu (Hindu Religious and Charitable Endowments Act, 1959). The state of Tamil Nadu has another legislation for Islamic trusts (Waqf Act, 1995).[5]

The required compliance depends upon the applicable law, which in turn depends on the place of origin, and nature of the entity seeking registration. For instance, a charitable trust set up in Delhi would be subject to fewer compliance requirements, while one registered in Mumbai would have to submit annual returns, and seek prior approval from the Charities Commissioner, etc. Additionally, some states also require regular renewal of licenses. Not surprisingly, this only adds to the compliance burden of Voluntary Organizations (like Jammu and Kashmir, Uttar Pradesh, Assam etc.).[6] The table below summarizes the national laws that apply to different types of Voluntary Organizations.

Type of Voluntary Organization	Registered Society	Trust	Nonprofit Companies
Applicable (National) Law	Registration of Societies Act, 1860	State Laws Apply along with the principles of the Indian Trusts Act, 1882	Indian Companies Act, 2013
Timeline of Formation	30-45 days	10-15 days	60-75 days

[4] Under Section 8 of the Companies Act, 2013

[5] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, A STUDY ON THE LEGAL, REGULATORY, AND GRANTS-IN-AID SYSTEMS FOR INDIA'S VOLUNTARY SECTOR 18 (2020)

[6] Centre for Social Impact and Philanthropy, supra note 6, at 23

Compliance Requirements	Relatively less regulation, basic provisions governing acquisition/disposal of property, alteration and dissolution.	Trusts have to register with the regional Charities Commissioner (CC). Alterations and changes have to be disclosed, and accounts are to be audited under CCs supervision.	Companies are required to conduct board and general meetings, file annual accounts with the Ministry of Corporate Affairs, maintain requisite registers, etc.

[7]

These differences appear confusing at best and restrictive at worse. The National Voluntary Sector Policy (2007) takes cognizance of the issue. It mentions how-

> *"Over time, many of these laws and their corresponding rules have become complex and restrictive, thus leading to delays, harassment and corruption."*[8]

The same document also proposes some interesting solutions to the said problem. It says that the government will strive to simplify, liberalise, and rationalise the rules for registration. However, what stands out is the idea of a *uniform VO registration law*. The policy states that the government will consider the feasibility of bringing in a pan-India liberal statute for registering VOs. The said statute would not replace existing laws but will be providing VOs seeking registration with an alternate route. Therefore, the law would co-exist with the existing legislations.

The problems with registration rules do not end with convoluted procedures. The lack of tailored policy for specific types of VOs is also an issue. For example, there is no exclusive legislation for VOs engaged in developmental or charitable work. In practice, this means that developmental VOs like a "resident's welfare association" will be faced with the same compliance requirement as a recreational activity centered VO. Additionally, even when a VO manages to get through the cumbersome and confusing registration process, inter-state operations still pose a challenge. This is not surprising as different states have different rules and regulations (as discussed previously).[9]

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[7] Id. at 19

[8] NATIONAL POLICY ON VOLUNTARY SECTOR, supra note 1, at 3

[9] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, supra note 5, at 21

In conclusion, despite the policy's aims to establish a simple operational framework, much still remains to be done. A fragmented legal regime, unnecessary impediments to registration and problems with interstate operations are some of the major complications that need to be remedied.[10]

2.3. Problems with the Tax Policy

The tax policy around VOs can be studied under two heads. The first category would be the *(a) tax compliance requirements that VOs are mandated to follow* while operating. Next, we can look at the *(b) tax incentives that individuals and corporations get entitled to when they make a financial contribution* to a Voluntary Organization. I will first present a rundown of the compliance requirements. After having summarised the basics of the taxation structure, it would be appropriate to discuss certain faultlines.

3. TAX STRUCTURE AND RULES FOR VOLUNTARY ORGANISATIONS

Contrary to popular belief, NGOs and Charitable Organizations are not entirely exempt from paying taxes. In fact, all NGOs/Trusts are required to file income tax under section 12 of the Income Tax Act. It is after fulfilling certain conditions that VOs become eligible for tax exemptions. Firstly, the VO must be registered under section 12AA of the said Act. Another requirement is that the organization should apply a minimum of 85% of its total income to philanthropic endeavours falling in one of the falling categories[11]:

> *Relief to the financially impoverished, Yoga, Medical Relief, Education, Environmental Preservation (including the preservation of monuments and places or objects of artistic or historical interest), and for the furtherance of any other object of general public utility*[12].

Lastly, if an NGO or a trust (working for the advancement of an "object of general public utility") engages in commercial activities (for a fee), the income from such activity should not exceed 20% of the net receipts. If a VO manages to comply with all of the above requirements, it becomes eligible to file income tax returns (thereby enjoying the benefits of exemption).

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[10] Id. at 21

[11] Income Tax Department, https://www.incometaxindia.gov.in/pages/acts/income-tax-act.aspx (last visited May 11, 2022)

[12] ClearTax, https://cleartax.in/s/charitable-trusts-ngo-income-tax-benefits)

The Income Tax ACT (1961) is not the only relevant legislation in relation to the income of VOs. The FCRA (Foreign Contributions Regulation Act) and the GST (Goods and Services Tax) Act of 2017 also contain certain compliance requirements. A Voluntary Organization may be required to file income tax if its income exceeds the threshold of 2 million Rupees annually. However, the GST act contains exemption provisions for a small group of VOs (The definition of the term "Charitable Act" is narrower under the GST ACT when compared to the Income Tax Act). The fact that the GST applies to VOs goes against the Act's key objective. The GST Act was legislated to tax entities that operate in furtherance of business, which is not the primary function of VOs[13]. As a matter of fact, VOs are not allowed to distribute profits to their directors.

The FCRA provides the rules and procedures for receiving and applying foreign contributions. A VO needs to be registered with the Ministry of Home Affairs to be eligible for foreign funding. A registration lasts for five years before expiring. Alternatively, the VO can directly apply for permission to receive a one-time sum. Further, the VO must publicly disclose this income by filing quarterly receipts. Its primary objective is to prevent the application of foreign money to endeavors detrimental to the national interest. While it is fundamental to check activities that run contrary to the public interest, the law, and at the very least, its implementation, is widely seen as draconian and restrictive. Allegations around the use of FCRA as a political tool often break headlines[14].

As of now, all the VOs in India are subject to the same tax compliance requirements. What this means is that the law is blind to the size or ability of VOs. A small NGO made up of a dozen volunteers will have to comply with the same regulations as an NGO with offices panning all across India. This poses a problem for VOs operating at a small scale as the smaller organizations lack the resources to conform to complex compliance requirements. To lower their burden of compliance, the policy should be nuanced enough to have room for differential treatment. Furthermore, the differences are not limited to the size of VOs. Factors like the nature of work and sources of funding should also be kept in mind while drafting policy.

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[13] Centre for Social Impact and Philanthropy, supra note 5, at 22

[14] FRONTLINE, https://frontline.thehindu.com/cover-story/weaponising-fcra-controversy-surrounds-govt-refusal-to-renew-licence-of-missionaries-of-charity/article38192422.ece#:~:text=Missionaries%20of%20Charity-,Weaponising%20FCRA%3A%20Controversy%20surrounds%20govt%20refusal%20to,licence%20of%20Missionaries%20of%20Charity&text=The%20controversy%20over%20the%20FCRA,especially%20those%20run%20by%20Christians. (last visited May 12, 2022)

Another policy flaw that impedes the healthy participation of VOs in our democracy is non-uniformity (of provisions and definitions). For instance, different laws define "charitable purpose" differently. On a comparative note, the Income Tax Act presents a broader definition, while the GST Act contains a narrower one. The former includes areas of poverty relief, environmental conservation, conservation of objects or places of historical or artistic importance, and "advancement of general public utility". However, the GST act limits the meaning of "charitable work" to the field of education, public health, environment, and religious activity.[15]

Additionally, different government bodies may interpret the same Act inconsistently. For instance, what counts as an "object of general public utility" is clearly a question of fact. As a result, the manner of interpretation becomes subject to executive discretion. Differences between state laws do not help in remedying the existing complexities. The following example illustrates this point:

> *While the Income Tax Act, 1961 (Central) allows VOs to invest in mutual funds, VOs registered under the FCRA act are not allowed to do the same. In contrast, Voluntary Organizations registered under the Maharashtra Public (Trusts) Act can only invest in specified debt-based mutual fund units.* [16]

Having briefly covered the tax structure, we can now look at the tax benefits citizens and corporations receive when they donate to VOs in India.

4. TAX INCENTIVES FOR DONATIONS

Policymakers often use tax incentives to promote a particular kind of economic activity. For instance, if a government wants to incentivize the buying of houses, it can do so by offering tax benefits. The US tax code, for example, does not include the money spent on mortgage payments in the category of taxable income. Therefore, mortgage payments become "tax-deductible". Similarly, many legal systems use tax incentives to promote donations to organizations undertaking charitable work. In the absence of such a policy, the cost of a philanthropic contribution would be equal to any other commercial expenditure. Therefore, tax benefits reduce the effective cost of philanthropy. A study by the Centre for Budget and

[15] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, supra note 5, at 21

[16] Id. at 21

Governance Accountability (CBGA) found that "simple and accessible tax incentives generally have a positive influence on the level of giving."[17]

Of course, charitable giving also depends upon factors like the culture of giving, personal traits, economic development, etc.[18]

The impact of tax benefits may vary depending *upon (a) The Form of Incentive; (b) Existing Tax Rates; (c) the Rate of Incentive; (d) the Incentive Ceiling. The following table serves as an illustration to this point.*

Form of Incentive	**Tax Deductible Income**	**Tax Credit**
Definition	Certain forms of expenditure are eligible to be treated as tax deductibles. In practice, it means that the money spent is not treated as "taxable income".	Tax Credits directly reduce the tax liability of the assessee. It is different from tax deductions that do not directly reduce the tax bill, but cut down the "taxable income."
Impact of Tax Rates	If the rate of tax is higher, provisions for tax deductions would make donations to charities more lucrative.	The impact of tax Credits, on the other hand, is not affected by the prevailing tax rate.

In addition to these factors, the non-monetary aspects of the incentive system are equally important. For instance, what causes are eligible for benefits or the fairness and efficiency of the system are crucial in determining the effect of tax benefits. The broader point is that several variables are involved here, and each one impacts the generosity of donations differently.[19] We will now look at some problems associated with this system.

In 2021, the Centre for Social Impact and Philanthropy (CSIP)[20] commissioned a study to find out ways to encourage charitable donations in India. The project culminated in a comparative

[17] CSIP, https://csip.ashoka.edu.in/research-and-knowledge/#report (last visited May 12, 2022)

[18] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, HOW INDIA CAN ENCOURAGE CHARITABLE DONATIONS: A POLICY BRIEF 2 (2021)

[19] Id. at 2

[20] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, REPORT ON TAX INCENTIVES FOR PHILANTHROPIC GIVING: A STUDY OF 12 COUNTRIES 1 (2021), (The Centre for Social Impact and Philanthropy is a Research Centre which operates under the aegis of the Ashoka University.)

study of 12 countries concerning their tax incentive systems for VOs. The following few paragraphs would make constant reference to the study.

A comprehensive analysis of data from 12 countries shows that India lies somewhere in the middle when it comes to the generosity of its tax incentives. The study mentioned above draws this conclusion by analyzing the data on all four factors mentioned above[21]. The following table serves as an illustration to this point. The report further declares the UK, France and Singapore as nations with the most generous tax incentive system. On the other hand, South Africa, Brazil and Mexico appear to lie on the other end of the spectrum (having the least generous incentive system). The table below compares the incentives that countries provide on various categories of taxes:

Countries	Personal Income Tax	Corporate income Tax	Inheritance tax	Wealth tax	Capital gains tax	Donation/ Gift Tax
Bangladesh	Yes	Yes	-	-	-	Yes
Brazil	Yes	Yes	Yes	-	-	Yes
China	Yes	Yes	-	-	-	-
France	Yes	Yes	Yes	Yes	-	-
India	Yes	Yes	-	-	-	-
Mexico	Yes	Yes	-	-	-	-
Norway	Yes	Yes	-	-	-	-
Singapore	Yes	Yes	-	-	-	-
South Africa	Yes	Yes	Yes	-	-	Yes
South Korea	Yes	Yes	Yes	-	-	-
UK	Yes	Yes	Yes	-	Yes	-
USA	Yes	Yes	Yes	-	Yes	-

[22]

India, like most other countries, provides tax incentives on personal income tax and corporate tax. However, the CSIP commissioned study found that 6 out of the 12 countries also offer incentives on Inheritance tax. The same is not the case in India, as the country does not levy inheritance taxes. It may be argued that the "absence of an inheritance tax in India lowers the motivation to donate"[23]. Similarly, India also scraped its wealth tax in 2017[24]. What follows is that a wealth tax incentive is also not an option in India.

[21] *i.e. (a) The Form of Incentive; (b) Existing Tax Rates; (c) the Rate of Incentive; and (d) the Incentive Ceiling.*

[22] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, supra note 16, at 3

[23] Id. at 3

[24] The Economic Times, https://economictimes.indiatimes.com/news/economy/policy/can-india-go-back-to-a-wealth-tax-by-appealing-to-the-better-side-of-the-rich/articleshow/89056174.cms (last visited May 12, 2022)

Furthermore, 9 of the 12 countries surveyed allow tax benefits for cross-border donations. In India, however, donations to VOs based outside of India do not qualify for tax exemptions. Other countries that stand out in this regard are China and Singapore.[25]

The study reveals a unique problem that VOs in India might be enduring, i.e., competition from government funds and entities. Out of the 12 countries surveyed, India came out as the only country that offers tax exemptions on donations made to public bodies and funds. The most popular Indian tax incentive scheme is found in section 80G (of the Indian Tax Code), which allows for a 50% deduction on taxable income (of the amount spent on charity/donation). However, the same section provides for a 100% deduction in taxable income for contributions made to certain government entities/funds.

The saga of this unhealthy competition does not end at unfair incentive rates. The ceiling rate is also a problem *sui generis*. Contributions to VOs are eligible for tax exemptions only so long as they do not exceed the ceiling of 10% of the taxable income. Any donation over the 10% threshold is ineligible to avail of the benefits of the 80G scheme. The data from the comparative study reveals that out of the 12 countries, 8 have a ceiling rate of 100% or more. The table below illustrates this point:

Countries	Form	Rate	Ceiling
Bangladesh	Deduction	15%	Maximum donation allowed is 30% of taxable income or BDT 15 million, whichever is lower
Brazil	Deduction	100%	8% of tax payable with charity area-based exemptions[2]
China	Deduction	100%	30% of taxable income
France	Credit	66%	20% of taxable income
India	Deduction	50%, 100%	10% of taxable income in most cases, 100% when donating to select government funds and entities
Mexico	Deduction	100%	7% of previous year's taxable income
Norway	Deduction	100%	NOK 50,000
South Africa	Deduction	100%	10% of taxable income
South Korea	Credit	15%, 30%	100% of tax payable
Singapore	Deduction	250%	Annual taxable income, remaining amount can be carried over for the next five years
UK	Deduction & Hybrid model	100%	100% of tax payable
USA	Deduction	100%	60% of taxable income

[26]

While these provisions appear restrictive in their own right, it gets worse. The ceiling rate for donations to public funds and entities is a solid 100%. In this light, Indian philanthropists would

[25] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, supra note 16, at 4

[26] Id. at 4

have a higher financial incentive to donate to government funds (instead of supplying resources to VOs).

Section 80G of the Indian Tax Code has not gone through any major liberalizing amendment in the past four decades. The law has only witnessed the addition of a few government entities and funds to the list (of entities eligible for exemption). In fact, the generosity of the tax incentive structure has gone down with time. For example, in 2020, an optional tax regime was introduced. The taxpayers can now choose between two alternative tax structures. While the newer system offers low tax rates, the tax benefits on donations are less generous. The case with the older system is quite the opposite. It does offer a more liberal incentive system, but the tax rates are relatively higher.[27] This puts the donors into an unnecessary conundrum. Moreover, the recent years have witnessed a reduction in the rates of personal income tax and corporate tax. As a result, the (static) tax incentives have become less attractive. All of this translates to an increased effective cost of philanthropy.

The lack of will (among policymakers) to liberalize the incentive structure can also be gauged by looking at the pandemic situation. The following is a direct quotation from the policy brief[28] of the CSIP study:

> *"In the sample of 12 countries, while the USA and China increased the level of benefit, India did not do any such thing. In India, the only change was the introduction of a new fund called PM CARES[29]."*

5. THE WAY FORWARD

As mentioned earlier, Voluntary Organizations are crucial to the functioning of a participatory democracy. The importance of this sector was also touched upon in the introductory section. Subsequently, I discussed various faultlines in the current legislative framework. It is only logical to consider possible remedial steps at this stage. The 2007 policy[30] mentions some progressive and noble objectives. Therefore, it should serve as a decent roadmap while

[27] Forbes, https://www.forbes.com/advisor/in/tax/old-vs-new-tax-regime-which-one-should-you-choose/ (last visited May 12, 2022)

[28] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, supra note 16, at 5

[29] PM CARE stands for Prime Minister's Citizen Assistance and Relief in Emergency Situations

[30] NATIONAL POLICY ON VOLUNTARY SECTOR, supra note 1

planning forward. The following paragraphs will offer some recommendations keeping in mind the goals set by the said policy.

Independence is emblematic of the very idea of a voluntary organization. Therefore, the first step should be to ensure that VOs can undertake autonomous operations without crumbling under the burden of regulatory overreach. A singular statutory amendment will not go far in achieving this goal. A slew of measures would have to be taken. In the end, all statutes, rules, and regulations should be such that the autonomy of VOs remains uncompromised. At the same time, VOs must also be held accountable if they undertake activities detrimental to the public interest.[31] A dilemma arises when trying to balance the need for transparency and autonomy. A viable solution would be the evolution of "an independent, national level, self-regulatory agency for the voluntary sector"[32]. This would ensure accountable governance and management without affecting the independence of VOs. Another way to achieve accountability without having tightrope restrictions is by opening up VOs to public scrutiny. For example, the National voluntary sector policy recommends the introduction of norms for filing basic documents (e.g., related to income tax). These documents could then be made available in the public domain. The filed information can also be available on a government website. This would go a long way in promoting the spirit of public oversight.

The convoluted registration process is an issue that requires immediate redressal. For instance, the procedures under section 25 of the Companies Act (which contains provisions for the registration, license and remuneration) are unnecessarily cumbersome. There is a need to rationalise and simplify the registration laws. As mentioned earlier, the policy makes an interesting suggestion regarding this, i.e., the introduction of pan-India optional registration law. The feasibility of such a measure should be explored by commissioning relevant research and studies. Additionally, to achieve said simplification, the following areas can be focused on:

> *(a) development of an online registration process (can be achieved by the use of an online data base that keeps track of all registration activity), (b) establishing a universal*

[31] Id. at 2

[32] Id. at 4

definition for the "charitable purpose", (c) A common classification system (typology) for Voluntary Organization[33]

In our discussion on the compliance rules, the issue of the need to regularly renew licenses was also taken up. The same can be addressed by making the license non-lapsable, given that the VOs consistently file their respective Income Tax/ GST returns. This has been recommended by a CSIP commissioned study (on the Legal, Regulatory, and Grants-in-Aid Systems for India's Voluntary Sector).[34]

Having discussed some recommendations for the regulatory framework, we can move to suggestions for the tax regime. First of all, there is a need to conduct a thorough study on the efficiency and usefulness of the current Income Tax regime. Such a study should cover two aspects, i.e., the tax compliance requirements, and the tax incentive structure. Otherwise, eliminating harmful laws and bringing in better ones won't be possible.

As discussed earlier, a major problem is the multiplicity of compliance requirements (under various statutes like the Income Tax Code, the GST Act, and the FCRA). In this light, it would be immensely helpful to ensure better cooperation between different departments and bodies (e.g., the FCRA, Income tax authorities, and the Registrar of Societies). There is also a need to bring more nuance to the tax law. The compliance requirements for VOs operating in different capacities should be stratified. For instance, differential treatment of VOs that create some social impact vis a vis recreational/ non-social impact VOs could be fruitful. Regard should also be had to the scale of operation of a VO. An NGO operating at a small scale cannot be expected to comply with the rules meant for large-scale VOs.

An amendment to section 2(15) of the Income Tax Act, 1961 should also be considered. As discussed previously, this section places a limit of 20% on the share of receipts from commercial services (for VOs working to further an "object of general public utility"). The revision should ensure that VOs working under all categories get to engage in commercial activities without any financial limit.

[33] Centre for Social Impact and Philanthropy, supra note 6, at 23

[34] Id. at 23

Next, we can move to recommendations around the tax incentive policy. Once again, the first step towards progress should be the commissioning of rigorous studies on the subject. This will help the legislators undertake evidence-based policymaking. As discussed previously, multiple variables impact the quantum of philanthropy. Merely increasing the rate of incentive might not be helpful, if other factors (like economic development, incentive ceiling, corruption, etc.) are not favourable. It would not be prudent to initiate sweeping reforms in absence of quality empirical evidence. Political ideology should not take over the role of academic research.

Nevertheless, few tweaks appear reasonable, at least after a surface-level investigation. First such change might be to offer tax exemptions to Indian philanthropists on donations they make to VOs based outside of India. Secondly, wealth tax and inheritance tax could be introduced. These taxes tend to affect the higher income groups and are therefore progressive. In addition to the creation of a new source of revenue for the government, such a measure would also allow for a new form of donation incentive. The government would be able to offer exemptions on these categories of taxes. Further, these incentives would cater to the strata of the society with higher financial capacity (making them more likely to donate). Lastly, the possibility of raising the rate of incentive and ceiling should be looked into. To reiterate, any policy change should be backed by thorough research and data.[35]

[35] CENTRE FOR SOCIAL IMPACT AND PHILANTHROPY, HOW INDIA CAN ENCOURAGE CHARITABLE DONATIONS: A POLICY BRIEF 7 (2021)

EPISTEMIC DISCONNECT BETWEEN SCIENCE AND LAW

Kanika Aggarwal

ABSTRACT

Forensic evidences are, both, applauded for the efficiency and certainty they lend to judicial decision making, as well as condemned for being incomprehensible and sometimes, leading to wrongful convictions. In the last two decades and more, a shift in scientific paradigm is being observed, especially in relation to the forensic disciplines that rely on pattern comparison- like odontology, hair analysis, tool analysis etc. The credibility of forensic evidences has come under a cloud since cases of wrongful convictions have gained attention globally. The enhanced critical analysis of the manner in which forensic evidence is scrutinised (or not scrutinised) in courts has given rise to the need of sensitizing the scientific and legal communities about the limitations inherent in the forensic sciences.

Though it is well-documented that none of the forensic science disciplines, other than DNA, can scientifically claim individualisation, the lawyers and judges are found to be totally oblivious of this scientific reality. Forensic/Scientific evidences, professed as scientific and objective, can unduly influence the outcome of a case. This makes the judge's role as gatekeepers when admitting science in the courtroom extremely crucial. After all, it is the call of a judge to decide whether or not, and to what extent, they want to rely on the expert's opinion. Unlike other evidences, these opinions are demonstrative in nature. It is solely a judge's responsibility to assess and evaluate forensic evidence. This leads to an interesting intersectionality of legal and scientific standards. Given the different nature of law and science as disciplines, it is a daunting task for judges to effectively evaluate forensic evidences. This task is made more onerous by a number of possible factors – limitation or lack of scientific knowledge in the legal community, partisan bias exhibited by experts, submission of new or dubious science etc.

Project Innocent and various cases of wrongful conviction cases have made it amply clear that disregard for intersectionality of law and science could be a serious threat to accurate judicial decision making. The paper aims to expose the ignorance to such issues in Indian context with the help of judgments from Indian courts. Part I of the article sets out the laws regulating forensic evidence in courts in India, including the one that have been transplanted from other jurisdictions. Part II of the article highlights the epistemic disconnect between law and science. The part III of the articles illustrates the perfunctory manners in which judicial gatekeeping function is being performed by making reference to judicial decisions. The last

part of the article is a review of suggestions put forth by various academicians and legal practitioners.

Keywords: Forensic Science, daubert, epistemic disconnect, gatekeeping function, judicial decision making

1. INTRODUCTION

Forensic evidences are, both, applauded for the efficiency and certainty they lend to judicial decision making, as well as condemned for being incomprehensible and sometimes, leading to wrongful convictions. In the last two decades and more, a shift in scientific paradigm is being observed, especially in relation to the forensic disciplines that rely on pattern comparison- like odontology, hair analysis, tool analysis etc.[1] Credibility of forensic evidences has come under a cloud since cases of wrongful convictions have gained attention globally.[2] The enhanced critical analysis of the manner in which forensic evidence is scrutinised (or not scrutinised) in courts has given rise to the need of sensitizing the scientific and legal communities about the limitations inherent in the sciences.

Though it is well-documented that none of the forensic science disciplines, other than DNA and fingerprints, can scientifically claim individualisation, the lawyers and judges are found to be totally oblivious of this scientific reality.[3] Forensic/Scientific evidences, professed as scientific and objective, can unduly influence the outcome of a case. This makes the judge's role as gatekeepers when admitting science in the courtroom extremely crucial. After all, it is the call of a judge to decide whether or not, and to what extent, they want to rely on the expert's opinion. Unlike other evidences, these opinions are demonstrative in nature. It is solely a judge's responsibility to assess and evaluate forensic evidence. This leads to an interesting intersectionality of legal and scientific standards. Given the different nature of law and science as disciplines, it is a daunting task for judges to effectively evaluate forensic evidences. This task is made more onerous by a number of possible factors – limitation or lack of scientific knowledge in the legal community, partisan bias exhibited by experts, submission of new or dubious science etc.

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[1] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009), hereinafter referred to as NAS.

[2] Innocent Project, *available at* https://www.innocenceproject.org/cases/kirk-odom/, (last visited 27th Sept., 2021).

[3] Gary Edmond, *Latent Science: A History of Challenges to Fingerprint Evidence in Australia* (38 U. Queensland L.J., 301, 2019)

Project Innocent[4] and various cases of wrongful conviction cases have made it amply clear that disregard for intersectionality of law and science could be a serious threat to accurate judicial decision making. The paper aims to expose the ignorance to such issues in Indian context with the help of judgments from Indian courts. Part I of the article sets out the laws regulating forensic evidence in courts in India, including the one that have been transplanted from other jurisdictions. Part II of the article highlights the epistemic disconnect between law and science. The part III of the articles illustrates the perfunctory manners in which judicial gatekeeping function is being performed by making reference to judicial decisions. The last part of the article is a review of suggestions put forth by various academicians and legal practitioners.

1.1. Conceptual/Theoretical Framework

Derived from Latin word *forensis*, the word FORENSIC's root refers to the 'forum' i.e. professional, political, or legal gathering.[5] Whereas the definition of the SCIENCE is "knowledge attained through study or practice."[6] Together the term Forensic Science, therefore, means application of scientific principles and techniques to matters of a legal system especially as relating to the collection, examination as well as analysis of evidence. In other words, forensic science is use of science for the purposes of law. And, the evidences so derived with the help of forensic sciences are called forensic evidences. Forensic Science, in broad terms, can be defined as –

"*that scientific discipline which is directed to the recognition, identification, individualisation, and evaluation of physical evidence by the application of the principles and methods of natural sciences for the purpose of administration of criminal justice."*[7]

Forensic Science includes a broad range of disciplines; each has its own set of practices and technologies. They all differ in terms of methodology, types, techniques, reliability, and numbers of potential errors, general acceptability, research, published material etc. Some disciplines are laboratory based (e.g., DNA analysis, drug analysis, toxicology); some are based

[4] "Kirk Odom". *available at* https://www.innocenceproject.org/cases/kirk-odom/, (last visited 2nd Oct., 2021)

[5] *R. v Dlugosz, Pickering*, [2013] EWCA Crim 2.

[6] WEBSTER'S NEW COLLEGIATE DICTIONARY 1051 (9th ed. 1991).

[7] B.S.Nabar, *Forensic Science in Crime Investigation* 1 (3rd ed. 2018).

on interpretation by an expert (e.g., fingerprints, bite marks, writing samples, hair analysis, tool marks etc.).[8]

As regards Forensic evidences, the relevance of these evidences is determined by way of Section 45 of the Indian Evidence Act. Forensic evidences fall in the category of "science" experts. The word science is used in a comprehensive manner and shall be construed broadly. The acid test for determining whether a particular subject under the category of science is, "*whether the subject matter of enquiry is such that inexperienced men are unlikely to prove capable of forming a correct judgment upon it without the assistance of expert?*[9]

Section 45 and 46 of the Indian Evidence Act, together, bring to light certain very crucial elements of the legal system, -

1. Faith and trust that courts place on people with specialised knowledge and skills of the facts concerning the case;
2. Reliance placed by courts on bonafide testimony of experts,
3. Facts that are otherwise irrelevant, shall be considered relevant when found consistence with the opinion of experts.[10]

Given the vast expansion of areas of expertise, no human can be expected to have the capacity to master all field and be a "Renaissance person." A judge needs help from experts as and when the need arises.[11] The term "expert" in general, means a person who has special skills or knowledge in a field.[12] There are experts in wide range of professions and have wide variety of skills, training and education.[13] The people who give specialised opinion in courts u/s 45 of the IEA are called experts.[14] Experts are considered as someone who would assist the court in finding out the truth.[15] An expert is the one who has special skills in a special branch of learning, beyond the range of common knowledge. It is not necessary that a person shall have

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[8] NAS, *supra*.

[9] *Ramesh Chandra v. Regency Hospital*, (2009) 9 SCC 709.

[10] Sati M, *Evidentiary Value of Forensic Report in Indian Courts*, Scholarticles, (Feb. 11, 2016), https://scholarticles.wordpress.com/2016/02/11/ms1/.

[11] Boaz Sangero & Mordechai Halpert, *Scientific Evidence v. "Junk Science,"* 11 C.L.B. L.STUD. 425, 430 (2014) (Isr.) at 1136.

[12] *Webster's Nuw Collegiate Dictionary* (9th ed. 1991).

[13] Kapsa, Marilee M. and Meyer, Carl B, *Scientific Experts: Making Their Testimony More Reliable*, California Western Law Review, 35 315 (1999) http://scholarlycommons.law.cwsl.edu/cwlr/vol35/iss2/5.

[14] Indian Evidence Act, 1872, s. 45.

[15] Oren Perez, *Judicial Strategies for Reviewing Confliction Expert Evidence: Biases, Heuristics, and Higher-Order Evidence*, 64 Am. J. Comp. L. 75 83 (2016).

academic qualifications and degree in order to be an expert. What matter is the acquisition of special skills which can come from informal training, experience, practice, observation etc.[16] For example, we may have reference to section 47 of the Indian Evidence Act, where the evidence of a person who is not professionally trained in handwriting is admissible provided he is acquainted with the handwriting of the other person. Thus, interestingly, it is a question of fact to be determined in the totality of facts whether a person is an expert in a specialised area of knowledge or not.[17]

Next step in the process of administering evidences are admissibility. The conditions that govern the admissibility of expert evidence are categorically laid in by Supreme Court in *Ramesh Chandra v. Regency Hospital*[18]. They are –

1. Expert must be heard unless Section 293 of Cr.P.C. applies. This section provides that senior government experts may not be summoned. Also, there are cases wherein foreign experts have been given the permission to testify through videoconferencing[19];
2. Area of expertise must be a recognised one;
3. The evidence must be based on reliable principles;
4. He must be qualifies in the area of specialisation. This can be either by education or by way of experience.

Acquiring knowledge by way of only experience is no disqualification and goes merely to weight of the evidence and not its admissibility. Further the authority of an expert is limited to presenting his opinion in the court. He shall not act as judge.[20] It is for the judge solely to form his own independent judgment with respect to the expert evidence.[21] Before admitting expert

[16] Sati M, *Evidentiary Value of Forensic Report in Indian Courts*, Scholarticles, (Feb. 11, 2016), https://scholarticles.wordpress.com/2016/02/11/ms1/.

[17] Ratanlal Ranchhoddas, Dhirajlal Keshavlal Thakore, The Law of Evidence 750 (23rd ed. 2010).

[18] (2009) 9 SCC 709.

[19] *Malay Kumar Ganguly v. Dr.Sukumar Mukherjee,* (2009) 9 SCC 221.

[20] *Id.*

[21] *Titli v. Jones*, AIR 1934 All 237.

evidence in courts, judges shall ask for methodologies, in detail, adopted by the expert and not just the results,[22] so that its reliability can be tested.

As regards weight of such forensic evidence, it has been held that these are evidences of advisory/secondary nature.[23] The courts, mostly insist on corroboration of such evidences as a matter of caution and prudence. Though it is only a general practice and there is no such rule of law.[24] It is a rule of caution and prudence.[25] Weight of the evidence is dependent on the correctness of the report, the reasons given in support of the conclusions[26], exactness of the science[27] and their expertise in the field.[28] The credibility of expert opinion depends on the reasons given in support of his conclusions. Example, footprint[29], tracker dog evidence[30] are not backed by science that is established and therefore were used only to reinforce the conclusion drawn from other evidences. Where the experts give no data in support of his opinion, the evidence although admissible, would be excluded from consideration in deciding the case. [31] An expert opinion losses its evidentiary value if he does not produce basis/authorities that support his testimony.[32]

Expert opinion is an exception to the rule against opinion evidence.[33] The rule against opinion evidence means that a witness is allow to give evidence of the facts only and not that of his opinion. An expert is not a witness to facts. It has been made admissible out of necessity[34] only. It does not go in evidence automatically without proof. T hough there are some statutory exceptions like Section 509 Cr.P.C. (Medical Certificate), Section 510 Cr.P.C. (Report of Chemical analyst) etc. In general, it is essential to check the reliability or ground on which such

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[22] Sangero, *supra*, at 1136.
[23] *State of Himachal Pradesh vs. Jai Lal and Ors.*, MANU/SC/0557/1999.
[24] Ranchhoddas, *supra,* at 757; *Murali Lal v. State of M.P*, AIR1980SC531.

[25] *Parappa and Ors. vs. Bhimappa and Ors.*, MANU/KA/0059/2008.

[26] *Malay Kumar Ganguly v. Dr.Sukumar Mukherjee*, (2009) 9 SCC 221.
[27] Agarwal, A. and Gangopadhyay, P., *Use of Modern Scientific Tests in Investigation and Evidence: Mere Desperation or Justifiable in Public Interest*, *NUJS L. Rev.*, *2*, 31(2009).
[28] *Parappa v. Bhimappa,* 2008 AIHC 2777, 2783 (Kant HC).

[29] *Pritam Singh v. State of Punjab*, AIR1956SC415.

[30] *Abdul Rajak Murtaza Dafedar v. State of Maharastra*, AIR1970SC283.

[31] *Ramesh Chandra Agrawal vs. Regency Hospital Ltd. and Ors.*, MANU/SC/1641/2009.
[32] Dalal, A.S. & Mukherjee, Arunava, *Constitutional and Evidentiary Validity of New Scientific Tests*, JLI, 49 (2007).

[33] *Id,* at 313,

[34] Monir M., *The Law of Evidence*, Universal Law Publication 233 (10th ed., 2015).

opinion is based. This is a specific requirement of admissibility of such evidences.[35] And, it is provided in Section 51 of the Evidence Act as well. The section says that,

"whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant."

Thus, an opinion is not evidence unless it is based on sound reasons. It is worthless without reasons.[36] He has to be examined in courts. Expert is duty bound to present to judge necessary scientific criteria so that judge can check the veracity and form an independent judgment.[37] It is only the reason and material which is the basis of expert opinion that determines the credibility of his evidence.[38] Therefore, any opinion of an expert that does not disclosed the reason in support gets discarded in courts.[39] Opinion render by experts in courts are not beyond the scope of judicial review.[40]

1.2. Gatekeeping Function of Courts

Forensic evidences, unlike ocular evidences, are considered as demonstrative in nature i.e. they are based on some technique, theorem, empirical data, method etc.[41] These principles/techniques on which the forensic evidences are based should be shown to be trustworthy by the expert testifying in court. The standard of proof expected from forensic expert shall depend on the nature of the science. The discretion and authority to examine the veracity of an expert's averments lies with the presiding judge.[42]

Reliability of expert evidences is a requirement that other types of evidences like eye witnesses etc., are not required to meet. Some of the possible reasons for this are[43] -

- Expert evidences are purported as science and are an exception to the rule against opinion evidence,

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[35] *Ramesh Chandra Agrawal vs. Regency Hospital Ltd. and Ors*, MANU/SC/1641/2009.

[36] M.Monir, *The Law of Evidence*, 46 (2015), at 257.

[37] *Chellappan v. State of Kerala*(Kerala HC), Cr. Appeal No. 760 of 2009, decided on 13/09/2012.

[38] *Id.*

[39] *Hazi Mohammad Ekramul Haq v. State of W.B.*, AIR 1959 SC 488.

[40] Ratanlal Ranchhoddas, Dhirajlal Keshavlal Thakore, *The Law of Evidence* 750 (23rd ed. 2010) 755.

[41] *Dayal Singh v. State of Uttaranchal*, (2012) 8 SCC 263.

[42]Setia, *supra.*

[43] Sangero, B., *supra,* p.1129, 1135.

- Expert evidence can unduly influence the minds of judges making them overvalue the weight of such evidences,
- It is practical to examine reliability of such evidences.

Reliability means the quality of "*repeatability, reproducibility, and accuracy."*[44] "Reliability" refers to the quality of something being consistent. For example, a method will be called reliable if it leads to same result even when performed by different people at different times.[45] It is different from validity. Validity refers to the suitable of the method for the purpose for which it is employed.[46] A technique can be reliable though not valid. For instance, a test that employs skin colour for deciding one's culpability would yield same result all the time, as everyone would concur in respect of the colour of the accused. And, thus it would be a reliable method. But, it would not be correct way of deciding the guilt and therefore would not be valid. In contrast, the idea of validity presupposes reliability. Meaning test can never be valid if it is not reliable. Scientific validity, as opposed to mere validity, means that a method is shown to be reliable enough based on empirical study.[47]

It is thus evident enough that the credibility of the forensic scientific evidence always depends on the reliability of the test conducted. Forensic evidence presented in the courts as evidence shall pass muster to the standards of probative utility. The courts have to be alert and highly careful in placing reliance on it. This, however, poses a great difficulty to the judges.[48] Judges are required to act proactively while dealing with questions of reliability of forensic evidence. The lawyers though have an interest in reification of science to support their case, their interest in the outcome of the case makes them inevitable manipulate the scientists.[49]

This is where the gatekeeping function of the courts comes into play. The role of the trial judge is not just to decide whether the expert testimony is relevant but also whether the

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[44] Report to the President, *Forensic science in criminal courts: ensuring scientific validity of Feature Comparison Methods*, 1 (Sep, 2016), p 47.

[45] Sandy A. Zabell, *Fingerprint Evidence*, 13 J.L. & POL'Y 143, 154 (2005).

[46] Arshad, H., Jantan, A. B., & Abiodun, O. I., *Digital Forensics: Review of Issues in Scientific Validation of Digital Evidence*, Journal of Information Processing Systems, *14*(2) (2018).

[47] PCAST 2016 Report, *supra*, at 48.

[48] C.E.Pratap, *Probative Efficacy of Forensic Scientific Techniques in Criminal Trials*, Academia, (last visited Nov. 25, 2019).

[49] Jenny McEwan, Carol A. Jones, *Expert Witnesses: Science, Medicine, and the Practice of Law*, 4 Soc. & Legal Stud, 552 (1995).

science/technique that lies at the foundation of the testimony is reliable enough to be considered as valid.[50] One of the motive behind giving this responsibility to judges is to reduce intrusion of scientists outside the courtroom from directly influencing litigation.[51]

1.3. Daubert Standard

In relation to testing the validity of polygraph test, the Supreme Court in the famous case of *Selvi v. State of Karnataka*[52] referred to US cases which discussed the validity of Polygraph test as per the Daubert Standards.

The Supreme Court of United States in the revolutionary case of *Daubert v. Merrell Dow Pharmaceuticals, Inc*[53] placed on the trial courts the role of a "gatekeepers" which is to ensure that the expert evidence presented to court is not just relevant but also reliable. The judgment tasked the judges with the responsibility of scrutinising the science coming to the court. [54] Factually in the case, one company, Merrell Pharmaceuticals manufactured a drug called 'benedectin' which was being prescribed for "morning sickness" during pregnancy. The issue involved in the case was whether use of this drug led to birth defects in new-borns.

The US Supreme Court in the judgment identified four non- definitive and non-exhaustive factors that were thought to be illustrative of characteristics of scientific knowledge. They are –

- testability or falsifiability,
- peer review,
- a known or potential error rate, and
- general acceptance within the scientific community.

It is not possible to find one uniform standards that would apply to all sciences as each of the technique/method of scientific enquiry is at difference stage of sophistication; each has its own tools, assumptions, methodologies, goals etc.[55] For example, there is vast difference between clinical physicians and physicians involved in research. For the clinical physicians the

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[50] Christopher Mueller & Laird Kirkpatrick, *Evidence,* 7, 8 (1995).

[51] Gary Edmond, Science, Law and Narrative: Helping the Facts to Speak for Themselves,

23 S. ILL. U. L. J. 555 (1999).

[52] AIR2010SC1974.

[53] 509 U.S. 579 (1993).

[54] Hilbert, J., *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of Junk Science in Criminal Trials*, Okla. L. Rev., 71, 759 (2018).

[55] Kapsa, Marilee M. and Meyer, Carl B, *"Scientific Experts: Making Their Testimony More Reliable,"* California Western Law Review, Vol. 35: No. 2, Article 5, 317 (1999).

goal is to avail patients with medicines. And for the research oriented physicians the goal is to conduct trial and check the efficacy of new medicines.[56] Each of forensic technique/method has its own methodology. Moreover, each is different in the level and degree of their scientific development.[57]

2. EPISTEMIC DISCONNECT BETWEEN LAW AND SCIENCE

"Law is the cement of the society."[58] And so is the case with science. As much as Law and science are meant to serve the society, the two are completely different disciplines. Law calls for consistency and predictability whereas scientific conclusions are subject to refinement and further testing.[59] "Scientific method refers to the body of techniques for investigating phenomena, acquiring new knowledge, or correcting and integrating previous knowledge. It is based on gathering observable, empirical and measurable evidence subject to specific principles of reasoning."[60] By virtue of these differences, there is need for adaption of some kind before scientific evidences are used for the purposed of law.[61] *Berger and Solan (2008)* [62] have stated that Science and law always have had an uneasy alliance. Law is a normative pursuit which tends to define the proper course of public and private functions. It tries to go as close as possible to a just decision of a case with finality and conclusively. In contrast, science is a descriptive pursuit, which does not bother to define the rules of universe. Science describes what the nature of things actually is. This difference in very nature of science and law poses both pragmatic and systemic dilemmas for the law.

Uncertainty, arising from inadequate date, indeterminacy and ignorance, is an integral part of science.[63] While, predictability and uniformity are some of the highly valued principles

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[56] *Id.*

[57] NAS 2009 Report, *supra*, at 111.

[58] Meera Bangotra, *Use of Modern Scientific Deception Detection Techniques in Criminal Investigation in India: A Study from Constitutional and Human Rights Perspective*, Journal of Global Research & Analysis, Vol 5(2), 55 (2016).

[59] *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993).

[60] Isaac Newton (1687, 1713, 1726) "Rules for the study of natural philosophy," *Philosophiae Naturalis Principia Mathematica.*

[61] Orofino, S., *Daubert v. Merrell Dow Pharmaceuticals, Inc.: the battle over admissibility standards for scientific evidence in court*, Journal of Undergraduate Sciences, *3*, 109-11 (1996).

[62] M.A. Berger and L.M. Solan, *The uneasy relationship between science and law: An essay and introduction*, 73 Brook. L. Rev. 847 (2008).

[63] Brian Wynne, *Uncertainty and Environmental learning*, (2. Global Envtl. Change 111) (1992).

in legal arenas.[64] The Supreme Court in India has time and again held that "*If one thing is more necessary in law than any other thing, it is the quality of certainty.*"[65] The pathway to "truth" for science is through gradual revision of its theories and findings with the help of empirical testing. However, as regards a legal system, decisions are not to be made gradually. The decisions once made in court are final and conclusive.[66]

For Instance, in a claim of injury due to a silicone gel breast implant, the court is required to decide, whether or not the expert evidence is clear or not. The court does not have the option of keeping the case pending till scientist conduct detailed study on this subject. "*In this regard, the judge is more like an emergency room physician, who often must make decisions on a very incomplete medical record and with little information about the particular patient*." While, in a similar circumstance, a scientist would examine this issue by designing an experiment, delve into research etc. Unlike judges, a scientist examining of whether silicone gel breast implants cause autoimmune diseases will study the problem, may be design new experiments, and do more and more research.[67]

Law and science are, though interdependent[68], totally different in their goals, culture, methodologies etc. The goal of science is to find universal truths. In law, the results are mostly localised and content specific. Each subject has importance in some areas of our lives. When natural forces are the main concern, natural laws play the governing role. When it comes of code of conduct for people in daily lives and activities in society, it is the man-made law that gets priority.

Discussion about relation and difference between science and law can be seen in environment cases as well. Environmental cases involve abundant use of science.[69] And, the

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[64] *State of Gujarat v. Gordhandas Keshavji*, AIR 1962 Guj 128.

[65] *Mahadeolal Kanodia v. Adm. Gen. of WB*, AIR 1960 SC 936.

[66] *Science and Technology in Judicial Decision Making Creating Opportunites and Meeting Challenges*, A Report of the Carnegie Commission on Science, Technology and Government (March, 1993).

[67] *Id,* p 27.

[68] Associate Justice of the Supreme Court of the United States Stephen G. Breyer, The Interdependence of Science and Law, Address at the 1998 American Association for the Advancement of Science Annual Meeting and Science Innovation Exposition (Feb. 16, 1998) (available in *The American Assoc. for the Advancement of Science* (visited Mar. 26, 1999) <http://www.aaas.org/scope/Breyer.htm>).

[69] R. Feldman, The Role of Science in Law (Oxford University Press, 2009); A. Green & T. Epps, *The WTO, Science and the Environment: Moving Towards Consistency*, 10(2) Journal of International Economic Law, pp. 285–316, at 302–7 (2007).

experts and their inputs are important for the working of the National Green Tribunal. [70] In the environmental cases, the uncertainty of scientific findings has created serious problems for the judges. In the case of, A.P. Pollution Control Board vs. M.V. Nayadu and Ors. (27.01.1999 - SC)[71], it was held that

> "*Uncertainty becomes a problem when scientific knowledge is institutionalized in policy making or used as a basis for decision-making by agencies and courts. Scientists may refine, modify or discard variables or models when more information is available; however, agencies and Courts must make choices based on existing scientific knowledge."*

3. JUDICIAL APPROACH TO SCIENTIFIC EVIDENCE

Despite authoritative research and publications, attorneys and judges are uninformed of the difficulties and risks associated with forensic evidence. Courts, lawyers, and experts should be fully aware that certainty is impossible, human mistake is a possibility, and subjectivity is an inherent part of the process. The use of categorical judgments should raise red flags. It is essential to accept the limits of forensic evidence owing to its subjective nature and the fact that it is not without flaws.[72] Scientific warnings have been ignored by courtroom players, who have opted for traditional views in the service of legal precedents. The Achilles heel of judges is their unwillingness to go into realms beyond their intellectual skills.

Cross examination and counter evidence do not encourage or enable attorneys to find, analyse, or voice epistemological concerns about forensic evidence. Nor have they placed the judges in a position to reasonably assess expert evidence.[73] Perhaps more troubling was the magistrate's presentation of limits and mistakes as a matter for defence counsel in an accusatorial procedure. In summary, it is disturbing that the availability of scientific knowledge has had no affect on contemporary legal practise.

Surprisingly, few of the objections raised against forensic evidence focus on the epistemological (or epistemic) value of the evidence. Almost never has the validity and reliability of forensic evidence been fully questioned or explored. If epistemological issues

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[70] Gill.G.N, *Environmental Justice in India: The National Green Tribunal and Expert Members*, 5 TEL 175 3 (2016).

[71] MANU/SC/0032/1999.

[72] A Campbell, 'The fingerprint Inquiry Report' (2011) 43 Edinburgh, Scotland: Aps Group Scotland 790, at 684.

[73] NAS report, *supra* note 5, at 18.

existed, they would centre on the validity and reliability of processes, indicative error rates, examiner proficiency, the presence and application of standards, the empirical foundation for forensic examiners' expressions, and how cognitive bias risks are controlled. By resolving these epistemological issues, those responsible for evaluating the data would have been able to evaluate if the approach works, how well it works, and under what conditions it works. To generations of lawyers and judges, the notion of contesting the underlying methodology (for example, validity), the categorical assertion of view, or the accuracy seems inconceivable. Unqualified judicial confidence in expert testimony reflects a larger reluctance on the part of some forensic scientists to accept the frailties and limitations of their methodologies.[74]

4. REVIEW OF SUGGESTIONS

Some of the suggestions to bring improvement to the current system, that are given by various scholars, from time and again are:

4.1. Training

It is only a well-informed judge who can check whether the standard of expert report present to him is up to the mark or not. Professionals in the field of law mostly do not have any formal training to understand and evaluate forensic science in an informed way. They ought to be imparted with training and education *"in the fundamentals of science, statistics, and common forensic practices; and in the limitations of, and potential forms and scope of error associated with, those practices."*[75]

Cheng (2007)[76] asserts that the judges who comprehensively understand a scientific issue, can make more sound scientific admissibility decisions. The required education can be attained either before or during the litigation. The judicial training programs can provide the judges with a broad understanding the issues involved in general. And, during the litigation the judges may independently delve into library based research.

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[74] Edmond, G., Tangen, J.M., Searston, R.A. and Dror, I.E., *Contextual bias and cross-contamination in the forensic sciences: the corrosive implications for investigations, plea bargains, trials and appeals*, 14(1) Law, Probability and Risk 1-25, 25 (2015).

[75] NAT'L ASS'N OF CRIMINAL DEF. LAW. (NACDL), PRINCIPLES AND RECOMMENDATIONS TO STRENGTHEN FORENSIC EVIDENCE AND ITS PRESENTATION IN THE COURTROOM 1 (2010), www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17775.

[76] Edward K. Cheng, Independent Judicial Research in the Daubert Age, 56 Duke L.J. 1263 1273 (2007).

Judges are ill-informed assessors of testimony given by experts who are retained and paid by litigants.[77] The judges are vulnerable to situations where one monetarily strong party can produce a parade of scientific experts.[78] As a result, the decision of a case gets affected by purchased or biased scientific knowledge.[79] The Innocence project also promotes and supports training of judges.[80] In a National Survey[81] of 400 state trial judges in USA, on the judges ability to comprehend and apply *Daubert* demonstrates that clearly there is requirement of more emphasis on science-based education of judiciary. To quote, it says

> "*the practical value of Daubert for judges may never be fully realized unless judges are provided with sufficient judicial scientific education to allow them to perform their gatekeeping role.*"

4.2. Appointment of a Neutral Expert

Christopher(2007) suggests that a more viable solution to the menace of partisan experts would be take help from a neutral expert in the relevant branch of science and technology.[82] The neutral scientific advisor can provide the court with non-party advice. It is believed that there would be less institutional resistance to this option as the report given by the neutral expert would be non-binding. This would ensure that the decision making power is retained with judges only.[83] Secondly, any mistake in decision yet made by both, the judge and the neutral expert, shall cause trust loss to a lesser extent.[84] *Justin P. Murphy (2000)*[85] has proposed setting up of a permanent body of specialised expert to help the judges combat the issue of reliability of the expert evidences. This body of expert can provide an impartial assistance to the courts. They would

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[77] W. Twining, 'Preparing Lawyers for the Twenty First Century' (1992) 3(1) Legal Education Review, pp. 1–16, at 14

[78] P.W. Huber, *Galileo's Revenge: Junk Science in the Court Room* (Basic Books, 1991).

[79] S. Jasanoff, *Science at the Bar* (Harvard University Press, 1995); S. Jasanoff, *Just Evidence: The Limits of Science in the Legal Process* (2006) 34(2) Journal of Law, Medicine & Ethics, pp. 328–41.

[80] *Forensic Science Problems and Solutions, available at* https://www.innocenceproject.org/forensic-science-problems-and-solutions/, (last visited 5th Oct. 2021).

[81] Gatowski, S.I., Dobbin, S.A., Richardson, J.T., Ginsburg, G.P., Merlino, M.L. and Dahir, V., *Asking the gatekeepers: A national survey of judges on judging expert evidence in a post-Daubert world.,* Law and Human Behavior, *25*(5), pp.433-458 (2001).

[82] Christopher Onstott, *Judicial Notice and the Law's Scientific Search for Truth*, 40 Akron L. Rev. 489 (2007).

[83] *Id,* at 490.

[84] *Id.*

[85] Justin P. Murphy, *Expert Witnesses at Trial: Where Are the Ethics*, 14 Geo. J. Legal Ethics 217 (2000).

cater to the court and not to one of the parties involved in the case. This body can provide the court with necessary resource and a pool of specialised experts from which court can select one as and when required.[86] The crucial element of this proposal is to provide courts with easy access[87] to relevant experts who do not have a stake in the claim before the court. Separating the expert from the parties, will free him from the burden of pleasing the litigant who hires him and would permits the expert to focus mainly on his or her duty in the litigation which is to utilize his or her expertise to analyze and explain the relevant issues to the judge without any undue influence or pressure.[88] This would put a stop to menace of *"jukebox experts who sing the tunes they [89]are paid for."*[90] This would help in better assessing the reliability of expert evidence in the following ways-

1. Neutral expert would have no stake in the case and thus would be able to objectively assist the court in comprehend complicated technical matters;
2. An independent expert would be able to identify the crucial flaws in the testimony proffered by party experts in court which is not possible for a not scientifically trained judge or lawyer.

4.3. Tightening Qualification of Experts

Another suggestion is tightening of qualification requirement of experts.[91] Determination of questions such as whether expert is qualified enough or not lie within the exclusive domain of the trail judge. The discretion is often exercised quite loosely, meaning a professional from a general field of science may come to testify on a subject that calls for a specialist in that specific branch of science.[92] For instance, calling an orthopaedist or neurosurgeon to testify in place a

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[86] *Id*, at 236

[87] Joe S. Cecil & Thomas E. Willging, *The Use of Court-Appointed Experts in Federal Courts*, 78 Judicature 41 (1994).

[88] Samuel Jackson, *Technical Advisors Deserve Equal Billing With Court Appointed Experts In Novel and Complex Scientific Cases: Does the Federal Judicial Center Agree?*, 28 ENvTL. L. 446 (1998).

[89] David Faigman, *A Look At Experts in the Courtroom; A Way to Sort Out Science From Spin*, WASH. POST, Aug. 22, 1999, at B3.

[90]Jeff Nesmith, *Science on Trial*, ATLANTA J. CONST., June 13, 1999, at D4.

[91] Harold L. Korn, *Fact, Law and Science in the Courts*, Columbia Law Review, Vol. 66, No. 6 (Jun., 1966) p 1080.

[92] *Id*.

general medical practitioner in courts.[93] Choosing of appropriate qualification concerning the technical matter in hand may in turn require technical assistance from neutral expert/experts.

[93] FISCH, NEW YORK EVIDENCE 246 (1959).

CHANGING CONTOURS OF LEGITIMATE EXPECTATIONS: ANALYSING THE PUBLIC-PRIVATE DICHOTOMY IN APPLICATION OF THE DOCTRINE

Omkar Upadhyay

ABSTRACT

The doctrine of legitimate expectations, an offshoot of natural justice, developed in England to put reins on the administrative bodies by holding them accountable to their own words and past practices. The doctrine essentially served as a path to bypass the traditional requirement of 'rights' possessed by the claimant and subsequent 'duty' possessed by the administrative or governmental body to hold the latter liable in law. In due course of time, the doctrine permeated in jurisdictions of various countries which like the inventor of it applied it in the public law domain, particularly in the administrative law. However, this isolation of the doctrine in the public law domain has been relaxed, to some extent, in certain jurisdictions that have made way for legitimate expectations to accrue even when two private individuals are involved. This has been particularly done in employment and contractual matters. This article would thus analyse this changing contour of legitimate expectations and would unravel the public-private dichotomy surrounding its applications. Moreover, the article would also bring forth the current standing of the Indian Apex Court on the doctrine's application and its undue leaning toward the traditional view, which in the opinion of the author is a narrow one.

Keywords: legitimate expectations, natural justice, public-private dichotomy, administrative law.

1. INTRODUCTION

The principles of natural justice are meant to fill the voids left by the written letters of the statute and therefore, ideals of natural justice supplant, rather than substitute, the express provisions of law.[1] Natural justice in effect emerged to blunt the harm resulting from the lapses in procedural aspects of law. This branch of judge-made rules and the emerging principles soon, to some extent, received statutory recognition, while most of the principles still remain tacit in recognition though evident in application. The doctrine of legitimate expectations is one such principle of natural justice. Having its roots in natural justice, the doctrine aims to ensure that the viable claims of the people get satisfied even though such claims are not

[1] A. K. Kraipak v. Union of India, (1969) 2 SCC 262.

justifiable in the eyes of law in the strict sense and thus ensure the ultimate aims of fairness and reasonableness.

The developers of the doctrine, British Courts, have since its inception applied legitimate expectations to control the unruly horses, the administrative and other governmental bodies, by using the doctrine as a rein. In doing so, they have, though not intentionally, isolated the application of this doctrine in the realm of public law. Similar has been the case with Indian Courts, which have assimilated yet another of the common law principles in deciding cases involving administrative authorities. This traditional approach, in the opinion of the author, is narrow in scope concerning only the public law domain. Certain Courts in other jurisdictions have come to apply this doctrine in private law matters too, especially in employment and contractual matters. Thus, the shackles of traditional view have seemingly been done away with and the doctrine is now permeating other domains hitherto believed to be outside its purview. This approach, in contradistinction to the traditional one, can well be regarded as the broader approach. Nonetheless, the Indian courts have failed to appreciate the broader perspective and have sought to stick to the traditional approach and even negativing the permeation of the doctrine in contractual matters.

Given this backdrop, this research would thus seek to analyse this public-private dichotomy which surrounds the doctrine of legitimate expectation by weighing and contrasting the two approaches as they presently exist. In doing so, the author would also unravel the origins and historical development of the said doctrine in England and India and would discuss the intricacies of the doctrine in depth. The argument here is that the current isolation of the doctrine is unwarranted and void of substantial reasoning, as being a principle of natural justice, it is meant to be of all-embracing character.

2. BY-PASSING THE RIGHTS REQUIREMENT: TRACING THE EVOLUTION OF THE DOCTRINE

A doctrine of legitimate expectations, of public law domain, grew particularly as an equitable remedy to by-pass the traditional 'rights' requirement, wherein for the claim to be justifiable in law, the claimant must show that his/her rights have been violated by the opposite side which owed some duty.[2] Originated in England, the doctrine was soon assimilated into the wider umbrella of natural justice and came to be applied in various countries. While even today it

[2] A.K. Srivastava, *Doctrine of Legitimate Expectation*, JTRIUP, 5 (1995).

remains an element of natural justice, the Indian Courts have made the doctrine a part of constitutional principles applicable to governmental and administrative authorities.[3]

2.1. Development in England

The doctrine of legitimate expectations owes its existence to the seminal observation of Lord Denning in *Schmidt* v. *Secretary for Home Affairs*[4] wherein the status of certain alien students as to their continued residence in the United Kingdom beyond the prescribed time was in hinges. The foreign alien students here wanted their stay to be extended by the Home Secretary for the completion of their studies to which the latter refused. The petitioner students based their claim on the fact that they have been earlier allowed extension for two times and refusal this time is prejudicial to their interest and void of reason and fairness. The Court, however, noted that the students did not have any *legitimate expectations* of being allowed an extended stay. While negativing the petitioner's, the Court however recognised 'legitimate expectations' as an alternative, or rather a by-pass, to the requirement of rights. On clarifying what constitutes legitimate expectations, *Halsbury's Law of England* puts it as:

> "*A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice.*"[5]

From the above description, it is evidently clear that the doctrine was sought to be of application against a decision of an administrative authority that was in breach of legitimate expectations of the claimant who otherwise did not possess any right in law to proceed with the claim. As to when would such expectations would legitimately arise, it was settled in the landmark pronouncement of *Council of Civil Services Union* v. *Minister for the Civil Services*[6]. Lord Fraser stated that such legitimate expectations may either accrue from an express promise given by or on behalf of a public authority or may arise from the past practices which are legitimately anticipated to be continued.[7] In another judicial pronouncement, the basis of the doctrine was

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[3] Ambuj Mishra, *Legitimate Expectations in India*, 1, IJJSR, 7, (2019).

[4] (1969) 2 WLR 337: (1969) 2 Ch 49 (CA).

[5] HALSBURY'S LAWS OF ENGLAND, para 81 at pp. 151-152, (LexisNexis 2006).

[6] (1958) AC 374: (1984) 3 WLR 1174 (HL).

[7] *Id.*

further concretised. The case of *Attorney General of Hong Kong* v. *Ng Yuen Shiu*[8] concerned the right of hearing of an immigrant against whom a removal order had been passed by the Director of Immigration without having the claimant being heard while the order of the government specifically provided that each immigrant's case would be heard on merits. The claimant based his claim on the legitimate expectation of being heard before a prejudicial order affecting his rights is passed by the governmental authority. Upholding the petitioner's contention, the Privy Council noted that,[9]

> "*In opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the applicant, along with other illegal 26 immigrants*."[10]

The judges were thus of the view that deviance from the express promises made would make the authority liable in law. However, the Privy Council also put a fetter in the application of the doctrine that such expectations would be side-lined if they are in conflict with express provisions of law. This limitation was further accepted in a later pronouncement.[11]

In various later pronouncements, the Court fastened liability on the government and administrative authorities for pulling back from their express promises. For instance, the Court noted that if an authority prescribes a procedure to be followed or a criterion to be fulfilled, such prescriptions may create an impression in the mind of the public which they legitimately expect to be adhered to by such authority.[12] Thus the rationale for introducing the doctrine as part of natural justice and rule of law is to ensure accountability of the administrative bodies in their dealings with the public where the acts of the former are bound to affect the interests of the latter. It is also to ensure that "*promises intended to be binding, intended to be acted upon are in fact acted upon.*"[13] This doctrine has also been referred to and described in different phraseologies such as the "*rule of protection of legitimate confidence*"[14] which seemingly can be equated to legitimate expectations.

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[8] (1983) 2 AC 629: (1983) 2 WLR 735 (PC).

[9] *Id.*

[10] *Id.*

[11] R v. Secretary of State for Education and Employment, Ex Parte Begbie, (2000) 1 WLR 1115 (CA).

[12] R v. Secretary of State for Home Department, Ex Parte Asif Mahmood Khan, (1984) 1 WLR 574 (QBD).

[13] Central London Properly Trust Company v. High Trees House Ltd (1947) KB 130.

[14] Re Civil Services Salaries E.C. Commission v. E.C. Council, [1973] E.C.R. 575.

Conclusively, it can succinctly be put that the doctrine of legitimate expectations, which evolved in England, is aimed at protecting the rights of an individual when is unable to claim any. Moreover, the Courts have, in course of years, put certain fetters on the doctrine, one being the weighing scale of public interest[15] and the other being express statutory provision in contrary to the expectations[16]. Therefore, when the larger public interest warrants side-lining the expectations, they can be denied.[17] One thing which is evidently clear from the above pronouncements is that the doctrine has found solace in the public law realm where claims are being made from the administrative or governmental bodies.

2.2. The Doctrine's Import in India: Tracing Roots from within the Constitution

The principles of natural justice were incorporated by the Indian judiciary adopting an activist magnitude in the pronouncement of *Maneka Gandhi* v. *Union of India*[18] wherein the roots of natural justice were uncovered from within the Constitution itself. Like other principles of natural justice, the doctrine of legitimate expectations too was welcomed and it is relatively of recent import established in the background of principles of natural justice.[19]

The Supreme Court for the first time recognised legitimate expectations in *State of Kerala* v. *K.G. Madhavan Pillai*[20]. The government, in this case, had given certain aid and sanction to the petitioner-respondents here to establish new schools. However, after 15 days, this aid was held back by an order. The Court while adjudicating upon the dispute noted that the earlier decision to grant aid for the establishment of schools created legitimate expectations which were breached by the subsequent order restricting the aid. The Court went on to note that such a breach would be tantamount to a violation of principles of natural justice. What is to be noted here is that the claimants, in this case, did not possess any right to claim the aid from the government for opening the schools, but their claim was nonetheless satiated by the Court on the basis of the doctrine of legitimate expectations. Thus, when certain policies of the government are made public *via* official notifications, such publication creates legitimate

[15] Shaughnessy v. Pedreiro, 99 L Ed 868.

[16] Supra note 10.

[17] Breen v. Selective Service Local Board, 396 US 460 (1970).

[18] (1978) 1 SCC 248.

[19] Ashoka Smokeless Coal India Ltd v. Union of India, (2007) 2 SCC 640.

[20] AIR 1989 SC 49.

expectations in the minds of the public which cannot be breached by a subsequent notification stating otherwise.[21]

The Indian Courts' interpretation of the doctrine, in consonance with the British Courts, has been succinctly laid in *Union of India* v. *Hindustan Development Corporation*[22], wherein the Court noted that,

> "*Time is a threefold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right.*"[23]

The Court further noted that for an expectation to be legitimate, its basis must be founded upon sanction of law or an established procedure followed regularly. In adopting the common law doctrine of legitimate expectation, the Supreme Court has made the principles of equality as enshrined in the Constitution[24], its repository. Thus, the basis of legitimate expectation flows from Article 14.[25] Therefore, if the legitimate expectations have been denied, such action would not only breach the principles of natural justice but would also amount to a violation of ideals of the Constitution namely, the principle of non-discrimination and non-arbitrariness. On similar lines, the Court in *F.C.I.* v. *Kamdhenu Cattle Feed Industries*[26] categorically stated that when the State and its instrumentality deals with the public at large and raises legitimate expectations in the latter's perception, the nonfulfillment would leave a taint of arbitrariness in the actions of the State.

In *National Building Construction Corporation* v. *S. Raghunathan*[27], the Supreme Court was of the view that for a claim of legitimate expectations to succeed, the claimant must have suffered 'detriment' as a result of deviance from the prescribed procedure. It is only when the claimant has suffered a detriment because of his reliance on representation from the government that a claim would succeed by application of the doctrine. On the question of when can the doctrine be successfully applied the Court in *Madras City Wine Merchants Association*

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[21] S.C. and Weaker Section Welfare Association v. State of Karnataka (1991) 2 SCC 604.

[22] [1993] 3 SCC 499.

[23] Ibid, 540.

[24] INDIA CONST. art. 14.

[25] J.P. Bansal v. State of Rajasthan, 2003 AIR (SC) 1405.

[26] (1993) 1 SCC 71

[27] (1998) 7 SCC 66.

v. *State of Tamil Nadu*[28] gave the following prerequisites; "*(a) if there is an express promise given by the public authority, (b) because of the existence of a regular practice which the claimant can reasonably expect to continue, and (c) such an expectation must be reasonable.*"[29] The test of reasonableness would essentially be of expectation of a *bonus paterfamilias*.[30]

The Indian approach has been in consonance with the approach of the British Courts, like the latter, they have also applied the doctrine when the claimant is a private individual and the opposite side is either State or its instrumentalities or any administrative authority. The doctrine is thus one of the newest means of putting checks on the unreasonableness and uncertainty emanating from administrative actions.[31] Apart from ensuring reasonableness, the Indian Courts have also sought to apply the doctrine to ensure that there is consistency in State actions.[32] Thus in doing so, the Court has sought to intermix the doctrine of legitimate expectations, a product of the United Kingdom, with the 'consistency principle' as prevalent in the United States (US). As per the dictums of the US Courts, "*the consistency principle is closely related to the rule of law, which recognizes that each citizen has a legitimate expectation and that the actions of public officials will be consistent with the existing law and legal practices*."[33] Though seemingly similar, the two concepts differ. While the consistency principle may be a limb of legitimate expectations doctrine, however, the latter is wider in connotation and aims at more than merely maintaining consistency. Another difference between the two rules is that legitimate expectations are sought to accrue, as per the British pronouncements, only on executive and administrative actions, the consistency principle also takes within its ambit judicial decisions too.[34]

3. LEGITIMACY OF EXPECTATIONS: PROCEDURAL AND SUBSTANTIVE

The legitimate expectations of an individual in its dealing with the government may originate either with respect to procedural aspects of administration or substantive benefits which he

[28] (1994) 5 SCC 509.

[29] *Id.*

[30] Lührs v. Hauptzollamt Hamburg-Jonas, 1978 E.C.R. 169

[31] Jayanta Chakraborty, *Doctrine of Legitimate Expectation - A Comparative Study of UK, USA & India*, 5 IJLPP, 21 (2018).

[32] *Supra* note 24.

[33] Shaball v. State Compensation Ins. Auth., 799 P.2d 399 (1990)

[34] *Supra* note 29.

anticipates to be poured on him from the authorities. While the latter has had a long history of application, the latter is of a rather new import. Though earlier there existed a dichotomy between "procedural" and "substantive" application of the doctrine, they have today come to be now applied in tandem.[35]

3.1. Procedural Expectations

The two pivotal principles of natural justice; *nemo in propria causa judex, esse debet* (no one should be made a judge in his own case) and *audi alteram partem* (no one should be condemned unheard)[36] aims at ensuring procedural propriety and to make sure that the process of law is void of unreasonableness and arbitrariness. Thus, if a decision is to be taken by an administrative authority that would have a direct bearing on the rights, interest, or status of the concerned party, it is of importance that he should be allowed to make his representations before such adjudicating authority and furnish his defence before it in forms of evidence or testimonies. Thus, the essence of the right to being heard is that before a prejudicial order is passed against an individual, natural justice warrants him to speak, himself or through legal representation, before the authority and present his side of the story.[37]

The procedural aspect of the doctrine thus seeks to ensure that when representations or past practices of an administrative or governmental body create an impression, legitimate in law, that before any decision of civil consequences is made, the parties would be heard, such bodies subsequently cannot do away with this opportunity as they would now be bound by the legitimate expectations.[38] Thus the doctrine, in the initial years of its inception, was to ensure procedural justice for the citizen.[39] The earlier decisions of the courts leaned particularly on this portion of the doctrine and to some extent negated the presence of "substantive" legitimate expectations. For instance, in one of the Canadian court's pronouncements, it was categorically stressed that the content of the doctrine was purely procedural in nature and thus there cannot arise any substantial benefits or entitlements through its application.[40]

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[35] Fedsure Life Assurance Ltd. and Others v. Greater Johannesburg Transitional Metropolitan Council and Others, 1999 (1) SA 374.

[36] M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, (LexisNexis 2017).

[37] Union of India v. T.R. Varma, 1957 AIR 882: 1958 SCR 499.

[38] Mark Elliot, *Legitimate Expectations: Procedure, Substance, Policy and Proportionality*, 65, CAMB. L.J., (Jul., 2006),

[39] T.R.S. Allan, *The Rule of Law as Rule of Reason: Consent and Constitutionalism*, 115 LQR 221, 233, (1999).

[40] Furey v. Conception Bay Centre Roman Catholic School Board, (1993) 104 DLR (4th) 455.

Thus, the initial view of the doctrine was merely as a device in the hands of the citizens to ensure that principles of natural justice, as elaborated above, are followed and in case there was non-observance of those principles in the procedures, the doctrine would come into play. The aim was, and is, to ensure procedural fairness and root out arbitrariness in administrative actions.

3.2. Substantive Legitimate Expectations

After the initial years of the doctrine's use in the matters of adjudication, it soon came to be applied in cases where the claimants asked for more than mere fulfilment of procedural requirements, that is, substantive benefits. The content of substantive legitimate expectations has been succinctly put in *Ng Siu Tung and Others* v. *Director of Immigration*[41] as,

> "*The doctrine recognizes that, in the absence of an overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court.*"[42]

Thus, substantive legitimate expectations would arise when the representations themselves suggest for certain benefits to be given other than the mere following of prescribed procedure. The substantive part of this doctrine is that when there are representations that substantive benefits will be granted or if such benefits were already given and the representations suggest the continuance of such benefits, then the rule of legitimate expectations requires such benefits to be given or continued in consistency with earlier practices.[43] Even the Indian authorities have accepted the substantive limb of the doctrine. For instance, in *M.P. Oil Extraction* v. *State of M.P.*[44] the question before the Court was whether a particular industry has legitimate expectations for renewal of the agreement on the basis of past practices. The Court answered in the affirmative to this question and thus essentially gave certain benefits on the basis of expectations. Similarly, in the *National Buildings Construction Corporation*[45] case the three-

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[41] (2002) 1 HKLRD 561.

[42] *Id.* para 92.

[43] G. Sreenivasan v. Principal, Regional Engineering College, AIR 2000 Ori 56.

[44] (1997) 7 SCC 592.

[45] *Supra* note 26.

judge bench of the Supreme Court firmly acknowledged that doctrine of legitimate expectations has both aspects; procedural and substantive.

Recognition of substantive legitimate expectations has also been viewed as, to some extent, an addition to the test of reasonableness. This is in addition to the test of reasonableness laid in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[46] which is famously known as the "Wednesbury reasonableness test". Thus, when a governmental authority reneges from its promises or deviates from its past practices, such actions would also be adjudged as unreasonable by the courts. Nonetheless, it has been held that a change in policy resulting in the breach of expectations would be justified if that change satiates the Wednesbury test.[47] Thus the doctrine could be side-lined if the requirements of reasonableness have been met with. The two aspects, procedural and substantive, have now come to be realised as part of one single scheme, a deviation from the earlier lopsided view which recognised only the former aspect. The courts have since held that the procedural aspect precedes the successful application of the substantive part and thus rather than contrast, they supplant each other.[48]

4. UNRAVELLING THE PUBLIC-PRIVATE CHASM: LEGITIMATE EXPECTATIONS IN CONTRACTUAL MATTERS

4.1. Traditional View Hitherto: A Narrow One?

The doctrine of legitimate expectation has been employed by the courts to make public authorities and bodies perform acts that they promised to perform.[49] Further, the doctrine has been sought as something which would ensure fairness and reasonableness.[50] Though the doctrine was aimed to serve noble purposes, the courts, English and Indian, have restricted the scope of the doctrine. Though the doctrine has its "genesis" in administrative law[51], it does not automatically exclude its operation in other branches of law. The preceding sections and the multiple foreign and indigenous authorities covered therein bring forth the pertinent observation that the doctrine of legitimate expectations, whether procedural or substantive, has been actively applied by the courts, but in doing so, the ambit of the doctrine has been

[46] Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223.

[47] R. v. Secretary of State for the Home Department Ex Parte Hargreaves, (1997) 1 WLP 906.

[48] *Supra* note 42.

[49] R (Abdi & Nadarajah) v. Secretary of State for the Home Department, (2005) EWCA Civ. 1363 (68).

[50] R. v. I.R.C. ex parte MFK Underwriting, (1990) 1 All E.R. 91, 111.

[51] National Building Construction Corporation v. S. Raghunathan, [1994] 5 SCC 509.

circumscribed and relegated to only the public law sphere. The doctrine has hitherto been used as a leash to control the administrative and governmental actions from turning into arbitrary and unreasonable. This has surely ensured that the dealings between private individual on the one side and the government on the other side is fair and the discretion of the latter is exercised in a logical manner sympathetic to the interest of the public at large, but at the same time, the courts, especially of England and India have made one thing clear without any cloud of doubt that the said doctrine would be of no application when both the parties are private individuals having no link with the government.[52]

In *Hindustan Development Corporation*[53] it has been made evidently clear that legitimate expectation doctrine concerns only the actions of the State. Similarly, the court in *Industrial Fuel Company Pt. Ltd. v. Heavy Engineering Corporation*[54] and *A.C. Roy and Co. and Others* v. *Union of India*[55], both being High Court judgements, have specifically held that the doctrine of legitimate expectation has no application when it comes to disputes which have their genesis in a contractual matter and the said doctrine is only applicable in cases dealing with State action. In another pronouncement[56], such a position was reiterated. It was in clear words put that the principles which flow from the doctrine of legitimate expectations, do not and cannot be applied in the contractual field.[57] One peculiarity is to be witnessed here, which is that while on one hand it has been in clear words stated that the doctrine has no application in matters of contract, there also exists certain judicial pronouncements which say otherwise. In the *Kamdhenu*[58] verdict, the court stated that "*in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the constitution of which non arbitrariness is a significant facet*." The court in the said case went on to apply the doctrine of legitimate expectations in favour of the aggrieved party in the dispute which arose out of the contract. The only distinguishing feature between the pronouncements disfavouring application of the doctrine in contractual matters and the judgments favouring it is the presence or absence of State as a party. Therefore, when State was a party to a contract, the doctrine has

[52] The State of Bihar v. Dr. Sachindra Narayan & Ors. Civil Appeal No. 884 of 2019.

[53] *Supra* note 21.

[54] Industrial Fuel Company Pt. Ltd. v. Heavy Engineering Corporation 1993 (2) BLJR 1308

[55] A.C. Roy and Co. and Others v. Union of India AIR 1995 Cal 246.

[56] D. Wren International Ltd. and Others v. Engineers India Ltd. and Others, AIR 1996 Cal 424.

[57] *Id.*

[58] *Supra* note 25.

been effectively applied in contractual matters, whereas an opposite stance is taken where both parties are private individuals despite the fact the dispute is in essence the same, arising out of contract. This in itself is the evidence of the fact that the doctrine has been kept in isolation segregating the public and private spheres.

This is true not only for the Indian courts, but certain judgements of foreign courts too, have ruled on similar lines of reasoning.

4.2. Permeation in Private Domain: Breaking the Shackles and Application of Doctrine in Contractual Matters

This narrow and isolated application of the doctrine in the recent past has witnessed a change in the form that certain courts have come to apply the said doctrine in employment and purely contractual matters. Employment matters too, fall under the ambit of contractual matters as the relation between the employer and employee is nothing but a contractual relationship governed by the terms of the contract. Thus, there essentially exists a dichotomy when it comes to the application of the doctrine and this gulf of opinion can be succinctly put as; while the traditional view seeks to apply the doctrine only when a public body is concerned, the opposite view, while accepting the traditional one, goes beyond it and embraces private contractual matters too.

4.2.1. Legitimate Expectations in Employment Matters

Employment relations particularly between the employer and the employee are governed by the terms of the contract of employment which in the express and specific terms lays down the terms and conditions of employment. In one sense, it serves as a 'law' for the particular place of employment in so far it creates rights in favour of the employer and casts certain obligations on the employee. There might accrue instances where though the letter of the contract is followed, but not in the spirit it was intended and thus may cause prejudice to the interest of the employee. In such situations, it becomes pertinent for the Court, when presented with such disputes, to read into the written texts principles of equity so as to arrive at a just remedy. The doctrine of legitimate expectation, being itself a principle of equity, shall, in the same manner, be made applicable to matters of employment. However, the application of the doctrine in employment disputes arising out of contracts has had a chequered spanning various decision. For instance, in *Embling* v. *The Headmaster, St. Andrew's College*, it was held that the natural justice principle of legitimate expectation has no application in matters of employment as they would solely be governed by the terms of the contract and nothing more. However, an opposite

view was taken by the South African court in *Lunt* v. *University of Cape Town*[59] where there was a disagreement on the view that contract matter excludes the application of the doctrine. [60] In another ruling by the South African court in *Administrator, Transvaal and others* v. *Traub and others*[61], the issue before the court was again on the applicability of doctrine even though the employer in question was in no way an instrumentality of the State and was thus a private party. The claim, in this case, was made by the employees of a private hospital who sought renewal of their employment and they based their claim on the fact that it was a tradition followed by the hospital administration wherein there will be an automatic renewal of the employment of the senior house officers, which the claimants were, after six months. Such renewal however did not accrue because they criticized certain of the hospital's policies. Going by written law, they did not possess any right to seek automatic renewal of their appointment to the post, they didn't even have a right in the first place to be appointed. The court nonetheless took a rather broad view and stated that even though the hospital is private in nature, much akin to a private company, but nevertheless the said tradition of automatic renewal of appointment every six-month created legitimate expectation in the minds of the claimant that they too would be meted the same treatment. Therefore, the court rightly and aptly broke the barriers of the application hitherto limiting the application of the doctrine in private affairs.[62]

4.2.2. Purely Contractual Relationships and the Application of the Doctrine

Purely contractual matters are those where both the parties specifically undertake to govern themselves by the terms of the contract as is entered between them. The Indian view on this regard has been dealt with in detail in the preceding sections. In *A.C. Roy and Co.*[63], the deciding judge put his observation in the following words, "*It is difficult to comprehend as to how the doctrine of legitimate expectation can be invoked in contractual fields.*"[64] Such difficulty which the learned judge apprehended in dealing with the case can be well resolved by looking at certain foreign authorities. For instance, in *Mokgoko* v. *Acting Rector, Setlogelo*

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[59] Lunt v. University of Cape Town, 1989 (2) SA 438 (C).

[60] Daniel Malan Pretorius, "Letting the Unruly Horse Gallop in the Field of Private Law: The Doctrine of Legitimate Expectation in Purely Contractual Relations", 118 *S. African L.J*. 503 (2001).

[61] Administrator, Transvaal and others v. Traub and others, (1989) 4 SA 731.

[62] M. P. Olivier, *Legitimate Expectation and the Protection of Employment*, J.S.A.L. 483 (1991).

[63] *Supra* note 54.

[64] *Id.* para 44.

Technikon[65], there were certain students of the Setlogelo Technikon who wanted their re-registration for the upcoming semester as was required by the rules of the school that each semester required re-registration. They were however denied such registration without ascribing them with the opportunity of being heard. Moreover, such denial of registration was also deviance from the long-standing tradition of the school which has hitherto re-registered the requesting students. The school before the court contended on the fact that their relationship with the students was contractual in nature and thus only the terms of the contract would govern the dispute and thus the student's claim of 'legitimate expectations' should not be accepted. The Court, however, stated that the "*doctrine of legitimate expectation was not confined to contracts of statutory or public-service employment*"[66] and it extends to even those contracts which have private individuals as its parties.

Similarly in a case where the aggrieved party was a medical practitioner wanting re-registration as a post-graduate student and was subsequently denied such re-registration without affording him the opportunity to present his case, which he legitimately expected to be afforded, claimed relief from the court. Though the court acknowledged that the relation between the claimant and respondent was contractual in nature, it would not exclude the application of the doctrine of legitimate expectation.

On similar lines of reasonings, a rather recent instance is of a pronouncement delivered by the High Court of Seychelles.[67] The brief factual matrix here was that there existed a contractual relationship between the parties to the dispute. Both parties were private in nature with no linkages to the State or its instrumentalities. The contract between them was in nature of an agreement of lease with a clause that provided for renewal after a specific time. The owner-respondent, however, did not renew the lease which resulted in certain loss to the claimant who relied on the renewal clause and made certain 'reliance' investments in his business venture which he carried on the premises of the leased property. Though the renewal clause was purely an optional clause concretising only when both the parties' consent to it, the court nonetheless held the owner liable for breach of contract on the ground that the renewal clause essentially created legitimate expectations in the mind of the claimant. The court emphasised that "*now time has come to rethink, remould and extend its application to other branches of law such as*

[65] Mokgoko v. Acting Rector, Setlogelo Technikon, 1994 (4) SA 104 (BGD).

[66] *Id*. para 115E.

[67] Allen Jean and Anr v. Wellington Felix and Anr, [2013] SCSC 63; [2013] SLR 205.

contract, as it constantly evolves." Therefore, the claimant was garnered with remedy even though he did not possess any right, in a strict sense, to claim so.

5. ANALYSIS, CONCLUDING REMARKS AND THE WAY AHEAD

The above pronouncements essentially run counter to the pronouncements of the Indian courts as have been discussed above. It is thus of prime importance to gauge the viability of each approach and weigh them in contrast to each other. The first approach, the narrow one, is not erroneous in its content but errs in its application. Catena of judgements discussed above primarily point to one single thing, that is, no matter the nature of the dispute, the doctrine would be applicable if the claim is being made from State and its instrumentalities.[68] It has thus become a pre-requisite before the Indian courts for having one's claim satisfied that government or administrative authorities must be involved and the presence of private parties at both ends would vitiate the application of the doctrine.

On the other end of the spectrum stands the other point of view which has been largely developed by South African courts.[69] In this line of cases, while the courts have confirmed the British view of the doctrine and its contents, they have gone a step further, and probably in the right direction, in extending the application of the doctrine in private matters particularly those of employment and contractual matters.

Though none of the views is erroneous in its reasoning, it is the undue leaning of particularly the Indian courts, on the former view which needs to be revisited. It has nowhere been mentioned that natural justice applies only and only in the domain of public law, and that too particularly in administrative law. Rather natural justice has been defined as the sense of 'right or wrong. [70]One cannot logically come to the conclusion that this sense of right and wrong can only be expected to be put into application by the courts when the government is involved. The doctrine of legitimate expectation itself being a component of natural justice must also enjoy such a wide ambit as natural justice itself deserves. Moreover, in elucidating the correctness of the two approaches, it is pertinent to look back at the evolution of the doctrine. When Lord Denning laid seeds of the doctrine in *Schmidt*[71], he did not anywhere intend that the claimants

[68] Navjyoti Cooperative Housing Society v. Union of India, (1992) 4 SCC 477; Global Energy Ltd. v. Central Electricity Regulatory Commission, (2009) 15 SCC 570.

[69] Mokgoko v. Acting Rector, Setlogelo Technikon, 1994 (4) SA 104 (BGD).; Administrator, Transvaal and Ors. v. Traub and Ors, [1989] 4 SA 731; Lunt v. University of Cape Town, 1989 (2) SA 438 (C).

[70] Dharampal Satyapal Ltd. v. CCE, (2015) 8 SCC 519.

[71] *Supra* note 4.

would be able to enjoy the fruits of this seed only when they claim from the State and its organs or instrumentalities. Even Lord Fraser in *CCEU*[72]when he wrote that expectations would arise from the express promise or past practices of public authority, it must not be given a strict meaning to mean that it would 'only' accrue on promises and past practices of public authority. His usage of public authority is only coincidental with the fact that the respondent was a state organ. Spirit, rather than words, must be given effect and the spirit is accountability, which would be made sure by holding oneself to his own spoken words and past consistent practices adopted by him giving the claimant an impression of their continuation.

Thus, the way ahead must surely be to observe the dictum of *Allen Jean*[73] and expand the application of the doctrine to even purely private contractual matters which would have severe consequences if left unattended merely because of want of actual rights to satiate the claims.

[72] *Supra* note 6.

[73] *Supra* note 66.

INSIDER TRADING: WHAT IS IT AND UNDERSTANDING THE EVOLUTION

Vyshnavi Praveen, Ananya Soni

ABSTRACT

India is home to one of the most active and largest financial markets in the world. With millions of investors and amounts exceeding crores, it is safe to say that the market is extremely volatile. With the number of investors increasing by the day and the growing instances of securities fraud, people have become weary of investment, and it's due to this purpose that the SEBI has been established. Amongst some malpractices that exist, insider trading the biggest and most pressing concerns of them all.

It's is the selling or buying of a publicly-traded company's stock by someone who has non-public, material information about that stock. Insider trading hampers the true aim of stock market. Insider trading not only shakes the confidence of investors but also acts as an unfair advantage to individuals in positions of power. The SEBI was specifically introduced to regulate and look into malpractices such as insider trading and draws its power from the SEBI Act of 1992. Insider trading is governed by the SEBI Regulations of 1992.

Although SEBI has contributed to curbing several malpractices in listed companies, we can see pressing issues and major drawbacks concerning the existing legislative framework, making complete prohibition nothing but a far-fetched dream. This paper attempts to understand the role that SEBI plays with regard to disallowing insider trading by undertaking a scrutiny of existing provisions to prohibit it and the potential roadblocks. The paper also takes a look at a comparison between India and US with regards to the tasks and responsibilities of the SEC versus the SEBI. Further, the authors try to provide suggestions and solutions which may be incorporated, concerning formulation of rules and regulations vis-a-vis insider trading for a more comprehensive framework.

Key Words: *Insider Trading, Price sensitive information, SEBI, Shareholders, Financial Markets*

1. INTRODUCTION

Insider trading is a commonly known practice, even among individuals who do not participate in the stock markets. It's a practice through which a company insider avails to himself certain price sensitive information which isn't public and uses such an advantage to benefit himself by either

buying or selling that particular stock. The reason this practice is looked down on is for the reason that it goes against the free market nature of share market.

It's a noteworthy that most nations across the world didn't term insider trading illegal until the 20th century. It was the United States that first termed insider trading an illegal practice[1]. Insider trading has been a long-standing issue in India with most instances being reported during the period of 1940 to 1990. The first popularly known and reported case was that of the *Garware Nylon insider trading case*[2]. In this case, a rumor that the company was going to issue bonus shares spread like wildfire through the company. This led to mass buying amongst the staff, which drove up the price. The rumor was, however, denied a few days later, causing a massive price fall. The company's management ended up purchasing large amounts of shares and following the same, bonus shares were announced. This resulted in heavy losses to public who had faith in the company. Another similar case was the Great Eastern shipping company, where it was detected that the share price of the company unexpectedly rose 200% and all of a sudden collapsed. This resulted in the complete collapse of the company[3]. When investigations were carried out, it revealed the fact that the company had provided price-sensitive information regarding bonus shares to a brokerage company and this created mass buying and eventually the shares had been sold at extremely high prices.

2. LEGISLATIVE HISTORY CONCERNING INSIDER TRADING IN INDIA

India's history relating to insider trading dating back to Bombay Securities Contract Act of 1925. This Act was used to govern sale of certain securities, back in the day[4]. After that, Capital Issue Control Act laid out the rules concerning the issuing of capital and price-fixing[5]. Insider trading was expressly discussed for the very first time in the Thomas Committee Report.[6] The Report highlighted the fallacies of the Indian securities market which were being used by top-level management for personal gains. This report also highlighted the need for urgent regulations to

[1] *Strong v. Repide* (1909) 213 US 419.
[2] *Union of India v Galware Nylone trading ltd* (1980) CENCUS 256 D,
[3] "Great Easter Shipping to consider buyback of shares, stock surge", *Live mi*nt, Dec 23,2021 *available at:*https://www.livemint.com/market/stock-market-news/great-eastern-shipping-to-consider-share-buyback stock-surges-11640223833543.html (Last visited on 25 May).
[4] The Bombay Securities Contract Act, 1925, (No. 8 of 925).
[5] The capital issue (Control) Act 1947, (Act of 29 of 1947).
[6] Thomas Committee Report, "Report on the Regulation of Stock Exchanges in India" (1948).

be placed to regulate unethical trade practices. Patel Committee Report of1986 was constituted by Central Government specifically to combat insider trading and also made suggestions regarding contract regulations[7]. Abid Hussain Committee Report of 1989 suggested that we need to impose criminal liability if insider trading is done and also to legislate a separate statute to deal with insider trading[8].

The establishment of SEBI was a huge milestone and a stepping stone toward more regulated financial markets[9]. SEBI was established in 1988 under the resolution of Central Government's to regulate activities of share market. It was the increase in fraud and malpractices that finally pushed for the creation of the SEBI. Sec, 11 of the Act prescribes the power and functions of the board. Under Section 11(2) (g), the prevention of insider trading is among the main duties of the SEBI. Section 12 A - which was amended in 2002 – expressly disallows insider trading. The SEBI (Insider Trading Regulations) 1992 was due to increasing fraud in financial markets[10]. Under the powers conferred by Section 30, the Board made certain provisions to disallow insider trading. Section 3 and Section 4 deal with the banning insider trading and powers to investigate. On basis of recommendations from Kumar Mangalam Birla committee, efforts were made to make provisions more comprehensive and inclusive, by defining terms like "price-sensitive information" and so on[11]. Through the Companies Act, definition of "price-sensitive information" was divulged. Section 195 of the Act prohibits insider trading of securities by any internal individual, inclusive of but not restricted to directors and connected persons[12].

The SEBI Prohibition of Insider Trading Regulations 2015 was based upon the Sodhi committee recommendations and replaced the SEBI (Prevention of Insider Trading) Regulations of 1992 and continues to remain in effect.

3. AN ANALYSIS OF LANDMARK CASES SURROUNDING INSIDER TRADING

India has had a long history of insider trading and over the years, we have seen some landmark cases which have shaped the process of legislating. *Harshad Mehta*

[7] Patel committee, "Report of the high-powered committee on stock exchange reforms", (1986).
[8] SEBI, The Abid Hussain committee report on Insider Trading,1989.
[9] Securities and exchange board of India Act 1992, (No. 15 of 1992).
[10] SEBI (Prohibition of Insider trading) Regulations 1992.
[11] SEBI (Insider trading) Amendment regulations 2002
[12] SEBI (Prohibition of Insider trading) regulations 2015, issued on 15-01-2015.

vs CBI dealt with among the most infamous scams of stock markets[13].Harshad Mehta, infamous stock broker, and advisor was found guilty of price rigging Stock exchange. He did so by taking advantage of loopholes in the banking system and draining several funds from interbank transactions. Subsequently, he bought a large quantum of shares at a premium rate, which drastically shot up the Sensex Index. When the intricacies of the scam came to light, the banks began to demand money from him, and this resulted in a drastic plunge of the Sensex overnight. The scam resulted in losses of over Rupees 5000 crores and he was charged with 76 criminal cases and 600 civil suits.

The *Hindustan Unilever Limited vs SEBI*[14] case is also among the most prominent cases. Hindustan Unilever Limited (HUL) had purchased 8 lakh shares of Brooke Bond Lipton India Limited (BBLIL) from the Unit Trust of India. This was made 2 weeks before a proposed merger was supposed to go through between Hindustan Lever Limited (HLL) and BBLIL. HLL and BBLIL were both subsidiaries of Unilever Company. They were purchased at Rs 320 per share and soon after the merger, they were valued at Rs 410 per share. Resultantly, enormous gains came to the Company. The SEBI noticed these irregularities and issued show-cause notice. Prosecution proceedings were ordered against the chairman and a fine was also levied.

A similar situation between parent company and subsidiary company was in *Dilip Pendse vs SEBI*[15]. This case pertains to Nishkalpa, which is subsidiary of Tata Finance. Dilip Pendse, former MD of Tata Finance was taking advantage. The SEBI intervened and sentenced him accordingly.

Yet another instance is *Reliance Industries Ltd. vs SEBI*[16]. Reliance Industries sold about 4% shares of the petroleum division in 2007. To prevent a drastic fall in the price, the shares were first sold in the futures market and then were later sold in the spot market. This came to the SEBI's notice due to the volume of transactions. The Board noticed the malpractice since the Company's sales in the two markets were with the intent of manipulating the share price, and therefore, the Board deemed the Company's actions to be an evident case of insider trading.

[13] *Harshad Mehta v. CBI (*1992) 24 DRJ 392.
[14] *Hindustan Unilever Ltd Vs SEBI* (1998) SCL 311.
[15] *Dilip Pendse Vs SEB*I in SAT. Appeal No.62 of 2017.
[16] *Reliance Industries Ltd. Vs SEBI*. Appeal No.120 of 2019.

The case of *Satyam Ramalinga Raju vs SEBI* [17] is also extremely infamous. This case dates back to 2009 when an ex-insider of Sathyam Enterprises unveiled the scam while also adding that the Chairman had confessed to committing the fraud. The Company was found to have created fake invoices to show inflated sales and use fabricated invoices to artificially jack up sales to show as receivables in the books of accounts, thereby inflating the Company's revenues. Investigations revealed insider trading within the company. Financial irregularities concerning Rs 4 crores in shares were recorded and owing to the quantum of money involved and the dexterity in execution, the Sathyam scam has proven itself to be among the biggest scams in Indian history.

4. POWERS AND ROLE OF THE SEBI REGARDING INSIDER TRADING

The SEBI was established as a statutory body with its roles and duties being highlighted in Sec. 11 of the 1992 Act[18]. Some of the powers of SEBI include the following:

- Power to work towards the promotion of investors' interests and work towards safeguarding them;
- Power to set up an inquiry committee if there is infringement of any provision; (Insider trading *see:* Chapter VA, VIA, IV)
- The power to appoint officers to look into the books of accounts of insider persons;
- The power to provide reasonable notice to the insider before initiating an investigation;
- The power to appoint a special auditor to inspect the books and accounts of an insider.

It is crucial to note that after conducting the investigations, the officer is required to submit report within 1 month, according to Regulations of 2015. Following the final report submission, the SEBI will be required to communicate the findings to the insider and issue a show cause within 21 days of such communication.

The SEBI is empowered to take action concerning insider trading, has actively increased the purview of its role over the years. The SEBI took up 70 cases for an investigation related to insider trading in fiscal year 2019 - which was over a fourfold increase from the number reported the previous year[19]. Although this is step in right direction, there are still a lot of issues concerning extent of function that the SEBI can play.

[17] *Satyam Ramalinga Raju vs SEBI* civil appeal No. 16805 of 2015 SC.
[18] *Supra* note 8.
[19] Kiran Kabtta Somvanshi, "Sebi investigated an unprecedented number of alleged insider trading violations in FY19*", Economic Times*, (Jan 30, 2020 *available at:*

For starters, the SEBI doesn't possess even basic investigative powers. Among the most commonly faced issues is insufficiency of evidence. Unless evidence is published in form of written information or electronic mail, it can rarely be proved that there was insider trading at all and this is more so the case when the quantum is on a smaller scale. This was highlighted in several cases including *Tata Iron and Steel Co. Ltd. Etc vs Union of India and Anr* [20] and the L&T case[21]. This is also reflected because SEBI was given powers to ask for phone records only in 2014, still doesn't have power to tap phone, as recommended by Vishwanathan panel.[22]Without being granted the right to tap phone calls, the scope of evidence to establish insider trading to be minimum. Several cases go unnoticed and insider trading activities on smaller scales can rarely be followed.

Another crucial drawback with regards to the enforcement of anti-insider trading laws is the severe lack of manpower. This takes a great deal of scrutiny which requires a great amount of follow-up. It is clear that the SEBI lacks the manpower to keep up[23]. The SEBI needs more manpower to effectively use its powers. There is also limited scope with regards to individuals carrying out investigations. Sec 11B (3) engages the SEBI to complete an examination, the exploring specialist may require an intermediary to outfit data and perform the necessary tasks. Upon comparing this with 1986 Act, state's secretary should designate a qualified and capable investigator for carrying out deeds. This results in more specific and targeted investigations and overall improves the investigation strategy.

Another important fallacy of the powers to regulate insider trading is lacking of territorial jurisdiction outside of India. Unfortunately, under Indian laws regulating insider trading, no penalizing or even conducting of investigation can be done for activities outside Indian Territory. Further, there's no specific mention in regulations about the performance of criminal action

https://economictimes.indiatimes.com/markets/stocks/news/sebi-investigated-an-unprecedented-number-of alleged-insider-trading-violations-in fy19/articleshow/73762248.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.(last accessed May 26).

[20]*Tata Iron and Steel Co. Ltd. Etc vs Union of India and Anr* (1996) SCR (3) SUPP 808. [21]"L&T Finance: SEBI Disposes Of Insider Trading Case Against Factorial Master Fund, *Bloomberg* Sept 23, 2019, *available at:* https://www.bloombergquint.com/business/l-t-finance-scrips-sebi-disposes-of-alleged insider-trading-case-against-factorial-master-fund , (last accessed May 29th).

[22]"SEBI wants powers to see phone call, e-mail records", *Business Line*,Aug 15, 2011, *available at:* https://www.thehindubusinessline.com/markets/stock-markets/sebi-wants-powers-to-see-phone-call-e-mail records/article20325365.ece1 (Last accessed May 29).

[23] "SEBI: From compliance to good governance", *Financial Express*, Jan 27, 2021, *available at:* https://www.financialexpress.com/opinion/sebi-from-compliance-to-good-governance/2179408/ (Last accessed May 29).

against any executive of a remote organization recorded in residential trade, which has enjoyed benefits stemming from insider trading. This is because the SEBI Act is not going to be relevant to regions outside India, which says that it is just another regional Act, limited by geography[24]. Additionally, the Indian government has made little to no effort to seek effective transnational assistance[25]. The Indian government's one-sided endeavors are not sufficient to tackle an issue as pressing as insider trading.

Another issue with the powers of SEBI is lacking of any anticipatory action on their part. The SEBI has power to dispatch an examination just when any mediator or any individual in relation to securities advertise has disregarded all arrangements of Act, Rules or Regulations made, or headings issued by Board[26]. Due to its expertise and knowledge in the area, it is likely that the SEBI may be able to anticipate certain instances of insider trading. However, the lacking of any legal provisions - which could enable the SEBI to take anticipatory action - is a major drawback as it prevents timely action.

Another aspect which is detrimental in making progress with regard to insider trading is the unreasonable time frame. The regulation does not prescribe an appropriate time at which the investigations ought to be completed within. The delays that come due to this destroy the intent of the provisions and prevent timely action from being taken. Excessive deferral of time can result in the concealment of crucial evidence and information that can be the key to the case. This is considered to be a flaw in investigative mechanism of SEBI[27].

The insufficiency of manpower despite the already existing issue of the lack of anticipatory powers highlights that the SEBI fails to act timely on several occasions and is not able to prevent any other happenings. By extension of not paying heed to the time aspect of these wrongdoings, the SEBI is failing to execute its obligations as prescribed under the Act.

Despite these obvious regulatory and jurisdictional issues, there exist similar problems that most statutory bodies in this country face that is basic bureaucratic issues and delays with regard to decision making. The insufficiency of manpower and the red-tapism adds to the already existing issues regarding insider trading. The lacking of adequate resources and initiative

[24] Amit Kumar Pathak, "How to Tackle Insider Trading in India: An analysis of current law and regulation through judicial decision", *Corporate Law Reporter,* Mar 28, 2012,*available at* http://corporatelawreporter.com/2012/03/28/tackle-insider-tradingindiaanalysis-current-laws-regulations judicial-decissions/ (Last accessed May 23).

[25] 2022. List of MoU's that India has signed with other countries *available at:* <https://mohua.gov.in/cms/List-of MoUs-signed-with-various-countries.php>.

[26] *Supra* Note 8.

[27] Vyas Amit K. (2006), "*Insider Trading: Review of Some Important Cases*", Chartered Secretary, ICSI, August 2006, pp-1133-1138.

is another problem that plagues the functioning and effectiveness of the SEBI. The regulations might seem to be adequate on paper, but on the large scale, the battle is far from won. With the lack of adequate vigilance, small-scale insider trading - in a nation with financial markets as active as India - is impossible to detect and address. Another issue is with regards to reporting examples of insider trading: Board has power to appoint an independent office of informant protection to whom such instances may be reported however there is extremely high scope for bias and lack of independence of such body owing to the sheer levels of powers in hands of board which may prevent efficient reporting[28]. It also appears that the Board possesses a very high level of discretion regarding informant confidentiality which might take away from the very intent[29]. Under the prescribed regulations, the Chief Executive Officer, the Managing Director and other such persons of power shall work to ensure that mechanisms are in place to tackle insider trading: this is another conundrum seeing as to how we discussed in several cases that it is often these individuals who are guilty. Such high levels of discretion and powers of insiders only seem to be redundant and provide ample scope for malpractice which might severely shake shareholders' confidence[30]. The board is also given the power to handle infringement of prescribed rules which provides scope for misuse and cover-ups.

A detailed study of the provisions seems to in many ways hint that the inherent imbalance in power coupled with the ever-so-many loopholes provide room for insider trading and other such malpractices. The lack of adequate measures to safely secure the interest of witnesses and the vast powers granted to the board regarding this is concerning.

5. COMPARISON OF INSIDER TRADING LAWS IN US AND INDIA

The practice of insider trading is widely practiced and is an issue that plagues most countries. Like the SEBI, other countries too have regulatory bodies empowered to look into matters concerning securities and investors' protection. Regulatory body in US is Securities and Exchange Commission (SEC).

[28] *Supra* note 11, § 7 (c) 1.

[29] *Supra* note, § 7H.

[30] *Supra* note, §9A.

Both the SEBI and SEC have regulatory and supervisory roles and are vested with the task of protecting the interests of the investors. Just as SEBI Regulations of 1992 applies to India, it is Securities Exchange legislation that governs insider trading in US[31].

Moving to compare the provisions between the regulations US and India, there are a few notable comparisons.

First, on the basis of whether there should be breach of duty that is fiduciary in nature to impose liability. In the United States, the trends say that there has to be a gradual demise of fiduciary principles where affixing responsibility for insider trading is concerned. Among some prominent cases that established that has to be fiduciary breach was *Chiarella v. the United States*[32], where, the Court observed that is was absence of policy of equal access to information regarding securities laws that create a duty for disclosing material, information that is not public or abstain from trading. Further, it was observed that the obligation in question had toemerge from a relationship between trader and stakeholder. The decision in this case coined the General Theory of Insider Trading. Comparing this with the Indian scenario, there was the same move - away from the requirement of fiduciary duty to establish liability - that was observed, after Amendment of 2008. The Securities Appellate tribunal made an interesting observation in the case of *Rakesh Agrawal v. SEBI*[33] that *"The requirement for establishing a breach of fiduciary duty to successfully make out a violation of insider trading under Regulation 4 is implicit in the provisions of Regulation 3, and necessarily needs to be read into the same."*

Liability of the individuals involved differs in US and India. In US, the misappropriation theory is what is widely accepted. Through this theory, the liability extends to an individual misappropriating information that is not public to carry out trades as a breach of duty and loyalty, which leads to infringement of Sec. 10b. In India, the liability is more far-reaching.

Therefore, it is concluded that as opposed to US - where it's just the person caught disclosing the information is held guilty - in India any individual who is recipient of the information is held guilty under the law. Despite the recipient of the

[31] U.S. Congress. (1934) United States Code: Securities Act of, 15 U.S.C 1934.
[32] *Chiarella v. United States* (1980) 9 445 U.S. 222.
[33] *Rakesh Agrawal v. SEBI* (2004) 49 SCL 351 SAT.

information not breaching their duty of loyalty to the company, they are still held guilty under Indian law. This highlights that the American provisions regulating insider trading are fixated on the breach of duty.

Both the Indian and American legislations call for criminal jurisdiction against individuals found engaging in insider trading. While there is similarity with respect to the legislation, the lawin US has different provisions regarding liability.

As per Indian law, Sec. 15G of the SEBI Regulations calls for a civil penalty of Rs. 24 Crores or an amount that is 3 times profits made, whichever is higher. The criminal liability is given in Sec. 24(2) which calls for imprisonment up to 10 years. Upon comparing this with the American legislation, it is evidenced that criminal liability given in Sec. 32(a) of the 1934 Act, which calls for a fine extending up to $5 million or a jail time of not more than 20 years.

Further, the SEC is better staffed than the SEBI, making the carrying out of investigations and follow-ups a lot more efficient. Based on the Annual Report (CY 2016) of the US SEC, they have almost one employee for each listed company whereas the SEBI has one per every six companies[34]. In key divisions of importance such as corporate finance, it is reported that the SEC has 15 times more employees as opposed to the SEBI[35]. Despite US hosting a smaller population, the staffing proportion is a lot higher, which makes implementation and investigative actions possible with efficiency. The SEBI however continues to face understaffing as a severe issue. Despite India being home to a larger population and an extremely active financial market scene, the SEBI remains to be inadequate. The SEC employs over 3958 staff[36] meanwhile the SEBI employs are merely 643 persons all over the country[37].

[34] United States Securities and Exchange Commission, "Summary of Performance and Financial Position", (Feb 2016).

[35] The Kotak Committee," Report of the Committee on Corporate Governance" (Oct 2017). [36] United States Securities and Exchange Commission," U.S. Congressional Budget Justification for Financial Year 2013 – 2014" (Apr 2014).

[37] *Supra* note 31.

A simple comparison between the two countries says that the SEC is more proactive and acts timely, and the consequences for insider trading are stricter and well-executed, as opposed to the comparatively lackadaisical situation in India.

Suggestions and Conclusion

Although the SEBI id taking necessary steps, there are several measures that can be taken to ensure speedy and effective redressal to the issue of insider trading. The steps that the SEBI can take and some changes that can be implemented include: 1. **Effective investigation mechanism:** In order for the SEBI to discharge its duty more

efficiently, it is essential for more power to be granted. This can help strengthen processes and make the investigative process easier. Additionally, the SEBI ought to be granted more powers such as the ability to tap phones, as this will make tracking insider trading movements a lot easier.

2. **Restructuring:** restructuring of the board is needed. Increasing number of officers and regulators will also allow the SEBI to increase its efficiency regarding investigative authority.
3. **Minimal Government intervention:** The reason several bodies such as the SEBI cannot efficiently perform is due to the massive number of restrictions in place and the huge government control. By comparing SEBI with the SCC, it is noticeable that minimal intervention will allow for a more efficient discharge of duties.
4. **Permanent and continuous surveillance mechanisms:** With regard to insider trading, surveillance is key. With a concrete surveillance system, the SEBI will be in a better spot to take action and this can prevent losses.
5. **Fast-tracking of courts for quicker trials:** With regards to offenders, there is necessary requirement to speed up the trial process to penalize offenders at the earliest. This will disbar them from becoming fugitives on the run and eliminates unnecessary delay.
6. **Rewarding whistle-blowers and increasing whistle-blower protection schemes:** Whistle-blowers are crucial in disclosing vital information and can be the key to cracking down on cases. Hence, there need to be more schemes that encourage and protect whistle blowers after exposing such cases.

India has a long way to go to fix the various loopholes in the system and most of them are related to increasing resources and the flow of power. In good time, with constant efforts and discussion, it is estimated that the Indian scenario regarding insider trading will become a lot more stable.

ABORTION RIGHTS OF WOMEN

Pooja S

ABSTRACT

Abortion is health care and health care is a human right. Around the world, there are ambivalent opinions about abortion. The purpose of this article is to shed light on women's human and legal rights in India concerning abortion and provide a global perspective on abortion law and regulations. Women's abortion rights are a widely discussed issue globally, especially following the leaked draft from the US Supreme Court which may overturn the Roe v. Wade case. Abortion laws should be formulated along such lines that they are intuitive, impregnable to women's requests, and universally accepted. Nonetheless, the approach and course of action to ameliorate the law on abortion is arduous and winding. Jurists, lawmakers, government, medical professionals, and official bodies can all help to realize the objective of accommodating a legal entitlement to secure abortion that is out of harm's way. With the support and advice of everyone, legal experts should research the political, health, sociocultural, cultural, legal, and judicial frameworks in their respective countries to determine the sort of law that should be implemented to effectively implement the entitlement to secure abortion so that people with unwanted pregnancy can have access to abortion. Every country has a distinct legal approach to abortion, with some countries imposing a complete prohibition, some lifting the ban for the mother's safety, and yet others allowing abortion up to 12-26 weeks.

Keywords: *Abortion, Unwanted pregnancy, unintended pregnancy, women's reproductive rights, mental health, pregnancy, rights.*

1. INTRODUCTION

According to the World Health Organization (WHO), a woman in a developing country dies every 8 minutes as a result of complications from unsafe abortion.[1] Even though laws differ around the world, most countries allow abortion to save women's lives. The WHO published technical and policy guidelines in 2003 to assist governments in passing progressive legislation. Accurate data on abortions is difficult to come by, especially for dangerous abortions. Two-thirds of countries lack the capability to gather data, and data collection varies

[1] National Library for Medicine, Unsafe Abortion: Unnecessary Maternal Mortality, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/, (last visited on May 24, 2022).

in size and number from country to country[2]. Abortion is widely recognized as a crucial element of women's reproductive health. Egypt, Angola, Thailand, the Philippines, Madagascar, and Iraq are among the 24 countries that have not legalized it. 37 countries, including Brazil, Mexico, Sudan, Indonesia, and Sri Lanka, allow abortion. A handful of nations, such as China, Russia, Canada, Australia, South Africa, allow abortion on demand, usually for a period of up to 12 weeks.[3]

2. WORLDWIDE HISTORY OF REGULATING ABORTION LAWS

When the 19th century was approaching its end, practically every government had made abortion illegal. Governments of Europe—France, Britain, Italy, Spain, and Portugal—are considered to be the source for anti-abortion laws as they formulated such laws, restricting abortion in their colonies.

As per the UN Population Division's comprehensive webpage on abortion laws, we can see 3 predominant groups of legal system in which abortion is strictly restricted, which emerged during 16th century. The common law was followed in UK and some of its erstwhile colonies, including Bangladesh, Australia, India, Canada, Malaysia, New Zealand, Singapore, Pakistan, US, Africa, Caribbean, and Oceania; the civil law was followed in the European nations, including France, Belgium, Spain, Portugal, their erstwhile colonies, Japan and Turkey, Latin America, parts of sub-Saharan Africa, and the erstwhile Sovereign States. Furthermore, the civil law of France has affected the legislation of various Middle East and North African countries; including Islamic law was practiced in parts of Africa and Asia, as well as other nations with largely Muslim populations, and had an influence on personal law, such as Indonesia, Bangladesh, Pakistan and Malaysia. [4, 5]

[2] Graham WJ, Ahmed S, Stanton C, et al, "*Measuring maternal mortality: an overview of opportunities and options for developing countries"*, BMC Med., 2008.

[3] World Population Review; Countries Where Abortion Is Illegal 2022, *available at:* https://worldpopulationreview.com/country-rankings/countries-where-abortion-is-illegal; (last visited on May 22, 2022).

[4] United Nations Population Division, Abortion Policies: A global review. 2002, *available at:* https://www.un.org/en/development/desa/population/publications/abortion/abortion-policies-2002.asp, (last visited on May 28, 2022).

Abortion bans have been in place for three primary reasons in the past. Firstly, abortion used to be risky, and the doctors who performed it were held accountable for deaths of many women. Resultantly, rules were deliberated to safeguard women who, despite the laws, went for abortions and endangered themselves in the process, which they still go with today if they are left with no alternative. Second, abortion was regarded as something that was against religious values or a sort of moral violation, and laws were enacted to penalize and to deter the practice. Thirdly, in some cases, abortion was prohibited to safeguard fetal life. Since abortion technologies have become safer, laws forbidding abortion are justified solely as repressive and coercive measures, or to protect the lives of fetuses over the lives of women. There are still cases of unsafe abortions that result in damage or death, but existing laws are considerably more frequently have a bearing against persons who go through and provide safe abortions outside of the law today. Sadly, it is restrictive abortion regulations from a bygone era that are to blame for the millions of lives and injuries caused by women who may not be able to spare the price to spend for an abortion that is illegal but ensures the safety of their health. [6]

Various legal measures to liberalize, restrain, or supervise abortion access, apart from legislations, include the constitutions of at least 20 nations, including Ireland's Constitutional amendment of 1983, which helped to regulate abortion legislation and allow women the entitlement to abortion. Indistinguishably, there are apex court verdicts permitting abortions beyond the 20-week limit, like in the United States, Columbia, Canada, Brazil and India.

Conventional or religious legislation, such as Muslim law interpretations that allow abortions till 120 days in UAE and Tunisia, but in other predominantly Islamic nations. the rules which compel health practitioners to maintain their confidentially at one end, but also require them to disclose any criminal actions which may come across, such as while giving care for impacts of risky abortion on the other; guidelines regulating the statutory requirement of abortion, for example, documenting guidelines, disciplinary proceedings, parental/spousal consent, and constraints upon which healthcare workers might provide abortions, and ethical codes concerning medical regulations that allow/disallow diligent objection.[7]

[6] National Library of Medicine, Abortion Law and Policy around the World, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035/#r1,(last visited on May 28, 2022).

[7] National Library of Medicine, Abortion Law and Policy around the World, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035/#r1,(last visited on May 30, 2022).

Reed Boland discovered that the boundary between laws of abortion and rules is normally ambiguous and some nations have published no regulations in any way, mainly those with severe abortion legislation. In the most complicated circumstances, several texts span countless years and may contain contradicting rules along with cryptic and out-of-date wording. Resultantly, no one knows when the abortion is considered legal, which makes it challenging to perform abortion safely and publicly.[8]

Uganda, for example, is a good example. According to Amanda Cleeve's recently released research, Uganda's Constitution and Penal Code conflict, causing confusing interpretations and an inadequate knowledge that abortion is lawful to safeguard females' health and life. Furthermore, although Uganda has national reproductive health policies, it is not backed up by legislation and is not executed. The Health Ministry and other stakeholders developed regulations and guidelines to prevent risky abortions in 2015 to clarify the situation. Details on who can perform abortions, and allocated healthcare responsibilities like post-abortion care. Yet, owing to political and religious belief, the rules were rescinded in January 2016.[9]

Since it was sanctioned during the International Conference on Population and Development's Programme of Action in 1994 as a temporary arrangement to save lives, post-abortion services to deal with the impacts of risky abortions have been implemented in nations where there's no potential for law reform. However, in some African countries, in which revised Penal Code of 1981 leaves it ambiguous and doesn't answer the question if abortion is lawful to protect a woman's physical and mental well-being, and where unsafe abortions still account for 16 per cent of maternity fatalities, this has proven to be unsuccessful.[10] Despite the state's efforts to increase post abortion care access, 2015 research revealed that "substantial inadequacies still existed, and women did not receive the attention they needed."[11] Taking into account the latest reports of doctors from various medical institutions acknowledging payments for conducting

[8] Boland R, *"Second-trimester abortion laws globally: Actuality, trends and recommendations",* Reproductive Health Matter, 2010; 18(36):67–89.

[9] Cleeve A., Oguttu M., Ganatra B., et al. *"Time to act—comprehensive abortion care in East Africa."*, Lancet Global Health, 2016; 4(9).

[10] Tanzanian Penal Code: Chapter 16 of the Laws (Revised) (Principal Legislation) 1981,

Keogh S., Kimaro G., Muganyizi P., et al. *"Incidence of induced abortion and post-abortion care in Tanzania"* PLoS One. 28 May 2022; Tanzanian Ministry of Health and Social Welfare, The national road map strategic plan to accelerate the reduction of maternal, new born and child deaths in Tanzania (2008–15 2008, May 29, 2022

[11] Keogh S., Kimaro G., Muganyizi P.,*"Incidence of induced abortion and post-abortion care Tanzania"*, PLoS, May 28, 2022.

abortions, disclosed a rise in occurrences of complications, the newly elected government made threats against the doctors to dismiss them if they performed abortions, according to a CCTV-Africa report. [12]

Other limitations are not directly related to abortion may also act as a hindrance. Morocco's laws concerning abortion was enacted in 1920, while it was a French colony. A legislative approach to strengthen safeguards was launched in May 2015, following a public debate sparked by accounts of women dying as a consequence of unsafe abortions. Women who were unmarried were exempted because it was morally wring to engage in sexual intercourse outside of marriage, according to the Family Planning Association of Morocco, in spite of a like-mindedness that abortion should be done within first 3 months of pregnancy, if the woman's physical and mental well-being is under threat and cases of rape, congenital malformation and incest.[13]

In 1971, India passed a highly permissive law concerning abortion, but it was not enforced properly, resulting in high mortality rate.[14] The registration process for a clinic as an authorized abortion service provider was difficult to even 15 years ago.[15] Furthermore, two those certain laws have hampered abortion significant exposure: the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, which called for restrictions when it comes to the utilization of ultrasound for the determination of sex and has resulted in limitations on abortions performed in second-trimester, and the Protection of Children from Sexual Offenses Act, which has a requisite for reporting under age sex and makes minors who have become pregnant feel unsafe if they pursue an abortion.[16]

3. ABORTION RIGHTS IN THE U.S.

There was a time in the US when abortion was just accepted as a fact of life. Abortions were lawful and extensively practiced until before 1860, according to historian

[12] "Doctors involved in illegal abortions to be fired in Tanzania" CCTV-Africa, 2016 Jan 8

[13] Moroccan Family Planning Association and Asian-Pacific Resource and Research Centre for Women, Religious fundamentalism and access to safe abortion services in Morocco, Rabat and Kuala Lumpur: Moroccan Family Planning Association and Asian-Pacific Resource and Research Centre for Women; 2016.

[14] Editorial, *"Unsafe abortions killing a woman every two hours"*, The Hindu, 2013 May 6

[15] Iyengar K., Iyengar S. D. *"Elective abortion as a primary health service in rural India: Experience with manual vacuum aspiration"*, Reproductive Health Matters, 2002; 10(19):54–63.

[16] Nadimpalli S., Venkatachalam D., Banerjee S. *"India's abortion wars" Deccan Chronicle*", 2017 Apr 16.

Leslie Reagan, author of "when abortion was a crime." Only after quickening, a subjective word for when a pregnant woman can feel the foetus moving was made illegal. Abortion pills were a lucrative business before 1880. Those who wished to control that industry were mostly concerned about poisoning, not moral, religious, or political issues, as Reagan points out. However, in 1857, America launched a crusade to make abortion illegal. The Comstock statute passed by Congress in 1873, outlawed abortion medications worldwide. Abortion was outlawed in most states by 1880 unless it was absolutely essential to protect the woman's life.[17]

There is legal recognition for abortion in the United States as a right under right to privacy. The state has the obligation to acknowledge the rights of the child only after the unborn child reaches the viability stage. Priority is vested with the health of women as it is their fundamental human right to life and liberty. The sovereign has a legitimate interest in protecting pregnant women's health and well-being, as well as human potential. The cases of Roe v. Wade and Planned Parenthood of Southern Pennsylvania V. Casey discuss extensively the mental as well as physical interests of women during pregnancy, along with interests that would affect the child's upbringing.[18] The following is the analysis of the two key decisions that highlighted the relevance of abortion legislation in the United States.

4. ANALYSIS OF LANDMARK JUDGEMENT OF ROE V. WADE

A single expectant mother in Texas, Norma McCorvey, sought an abortion. Texas law in the early 60s, barred abortions unless they were done or acquired to save the mother's life. McCorvey filed the lawsuit in federal court to safeguard her privacy. She claimed the abortion restriction was illegal and sought the court to grant an injunction prohibiting Texas from enforcing it. The Texas abortion limitation was held unconstitutional by the district court because the act was too ambiguous and overly broad, and thus violated the US fourteenth amendment right to privacy and stamped on the people's rights under the ninth amendment. However, since the court did not issue an injunction to prevent Texas from implementing its ban, Roe took the matter to the US Supreme Court.

Justice Blackmun ruled in favor of Roe. The implied "zone of privacy" first described by the court in Griswold v. connection, according to Blackmun, was broad enough to allow a woman's

[17] Leslie J. Reagan; "*When Abortion Was a Crime Women, Medicine, and Law in the United States, 1867-1973"*; (1st edition, 1996).

[18] Sai Abhipsa Gochhayat, "*Understanding of right to abortion under Indian Constitution*", Manupatra 7,8.

right to abort her pregnancy. Regardless of how basic this right is, the court ruled that it protects the mother's life and health throughout pregnancy, as well as the fetus's prospective life. Nonetheless, any legal restrictions on women's fundamental right to privacy must be restricted to serve a compelling state interest.

In an endeavor to reconcile with these needs, Blackmun developed a term-based method. In the time of the first trimester, when the health hazards of abortion are less severe when compared to that of childbirth and the fetus is still developing, a woman's right to privacy is fundamental and exceeds any competing state interest. The state's interest in safeguarding women's health from the possible dangers of later-performed abortions and the fetus' potential personhood develops beyond the first trimester, which can warrant further regulation. The state's interest in the prospective human life is compelling enough to sustain an outright abortion prohibition, defined as the time when the fetus can exist outside the mother's body, usually between 24 and 28 weeks.

The Texas statute was overturned because it restricted a woman's ability to choose abortion during the first trimester of pregnancy. Two justices dissented, while three justices concurred. [19]

5. ANALYSIS CASE OF PLANNED PARENTHOOD OF SOUTHERN PENNSYLVANIA V. CASEY

In 1992, the Apex Court in the US re-evaluated the constitutional protection granted to women's right to choose, 19 years after Roe v. Wade case. A divided court in Planned Parenthood v. Casey upheld Roe's basic holding but differed on almost everything else. The Pennsylvania Abortion Control Act of 1982 placed a total of five limitations on abortion providers and women seeking abortions. The five impugned provisions were:

1. Women must offer informed consent.

2. Providers were required to give women state-published abortion information at least 24 hours before the operation.

3. A minor's abortion required informed consent from at least one parent. 4. Married women had to sign a statement stating that their husbands had been informed. 5. The act required abortion providers to retain records and submit reports.

[19] Sai Abhipsa Gochhayat, *"Understanding of right to abortion under Indian Constitution"*, Manupatra 6,7.

A group of abortion providers sued Pennsylvania Governor Robert Casey, challenging the act's constitutionality. The district court found all five of the challenging sections to be unconstitutional after a bench trial. Only the spousal notice requirement failed constitutional scrutiny, according to the court of appeal, which upheld in part and reversed in part. The case was accepted by the US Supreme Court, which will re-examine Roe v. Wade case and assess the degree to which a state might restrict abortion access. The majority decision upheld Roe's key ruling, stipulating that the 14th Amendment's due process clause prevents states from unnecessarily interfering with a woman's right to terminate a non-viable fetus. The majority confirmed Roe's core holding, which was split into 3 parts.

First and foremost, a woman has the legal right to abort a non-viable pregnancy without government interference. Second, states have the authority to limit abortions after viability, with exceptions for pregnancies that risk a woman's life or health. Thirdly, states have a legitimate interest in preserving the well-being of a pregnant woman and her fetus from the beginning of pregnancy. Only the spousal notification requirement was found to be illegal by the majority of the five justices. Parts of the decision were upheld, but others were overturned.

The Casey court affirmed the basic conclusion of Roe v. Wade after nearly two decades of discussion. The court's interpretation of the due process clause has remained valid since then. Since Casey, the focus of abortion cases has been on whether a challenged restriction places an undue burden on a woman's right to choose.[20]

6. A COMPARATIVE ANALYSIS OF INDIAN AND AMERICAN LAW

Before the landmark Roe vs. Wade decision, states in the United States had highly severe abortion laws that restricted the aborting of pregnancies unless the pregnancy poses a severe health hazard to the mother. The Roe vs. Wade decision helped to alleviate this. It provided females more rights to abort their pregnancy by placing the freedom of abortion inside the 'zone of privacy. It is vital to remember, however, that the regulations don't cover abortions caused by rape or incest. Even in this day and age, the United States, among the most liberal countries on the planet, does not allow women to legally abort their children if they become pregnant as a consequence of rape or incest. Furthermore, only a few states in the U.S consider a pregnant woman's mental health when deciding whether or not to terminate her

[20] Sai Abhipsa Gochhayat, *"Understanding of right to abortion under Indian Constitution"*, Manupatra 7.

baby. The physical and psychological consequences of sustaining an unintended pregnancy are also ignored.

In comparison with the US, India's abortion regulations are far more liberal. Though the US was among the first to declare abortions as a part of a woman's 'zone of privacy with the Roe vs Wade decision, India recognized a woman's right to abortion as part of her right to personal liberty under Article 21 years down the line. India was swift to consider the role of females to give birth and bring up children out of unintended pregnancy while also considering the survival of the prenatal child. The abortion system in the US is tight and restrictive because the government emphasizes the rights of the unborn child while ignoring mental health issues and other bodily integrity and integrity concerns.

Indian legislation provides a good example. Abortion beyond 20 weeks of gestation is illegal in India owing to the danger or harm to the mother. However, considering the country's current medical and technical advancements, an amendment is put forth to increase the top limit to 24 weeks. It is necessary to follow such methods. However, in delicate and emotionally distressing situations such as conception resulting from incest and rape, having an abortion during the pregnancy should be permitted because it has a negative influence on the mental wellbeing of the pregnant female. It would be unjust and unfair to the rape/incest victim if this was not done.

7. IS INDIA PROGRESSIVE WHEN IT COMES TO GIVING WOMEN THE RIGHT TO ABORTION TO OTHER COUNTRIES?

Right to choose whether or not to continue a pregnancy is supported by International human rights legislation. Right to abortion has been established under the rights to life, health, autonomy, and bodily integrity.

According to the survey, as education and economic levels rise, the number of unplanned pregnancies decreases. More than 60% of unwanted pregnancies result in abortion, and these abortions are frequently hazardous - they are one of the primary causes of maternal deaths and hospitalization of women.[21] Sections 312-318 of the IPC talks about abortion regulations, which were crafted based on the Indian community's ethics, morals, religion, and social backgrounds. Section 312 deals with the penalty for intentionally causing a miscarriage.

[21] Indian Express, Report: 67% abortions in India unsafe, cause nearly 8 deaths every day, *available at:* https://indianexpress.com/article/india/india-unintended-pregnancy-abortion-7845655/, (last visited on May 23, 2022).

The term "abortion," "miscarriage," or "unborn child" is not defined in the code. The parts should be read in this light. The IPC criminalizes abortion and only permits abortion to preserve the mother's life. [22] Among all countries that refuse to abolish the prohibition to save the lives of women. In 1971, India passed the Medical Termination of Pregnancy Act, which makes an exemption to the severe restrictions outlined in the Indian Penal Code (IPC), which criminalizes any abortion and miscarriage unless it is performed to save the woman's life. [23] In India in 1972, the Medical Termination of Pregnancy Act became law. The act allowed for termination of pregnancy, but it was finally revised in 2021, increasing the upper gestational age limit from 20 to 24 weeks. The use of abortion pills is also permitted under Indian legislation. India is one of the countries that allow abortion based on a woman's social or economic conditions. After the modification in 2021, the MPT Act now allows medical practitioners to perform abortions in good faith only within 20 weeks and with the opinion of two medical practitioners within 24 weeks. [24]

Better education and access to quality health care are also essential. Non-restrictive abortion regulations do not ensure secured abortions for those who are in need. Despite the adoption of the Medical Termination of Pregnancy Act in the early 1970s, hazardous illegal abortions continue in India. Although the statute seems to remove legal barriers to terminating pregnancies in the underfunded (national) health care system, women continue to get abortions done from unqualified medical practitioners. The law's ramifications were never communicated to the people who needed it the most.[25] This is also the case in Cambodia, where abortion is permitted on-demand and women frequently attempt to abort themselves before going to the hospital.[26]

Abortion is permitted in India up to the 24th week of pregnancy. In India, women over 18 years of age who are of sound mind have an unrestricted right to abortion. It means that any woman above 18 years of age does not require the assistance of anyone, including her spouse if she is married. If the woman is unmarried, she does not need to be married to avail an abortion. If woman is unmarried

[22] Sai Abhipsa Gochhayat, "*Understanding of right to abortion under Indian Constitution*", Manupatra 3.

[23] Sai Abhipsa Gochhayat, "*Understanding of right to abortion under Indian Constitution*", Manupatra 4.

[24] Sai Abhipsa Gochhayat, "*Understanding of right to abortion under Indian Constitution*", Manupatra 4.

[25] Malhotra A, Nyblade L, Parasuraman S, et al., editors. "Realizing Reproductive Choice and Rights: Abortion and Contraception in India" Washington, DC: International Centre for Research on Women; 2003.

[26] Long C, Ren N, "Abortion in Cambodia", Advancing the Role of Midlevel Providers in Menstrual Regulation and Elective Abortion Care conference (2001).

married and is an adult, she does not need the assent of her baby's biological father to end an unwanted pregnancy. The approval of a guardian or parent is essential if the girl is a minor. Unwanted pregnancy has a natural effect on a pregnant woman's mental health. If a woman becomes pregnant as a consequence of rape or a failed contraceptive method, it is assumed that she would be put through serious mental harm.

Unwanted pregnancy, on one end, is not similar to selected sex of pregnancy termination. As per to the United Nations Population Fund's (UNFPA) State of the World Population Report 2022, unsafe abortions are the third greatest cause of maternal mortality in India, with over 8 women dying every day from causes associated with unsafe abortions. Between 2007 and 2011, 67% of abortions in India were deemed unsafe. [27]

"Abortion remains a public health emergency, hospitalizing over seven million women a year globally, spending an estimated $553 million in treatment expenses alone, and contributing to a large percentage of all maternal morbidity and 4.7–13.2 per cent of all maternal fatalities," the research adds. Both the Medical Termination of Pregnancy Act of 1971 and the Medical Termination of Pregnancy (Amendment) Act of 2021, which broadens the Act's scope and encourages safer abortions, are progressive and promising, according to the research. [28]

Unintended pregnancies are linked to decreased maternal healthcare utilization and poorer newborn and mother health outcomes, according to studies from India. It is vital to understand that a woman's ability to make reproductive choices is a component of her right to personal liberty under Article 21 of the Indian constitution. Reproductive options can be used to have or to not bear children. The right to privacy, dignity, and integrity of women is accorded special regard under Indian law.

8. INDIA'S OBSTACLES WITH REGARD TO ABORTION

On social media, netizens believe that the country is more advanced because of the 1971 Medical Termination of Pregnancy Act, which ensures the entitlement to abortion but there some barriers that India faces concerning abortion rights. Six out of ten induced pregnancies result in induced abortion, according to the World Health Organization. Approximately 45 per cent

[27] Indian Express, Report: 67% abortions in India unsafe, cause nearly 8 deaths every day, *available at:* https://indianexpress.com/article/india/india-unintended-pregnancy-abortion-7845655/, (last visited on May 23, 2022).

[28] Indian Express, Report: 67% abortions in India unsafe, cause nearly 8 deaths every day, *available at:* https://indianexpress.com/article/india/india-unintended-pregnancy-abortion-7845655 /, (last visited on May 23, 20220.

of all abortions are unsafe, with 97 per cent occurring in developing nations. According to a national study published in the PLOS One journal in 2014, abortion is responsible for 10% of maternal fatalities in India. According to a 2015 study published in the Indian Journal of Medical Ethics, risky abortions are reason for 10-13 per cent of maternal deaths in India. In India, roughly 1.5 crore abortions are performed. Abortions are banned under the MTP Act; hence 80 per cent of them take place outside of a recognized hospital. Many survivors are forced to face a life of pain, which is exacerbated by infertility, sepsis, and other internal ailments. [29]

According to the latest round of the national family health survey 2019-2021, 3% of all pregnancies in India end in abortion. In India, more than 53% of abortions are performed in the private sector, compared to only 20% in the public sector, owing to the lack of abortion services in public facilities. More than a quarter of abortions (27%) are carried out at home by women. According to another fact-finding investigation published in "The Lancet" in 2018, pharmaceutical abortions accounted for 73% of all abortions in India in 2015, and while they may been saved, many of them were unlawful under the MTP Act if performed without the clearance of a certified medical practitioner. Another 5% of all abortions were performed outside of a medical facility using means other than medication abortion. These dangerous abortions are carried out by unskilled individuals in unsanitary conditions, utilizing harmful procedures such as object insertion, consumption of various drugs, abdominal pressure, and so on. Even though abortion is legal in India, a woman's rights are limited. She must get the consent of one medical practitioner if the abortion is within 20 weeks, and approval from two medical practitioners if the abortion is between 20 and 24 weeks. Abortion is permissible up to 28 weeks only in cases of serious disability to the unborn child. This premise emphasizes women's lack of autonomy and choice and bases the decision on the doctor's opinion.

Although the new rules have increased access to abortions to some extent, Poonam Muttreja, executive director of the Population Foundation of India, an NGO that promotes gender sensitive population strategies, said that they fail to correct a fundamental flaw in the MTP Act, which is that a woman does not have the basic right to terminate a pregnancy if and when she chooses. She stated that abortion remains a privilege granted by the state or a medical board. "The introduction of a state medical board creates additional worries about their access,

[29] National Library for Medicine, Unsafe Abortion: Unnecessary Maternal Mortality, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/,(last visited on May 24, 2022).

especially for women from rural areas," Muttreja said. Unfortunately, as a culture, we are still unable to provide reproductive independence to our women, including many who not just lack the right to plan pregnancies but also encounter various obstacles while seeking abortions."[30] Transgender people and those who do not identify as women are not recognized by the MTP Act.

The acceptance of abortion in Indian society is positioned in the framework of population management and family planning, but more crucially, women and transgender people suffer a big barrier in accessing safe abortion cases after more than 50 years of the MTP Act. Many people in India are unaware that abortion is legal, and they engage in dangerous abortion methods as a result. Although the MTP Act has been in place for nearly 50 years, it is not commonly known throughout the country. Because of the societal stigma associated with abortion, unmarried and transgender persons who choose to have an abortion are staved off from medical facilities and are forced to have to unsafe abortion methods. Despite the adoption of the Medical Termination of Pregnancy Act in the early 1970s, hazardous illegal abortions continue in India. Although the statute seems to remove legal barriers to having abortions in the impoverished (national) medical system, women continue to get abortions done from unqualified medical practitioners. The law's ramifications were never communicated to the people who needed it the most. [31]

The statutory provisions of the Protection of Children from Sexual Activities Act (POSCO), 2011, the law prohibiting child sexual offences, have an impact on privacy and make it difficult for adolescents to get safe abortion services. Every woman seeking abortion care in a health amenity is frequently mistreated and does not receive the drugs she requires. Passing one law and assuming the job is done is not a sign of a progressive country, thus it should be concentrated, and other regulations should be established to ensure women's ultimate choice to determine their abortion rights. Lack of access, systematic impediments, societal standards and cultural preferences, and even criminal culpability are all issues that many people encounter. Abortion is an issue that not only impacts family planning and maternal health, but also reproductive well-being. [32]

[30] The Economic Times, *available at:* https://economictimes.indiatimes.com/news/india/rape-survivors-minors divorcees-and-widows-allowed-abortion-up-to-24-weeks/articleshow/87002082.cm, (last visited on May 26, 2022).

[31] Malhotra A, Nyblade L, Parasuraman S, et al., editors. *"Realizing Reproductive Choice and Rights: Abortion and Contraception in India"* Washington, *DC*: International Centre for Research on Women*;* 2003.

[32] Editorial, "India must shift the discourse on abortion rights" *The Hindu*, May 26, 2022.

9. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND ABORTION LAWS

Lately, a new trend in advocating for safer abortion has evolved, based on examination of how the laws at present affect women and if they comply with international human rights norms. Various human rights organizations and committees within the UN have called for profound abortion laws and to end brutality concerning abortion against women. [33]

Abortion is a fundamental right protected by various international and regional human rights treaties along with national constitutions around the world. These treaties enshrine right to life and liberty, freedom, privacy, equality and non-discrimination, and freedom from harsh, inhuman, and degrading treatment in a slew of rights. Restrictive abortion regulations have been consistently deemed incompatible with global human rights standards by humanitarian organizations.

The legality of abortion refers to more than where only women are legally obliged to choose whether or not to carry their pregnancy to term. It also exposes the probability of a woman dying of risky abortion, whether girls will complete their education and the barriers to women and girls participating in public and political life. In summary, examining the legal position of abortion reveals that women are treated as equals and given the freedom to choose their path in life. [34]

The burden of risky abortion is shared by women and their families, along with public health system. Blood supplies, antibiotics, oxytocic, anesthesia, operating rooms, and surgical specialists may be required for every woman admitted for emergency post abortion treatment. Emergency care's financial and logistical costs can overload a health system, preventing attention from being given to other patients.

[33] the UN Human Rights Committee Recommendations on abortion law and policy: Burkina Faso, Ecuador, Ghana. 27 July 2016, available at: http://us12.campaign archive1.com/?u=c02a095d6213ac4bd2aed2e81&id=351dc6b224, (last visited on May 29, 2022).

[34] Centre for reproductive rights, The World's Abortion law, *available at:* https://reproductiverights.org/maps/worlds-abortion-laws/, (last visited on May 29, 2022).

10. RECOMMENDATIONS AND ACTIONS THAT CAN BE INITIATED

Despite the difficulties, the situation is not hopeless. Unintended pregnancy prevention should be a top goal for all countries. Incorporating reproductive health education into schools should be a priority. Increased contraceptive services, including correct information and proper use of contraceptive techniques, are required in countries that are not opposed to contraceptive usage. Governments and non-governmental groups must make use of efficacious strategies for overcoming cultural and social stereotypes that keep women from accessing essential health care.

In countries where right to abortion has been recognized legally, providing women with easier access to abortion clinics is critical. When complications arise, practitioners need to be better trained in safer abortion methods and be prepared to transport patients to a medical amenity that would provide emergency care. WHO strongly encourage health institutions to treat women who have been put through partial abortions have the necessary technology and trained personnel in place to guarantee that care is consistently available and affordable. Furthermore, post-abortion family planning counselling must be included in the service.

Evidence shows that loosening abortion restrictions to allow trained practitioners to perform services openly can decrease the occurrence of abortion-related morbidity and death. Obstacles of a socio-political and religious nature, on one end, plays a part in the passage of abortion laws. The relevance of reducing abortion regulations is highlighted by studies, grassroots organizations, health providers, campaigners, and the media. Women's and families' emotional, physiological, and economic costs, as well as the strain on the healthcare system, should no longer be overlooked. [35]

It is past time for restrictive abortion regulations to be liberalized in tandem with cultural shifts. Women should have access to safe abortion procedures and quality post-abortion care, including psychotherapy, regardless of their marital status. There should be a strong acknowledgement of women's freedom to freely exercise their reproductive and sexual rights, which includes the entitlement to abortion. The MTP (Amendment) Bill 2014, which, inter alia, proposes deleting the word "marriage" and replacing "husband" with "partner," should be dragged out from under the pile and implemented as soon as. A progressive law cannot be

[35] National Library for Medicine, Unsafe Abortion: Unnecessary Maternal Mortality, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/, (last visited on May 24, 2022).

overturned because more sex-selection abortions will occur. The suppression of another's right cannot be used to prevent the misuse of the law. [36]

Millions of women and a slew of abortion providers violate restrictive abortion regulations daily. Even in countries with non-conservative laws, research reveals that law is bent in various ways to meet women's needs concerning abortion. Despite this hostility and antipathy, we continue to meet women's unrestricted abortion needs.

11. CONCLUSION

The reasons of this study was not to provide an answer or solution for this conundrum, as each country's circumstances must be considered. The goal was to inspire new ways of thinking about whether or not a punitive ban against abortion is essential. Viewing abortion as a crucial form of health care is a huge forward, and advocates could write the best law possible, putting after-care of abortion in first-trimester in community settings, securing services in second trimester, raising women's awareness about the services and law, aiming for universal access, eradicating social asymmetry.

Abortion rights are basic and crucial rights that every woman who has a claim on and that defend the integrity of women's reproductive health. In this research, I intended to examine various countries' abortion rights and insisted on a thorough examination of the differences between US and Indian regulations. Abortion is not just a necessary legal right, but also a fundamental human right. Every woman has the right to prioritize her physical and emotional health. In terms of abortion regulations, countries around the world should be progressive. The never ending discussion over the unborn child's rights and women's reproductive health is vast, but the basic right to life is underlined and should be defended first and foremost.

[36] India's Abortion Laws Need to Change and in the Pro-Choice Direction, The Wire, *available at:* https://thewire.in/gender/abortion-pregnancy-law-india, last visited on May 27, 2022.

ARTICLES

THE PROPOSED BAN ON CRYPTOCURRENCY: A STEP IN THE RIGHT DIRECTION?

Ashutosh Singh, Saurabh Kumar

ABSTRACT

In the era of Artificial Intelligence, blockchain technology seems to be the future of the financial market. The use of blockchain technology by cryptocurrency highlights the enormous potential cryptocurrency carries. Originally built to replace conventional money and possessing features, such as low transfer cost, self-governed currency and lightning-fast transaction speed. It is perceived to have improved the efficacy of the financial system, but on the other side of the coin, its use for terror financing, money laundering, tax invasion, and fraud reveals its perilous nature, which ultimately questions its legal existence, while many countries have legalised crypto-transactions believing it to be a game-changer of future, whereas others view legalising it as playing with fire and thereby without proper analysis prohibited its use.

When it comes to India, Supreme Court lifted the imposed ban by RBI, which barred financial institutions from dealing and providing services in cryptocurrency, on the ground of proportionality. As of now, the Government of India is, purportedly, planning to introduce a bill to illegalise the use of cryptocurrency. Through a comparative analysis, it can be summed up that nearly all the top economies have focused on regulating cryptocurrency rather than imposing a ban. Even, imposing a ban cannot be an appropriate solution as its use will continue illegally, therefore the only optimal solution is to regulate it which can be done through various measures, such as taxation of cryptocurrency, implementing KYC (know your customer policy), and many more. India, being a developing nation, should focus on exploring cryptocurrency by regulating it, rather than outrightly prohibiting it and the government should reconsider its proposed ban as it will not do any good.

Keywords- *Cryptocurrency, Blockchain technology, CBDC (Central Bank Digital Currency), RBI regulation.*

1. INTRODUCTION

Cryptocurrency has always been an issue of skepticism as to its volatility and regulation since its inception in the global financial market. In a literal sense, cryptocurrency is an ungovernable encrypted digital currency with a massive fluctuating price. Its highly unstable price makes the government skeptical about its regulation and obligates it to place an embargo on the proliferation of its use. But the question that rings the bell is, how far banning cryptocurrency would be the solution?

In March 2020, the Apex Court struck down the impugned RBI circular of April 2018 wherein it proscribed banks and the financial institutions, regulated by RBI from providing services dealing with virtual currencies. The court noted, "*RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there is none.*"[1]

The soaring trade volume of cryptocurrency, shortly after the lifting of the ban, exhibits the steady growth of its popularity in India. According to data[2], an estimated 1.7 million Indian nationals trade in digital assets. Since the removal of prohibition, many domestic and international cryptocurrency exchange platforms have set up their outlet within the country. All the efforts of the government to restrict its transactions seem to go in vain. Many foreign countries, too, started regulating virtual currencies instead of putting prohibition over their use. Like any other technological innovation, Cryptocurrency can also be used for good or evil, depending upon its user. A serious concern that attaches to crypto-transactions is its anonymity which provides a foxhole for terrorists and criminals to make illicit transactions anonymously and effortlessly.

In this essay, the authors attempt to describe crypto technology, its inception, and how it functions, lucidly. Then, analyse the positive and negative impact of cryptocurrency on the economy of the country. After that, a comparative analysis of its implementation and prohibition in foreign countries will be presented which will be followed by the way forward suggested from the in-depth study.

2. WHAT IS CRYPTOCURRENCY?

Cryptocurrency is a decentralized digital currency that is based on a complex maths algorithm, is secured by cryptography and banks on keys which are an arrangement of numbers and letters

[1] *Internet and Mobile Association of India v. RBI*, 2020 SCC Online SC 275.

[2] Archana Chaudhary and Siddhartha Singh, India plans to introduce law to ban cryptocurrency trading, *The Economic Times,* September 17, 2020, available at https://economictimes.indiatimes.com/news/economy/policy/government-plans-to-introduce-law-to-ban-cryptocurrency-trading/articleshow/78132596.cms (January 16, 2021).

to pass over its worth.[3] It is derived from "***Crypto***" which refers to the various encryption algorithms and cryptographic techniques. The purpose of cryptocurrency is to act as a source of exchange, a stock of value and as a unit of account, even though it rarely possesses legal tender status.[4] Even though it is embraced that technological advancement of cryptocurrency and crypto relating assets possess the prospective to revolutionize the whole banking and financial ecosystem thereby strengthening the economy as a whole, it also raises issues concerning investor and consumer protection, further, its use in activities such as money laundering, terror financing, and tax evasion seems to object its legal status.

*A **sine qua non*** feature of cryptocurrency is that for recording any digital transaction it pivots on blockchain technology which is computerized database with strong and formidable cryptography to safeguard transaction record entries, which is again used to verify the transfer of coin ownership and control the digital coin records[5]. This technology which is also known as **Digital Ledger Technology (DLT)** renders counterfeiting, double-spending almost impossible thereby immensely reducing the chance of fraud. Another distinguishing feature of crypto currency is that it is a decentralised virtual currency which means it is usually not distributed, issued, or Bank by any central agency such as RBI, which renders any potential interception a herculean task for the government.

3. EMERGENCE OF CRYPTOCURRENCY

Cryptocurrency is an outcome of excavations carried out by data scientists at WWW (world wide web) which reveals that this technology is only 12 years old (at most 37 years old). The Emergence of cryptocurrency can be traced back to 1983 when David Lee Chaum, a Computer Scientist and Cryptographer, came up with digital cash through the company ***Digicash,*** which ended as soon as the company became bankrupt. After that, Adam Back, a British cryptographer, released a digital currency called ***hashcash,*** but again due to its shortcoming it was not long before it went obsolete and was replaced by Nick Szabo's ***bitgold,*** which was

[3] FATF, "Virtual Currencies Key Definitions and Potential AML/CFT Risks" Pg. 5 (2014).

[4] *Internet and Mobile Association of India v. RBI*, 2020 SCC Online SC 275.

[5]Andy Greenberg, Crypto Currency, *Forbes, April* 20, 2011, available at https://www.forbes.com/forbes/2011/0509/technology-psilocybin-bitcoins-gavin-andresen-crypto-currency.html?sh=5beaf144353e (January16, 2021).

further replaced by Wei Dei's cryptocurrency ***b-money,*** but all these concepts and experiments lead to nowhere until the emergence of ***bitcoin,*** which is entitled as Adam of cryptocurrency, after a research study subjected "Bitcoin: A Peer to Peer Electronic Cash System was published in 2008 by a pseudonymous developer named Satoshi Nakamoto which opened the door for other cryptocurrencies such as Litecoin, Peercoin, Name coin, etc.

The reason for the existence of cryptocurrency can be comprehended by Adam Back's statement *"What we want is fully anonymous, ultra-low transaction cost, transferable units of exchange. If we get that going… the banks will become the obsolete dinosaurs, they deserve to become."*[6]Even, Satoshi Nakamoto penned down the purpose of bitcoin, which was to act as an alternative to fiat currency and be free of intervention by government and its abuses *"The problem with fiat currency is that trust is required to make it work. The Central Bank must be trusted not to devalue the currency, but the history of conventional currencies is full of breaches of that trust."*[7]

4. APPROVAL AND CRITICISM OF CRYPTOCURRENCY

Certainly, the Financial market got revolutionized with the emergence of cryptocurrency, an epitome of technological innovation that has taken the world economy by storm. Cryptocurrencies have several beneficial features as they can easily be exchanged for any currency like the Indian Rupee, US Dollar, etc. at cryptocurrency wallets and exchanges. Crypto-transactions are also claimed to be highly secured as it stores coded mathematical puzzles which are near impossible for a hacker to decode. Most Cryptocurrencies are pseudo-anonymous, which ensures the privacy of the user and his/her stored data.

One of the most celebrated features of Crypto-transactions is transparency, it provides through blockchain technology, which also makes cryptocurrency self-governed and managed. A blockchain is a ledger account which records the transactions of cryptocurrencies that have ever been made and can be visible to anyone. It is also the most cost-effective way of making money transactions across the border, as it costs a very negligible or zero amount. It has been able to do that by eliminating the involvement of a third party like Visa and PayPal, which

[6] *Internet and Mobile Association of India v. RBI*, 2020 SCC Online SC 275.

[7] *Id*. at 6

charges a high sum for even just verifying a transaction. As most of the barriers are absent, verification takes very little time, and makes transactions speed-light-fastening, whether domestic or international.

But it was not so long when these boons owing to, their anonymous/pseudo-anonymous nature backfired as they began being using it for illegitimate purposes which included acts such as money laundering, terror financing, and tax evasion which was first highlighted by FATF in its report as *"Cryptocurrency while having an ocean of opportunity for financial revolution through its brilliant innovation, have got an unwanted attention of various terrorist and criminal groups, who perceive it as a source of their funding*[8] which emphasized the vulnerability of cryptocurrency towards money laundering/terrorism financing risks.
The case of Ali Shukri Ameen is a paradigm of cryptocurrency used as finance by terrorists as in the case he was charged to have provided instruction to the public regarding the transfer of cryptocurrency to ISIL, a terrorist organization.[9]

The drawback of cryptocurrency is its unconscionable use for wheeling and dealing on the black market as criminals doing this know that cryptocurrencies are untraceable. For example, the "dark web" platform Silk Road used Bitcoin nefariously for promoting illegal drug sales.[10] Yet another problem is customer grievances as cryptocurrencies are decentralised there is no proper authority to look after complaints, which means there will be no refunds in case of fraud which indicates the risk involved.

RBI in its annual report of 2017- 2018 mentioned another bane of cryptocurrency which included the detrimental effect on monetary policy as "*The cryptocurrency eco-system may affect the existing payment and settlement system which could influence the transmission of monetary policy".*[11] Thus a large amount of cryptocurrency will eventually erode monetary stability and the last issue is its volatility and unpredictability which were accentuated by

[8] Financial Action Task Force, "Virtual Currencies Key Definitions and Potential AML/CFT Risks" Pg. 9 (2014).

[9] Julie Carey, Virginia Teen Sentenced to More Than 11 Years for Helping ISIS, *NBC4 Washington,* August 28, 2015, available at **https://www.nbcwashington.com/news/local/teen-to-be-sentenced-for-helping-isis/1988769/** (last visited on January 16, 2021).

[10] Marie Claire Van Hout and Tim Bingham, Responsible vendors, intelligent consumers: Silk Road, the online revolution in drug trading, *National library of medicine*, March ,2014, available at **https://pubmed.ncbi.nlm.nih.gov/24268875/** (Last visited on January 17,2021).

[11] Reserve Bank of India, "Annual report 2017-18", 48 (June 2018).

IDBRT's report[12] and can even be observed from the price of bitcoin which went from 20000$/bitcoin to more than 40000/bitcoin in 25 days,[13] thus factors from money laundering, financing terrorism, tax evasion, the risk involved, to volatility add to its criticism.

5. STATUS QUO OF CRYPTOCURRENCY IN INDIA

The arrival of bitcoin lead to the proliferation of cryptocurrency in India, although, cryptocurrency was perceived to have been carrying enormous potential, RBI realized its double-edged sword nature and through a circular dated 06 April 2018 prohibited entities modulated by it from dealing in any virtual currency or facilitating assistance to any person or entity settling payments or trading in virtual currency[14], citing its perilous nature and risk associated as the principal ground for the ban. But soon the circular was challenged in two separate writs in the Supreme court, one by IAMIA (Internet and Mobile Association of India), an industrial body and the other by a group of companies that own online crypto-exchange platforms and a few cryptocurrency traders impugning the circular on several grounds from questioning the RBI's authority to deal with cryptocurrency, that the decision of ban was taken in a hurry to that the circular was arbitrary and the decision of ban was disproportional.

The Apex court clubbed both the writs in ***Internet and Mobile Association of India vs Reserve Bank of India***[15] and on 4th March 2020, the three-judge bench came up with a landmark judgment in which it struck down the curb imposed by RBI thus legalizing cryptocurrency and its exchange in India.

The sole ground for the verdict in the petitioner's favour was the test of proportionality and the availability of alternatives and in the end, the court relied upon European Union Parliament's research paper[16](subjected 'Cryptocurrencies and Blockchain') in which it was asserted that

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[12] Institute for Development and Research in Banking Technology, "Applications of blockchain technology to banking and financial sector in India", (January 2017).

[13] **Anchalee worrachate,** Bitcoin ends a choppy week of trading with prices below $40,000*, The Economic Time*s, January 15, 2021, available at https://economictimes.indiatimes.com/markets/stocks/news/bitcoin-ends-a-choppy-week-of-trading-with-prices-below-40000/articleshow/80289272.cms (January 17, 2021).

[14] *Internet and Mobile Association of India v. RBI*, 2020 SCC Online SC 275.

[15] *Id*. at 15.

[16] European Parliament /Prof. Dr. Robby Houben and Alexander Snyers, "Cryptocurrencies and blockchain" (July 2018).

"We do not favour a complete ban on cryptocurrencies such as in China. That is an extreme step which would do no good. Till the time proper safeguards are there such as rules against money laundering, terrorism financing, tax evasion and maybe a set of more understandable regulation accompanying rules it should be more than enough".[17]

Concurring to the report the apex court held the ban to be disproportional and that RBI should have considered different alternatives before coming up with the challenged circular. Thereby, legalizing cryptocurrency in India, but the government of India is now planning to introduce a bill proscribing cryptocurrency and its trade in India.

6. COMPARATIVE ANALYSIS

Since cryptocurrencies have become ubiquitous, it stimulated countries to acknowledge their existence and formulate their regulations accordingly. Not every country perceived it as a revolutionary technological innovation, rather some identified it as a virtual threat, that endangers their economy. Therefore, few countries have laid down the prohibition, directly or indirectly, on its use, but, at the same time, plenty of them have amended their laws to regulate cryptocurrencies.

In terms of economy, as of now, none of the top five largest economies has put a blanket ban on crypto-transaction, including India. In the United States, every state has its own definition and regulation as to cryptocurrencies, but it is not prohibited in any part of the USA, rather they have enacted laws to regulate it.[18] China, 2nd largest economy, has not banned crypto-transactions, however, it has restricted its financial institutions from facilitating transactions of cryptocurrency just like how the RBI once did in India.[19] Japan has legalized cryptocurrency and its transactions since 17th April 2017. Japan brought forth strict regulations to make registration compulsory for cryptocurrency exchanges and to protect investors from malpractices. In Germany, The German Financial Supervisory Authority (Bundesanstalt für

[17] *Id*. at 17.

[18] Kyle Torpey, U.S. Lawmakers Are Realizing They Can't Ban Bitcoin, *Forbes,* July 30, 2019, available at https://www.forbes.com/sites/ktorpey/2019/07/30/us-lawmakers-are-realizing-they-cant-ban-bitcoin/?sh=2612fe543e31 (last visited on January 16, 2021).

[19] Gerry Mullany, China Restricts Banks' Use of Bitcoin, The New York Times, December 5, 2013, available at https://www.nytimes.com/2013/12/06/business/international/china-bars-banks-from-using-bitcoin.html (Last visited on January 16,2021).

Finanzdienstleistungsaufsicht, BaFin) has qualified cryptocurrency as a basic measure of account and as a financial and banking instrument.[20]

Through legislation in November 2019, Germany allowed its financial institutions to sell and store cryptocurrencies.[21] There is no prohibition in the United Kingdom as to the use of cryptocurrencies. U.K govt. treats cryptocurrencies as a foreign currency for taxing and other purposes, also brought several laws to curb money laundering, terrorist funding, and all menace attached to virtual currencies. Very recently, the Financial conduct authority(FCA) which regulates the financial market of the UK has prohibited the trade of crypto-derivatives to retailers to protect retail investors from sudden and unexpected losses.[22]

Although none of the great economies have accepted cryptocurrency as legal tender till now, most of them are regulating or making effort to regulate it, ensuring the highest possible safety of investors and the economy of the country. It could be drawn that all of them have recognized the potential of virtual currencies in the tech-growing world. It is the reason why China after restricting its financial institutions from facilitating crypto-transactions, is still trying to formulate its government-backed cryptocurrency.[23]

Being the 6th largest economy, India must consider the regulatory steps taken by other top five largest economies as to cryptocurrency regulation. Cryptocurrencies are not banned in any of these countries; however, China is on its way to launching its government-backed cryptocurrency but did not ban all cryptocurrencies technology inside its territory. Cryptocurrency and blockchain technology have immense potential and India, being the fastest developing economy, cannot afford to completely isolate itself from such fin-tech. It can easily be understood that the world sees its future with cryptocurrency-bitcoin technology that has revolutionised the financial world just by its emergence.

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[20] European Parliament /Eddie Gerb and Margarita Rubio, Virtual Money: How Much Do Cryptocurrencies Alter the Fundamental Functions of Money? (November 2019).

[21] *Id*. at 21.

[22] Financial Conduct Authority, available at: **https://www.fca.org.uk/news/press-releases/fca-bans-sale-crypto-derivatives-retail-consumers** (last visited on January 17, 2021).

[23] Jonathan Cheng, China Rolls Out Pilot Test of Digital Currency, *The Wall Street Journal*, April 20, 2020, available at **https://www.wsj.com/articles/china-rolls-out-pilot-test-of-digital-currency-11587385339** (last visited on January 17,2021).

7. WAY FORWARD

After examining the status quo of cryptocurrency in India and its comparative analysis with other giant economies it can very well be observed that banning cryptocurrency is going to lead nowhere and even if a ban is imposed its use would go underground and it will become unfathomable for government to trace its transactions like it is happening in China where traders trade cryptocurrency using VPN(Virtual Access Point).[24] Therefore putting a ban will not be much fruitful and hence regulating cryptocurrency should be preferred. The Government may consider a few measures, given below, that would be instrumental in the regulation of cryptocurrency in the country:

- Prohibition of Anonymous cryptocurrency

It is a myth that cryptocurrencies are only anonymous rather it is both anonymous and pseudo-anonymous. Cryptocurrency such as Bitcoin and Ethereum are pseudo-anonymous and being pseudo-anonymous they can be traced while cryptocurrency such as Dash and Zcash are anonymous[25] and they cannot be tracked therefore proscribing only anonymous cryptocurrency rather than banning the whole cryptocurrency can be a key solution.

- Know your customer (KYC) Policy.

KYC of all crypto transactions should be mandated. KYC is a compliance process in which any banks and financial institutions ask for identification credentials from their customer before making any transaction. It helps in determining the parties to financial transaction and prevent anonymity in the business. It is very helpful to clamp down on illegal activities such as money laundering as it unveils the true identity of anyone making transactions.

- Generation of CBDC

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[24] Shen Wenhao, Cryptocurrency laws and regulations in China, *Law Asia business journal*, July 12, 2018, available at https://law.asia/cryptocurrency-law-china/ (Last visited on January 17, 2021).

[25] Shehan Chandrasekera, IRS Is Trying To Deanonymize Privacy Coins Like Monero And Zcash, *Forbes*, July 6, 2020, available at https://www.forbes.com/sites/shehanchandrasekera/2020/07/06/irs-is-trying-to-deanonymize-privacy-coins-like-monero-and-zcash/?sh=60891e404174 (Last visited on January 17, 2021).

CBDC (Central Bank Digital Currency), centralized virtual money furnished by the apex monetary institution of a particular country[26] can act as a panacea to the problem of regulation, as it possesses all the positives of cryptocurrencies such as low transaction cost and use of blockchain technology. Being backed by a central authority such as RBI in India CBDC will address all the cons of cryptocurrency thereby curbing tax evasion and, money laundering, frauds, and terrorism financing as these transactions could be traced. Also, CBDC in due course will help India move towards a more cashless economy. Countries such as China, the USA and Canada are already racing for the first CBDC with China being the front runner with its DCEP (Digital Yuan) which is already in its testing phase.

A futuristic approach from India is needed by developing its own CBDC. An update to this need was provided during the Union Budget speech which was conveyed on 1st February 2022, where it was revealed by the finance minister of the country that the government of India is planning to introduce its own CBDC with the assistance of RBI. Suggest that India's very own official digital currency debut as early as 2023.[27]

- Mandatory Registration

The Government should have a proper check on the functioning of the cryptocurrency exchanges within its territory. It should be mandatory for all cryptocurrency exchanges to register themselves and should have the license to deal with cryptocurrencies and assets. The mandatory registration should not be only for crypto-fiat exchanges and crypto custodians; rather crypto-to-crypto exchanges too must get themselves registered. It would deter money Laundering as it brings obligation on crypto-exchanges to ensure Anti Money Laundry (AML) compliance and must have to implement customer due diligence requirements during the customer onboarding phase. As of now, few countries already have rules for mandatory registration of crypto exchanges like Japan, Estonia, and Canada.

- Taxation of Cryptocurrencies

[26] Orla Ward and Sabrina Rochemont, "Understanding Central Bank Digital Currencies (CBDC)" *The Institute and Faculty of Actuaries* 5 (March 2019).

[27] PTI, India's digital rupee to debut by early 2023, The Economic Times, February 03, 2022, available at https://economictimes.indiatimes.com/news/economy/policy/indias-digital-currency-to-debut-by-early-2023/articleshow/89379626.cms (Last visited on February 10, 2022).

The government may consider levying taxes on crypto transactions as it would bring double benefits, first, it will be used legally and can easily be traceable, and second, it will generate income and bestow immense financial support to the countries' economy. The kind of taxes to implement, direct or indirect, depends upon how government characterizes it, as a commodity or coin. Recently, the government of India, backtracking from its earlier stance, has levied a 30% tax which means that all the income from cryptocurrency and crypto assets in the fiscal 2022-2023 will be taxed at he rate of thirty per cent (30% plus cess and surcharges).[28]

Being the most volatile digital assets, no doubt, cryptocurrencies would continue to bring up momentary risks to the economy, but those risks escort numerous and multifarious opportunities to explore the fin-tech world. Letting this opportunity slip out of hand would be the most regrettable decision one may make. The Government of India should reconsider its policy and should make an effort to regulate cryptocurrency in the country.

[28] Sneha Kulkarni, Budget 2022 levies 30% tax and TDS on cryptocurrency assets, The Economic Times, February 03, 2022, available at https://economictimes.indiatimes.com/wealth/tax/budget-2022-levies-30-tax-and-tds-on-crypto-assets/articleshow/89267756.cms?from=mdr (Last visited on February 10, 2022).

RIGHT DIRECTION, WRONG TIMING?

CRITIQUING THE GROUNDWATER (CONSERVATION) BILL, 2016

Pranav Kumar

Preface

"We have no choice but to subside on meagre amounts of water. Unlike our village, we don't have wells or borewells here that we can access easily", replied Savithri, who now resides in a rural locality around Nagashettyhalli, Bangalore; away from home, for pecuniary reasons. She then went on to rant about the drastic reduction in the ease of groundwater extraction back home, before being summoned by her mother-in-law, presumably for some odd chores. She quickly bade me goodbye and went inside. I looked at her diminutive residence for a short moment, before taking off on my scooter, bringing a quick end to my water crisis gauging quest.

1. INTRODUCTION

India hosts almost 16% of the global population, but only possesses 4% of global freshwater resources. Notwithstanding such scarcity, the extraction of groundwater has been steeply rising for decades. As per the Jal Shakti Ministry[1], 17.2% of the groundwater blocks are overexploited, while 14.1% and 4.5% are at semi-critical and critical stages. Erratic rainfall, groundwater pollution, and indiscriminate usage are the foremost reasons why the aquifer depletion rate is greater than its recharge rate. Such overexploitation threatens not only biodiversity and urban development but also food security and sustainability. Combating these threats requires careful policy planning and execution, along with a legal framework that allows such policies to flourish. However, the problem of groundwater over-use has barely attracted any strong policy intervention, as politicians would rather not prod the powerful benefitting from the exploitative regime than raise brows by picking on long-term policy changes. Policy paralysis in the realm of groundwater is thus expected, as allowing short-term exploitation becomes politically and economically viable. As acknowledged in the 12th Five Year Plan Approach Paper, to confront the lack of policies prioritizing regulation and protection of groundwater resources, "there is an urgent need to come out with a clear legal framework governing the use of groundwater"[2]. It is in this context, that the Water Resources Ministry penned the Model Bill for the Protection, Conservation, Regulation, and Management of Groundwater, 2016 (hereinafter, "2016 Bill")[3]. In this paper, I attempt to critically analyse this Bill, and the Principle of Subsidiarity infused in it. I argue, that though the introduction of the principle itself is commendable, the approach taken is blind to the country's realities, and might hamper groundwater equitability instead of ameliorating it.

I shall approach the topic in 3 chapters: *First,* I shall trace the history of Indian groundwater legislation: from the Indian Easement Act, 1882, to the 2016 Bill. *Second,* I shall analyse the 2016 Bill and its interplay with the Subsidiarity principle; and *third,* I shall argue why the principle of subsidiarity, incorporated in its present form, could worsen effective groundwater management, and *further,* critique specific provisions of the bill in light of various principles of the subsidiary, fairness, and equality.

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[1] Ministry of Jal Shakti, Government of India, *National Compilation on Dynamic Ground Water Resources of India, 2017*, (2019), <http://cgwb.gov.in/GW-Assessment/GWRA-2017-National-Compilation.pdf>, p. 18. "…out of 6,881 assessment units all over India, 1,186 have been categorised as Over-exploited, 313 as Critical, 972 as Semi-critical, and 4,310 units as Safe".

[2] Planning Commission, Government of India, *An Approach to the Twelfth Five Year Plan 2012-2017*, (2011), para 5.18, p. 48.

[3] Model Bill for the Protection, Conservation, Regulation, and Management of Groundwater, 2016.

2. CHAPTER I: TRAJECTORY OF INDIAN GROUNDWATER LEGISLATIONS

Under this head, I shall summarily lay the evolution of Indian groundwater law in India, by examining groundwater rights provided in *first,* the Indian Easement Act, 1882; *second,* the Model Groundwater Bill, 2005 and *third,* the Model Groundwater Bill, 2011.

2.1. Indian Easement Act, 1882

It is commonplace to argue using Section 7(g) of the Easements Act[4], that groundwater is an easementary right. The illustration states, that every land owner has a right to "collect and dispose within his limits of all water under the land…" However, this argument giving all landowners the right to dispose of groundwater under their land is not only exclusionary and discriminatory towards the landless, but also legally unsound. Recent scholarship has proved, that the right to extract groundwater is not easementary or absolute, but is merely an ancillary right that can be restricted by other easements.[5] These arguments being beyond the scope of this paper shall not be detailed further. Nevertheless, the removal of groundwater from the realm of private ownership has only been taken to fruition in the academic world; in reality, landowners continue to exercise considerable influence on groundwater usage.

2.2. Groundwater Bill, 2005

To counter such exploitation (rather unsuccessfully), the Water Resources Ministry drafted the Groundwater Bill, 2005.[6] A major step taken in the Bill towards conservation was mandating registration of existing groundwater sources, consequently extending state control over them. However, this move was offset by the bill tacitly allowing exploitation and unofficial groundwater sale, by failing to chart any difference between commercial and non-commercial use[7]. Thus, it failed to provide any solution to the concern of overuse or contamination.

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[4] Indian Easements Act, 1882, Sec 7 Illustration (g). "The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel."

[5] M.S. Vani, "Groundwater Law in India: A New Approach", Water and the Laws in India, SAGE Publications, 2009, p. 444.
"...the existence of two heritages or tenements (dominant and servient) belonging to different owners is absolutely essential to establish an easement... By this definition, the right in groundwater can by no means be defined as an easement, as in the exercise of this right, no servient heritage is required. It is a natural incidence to land which a landowner may enjoy, but which may be restricted by other easements…".

[6] Model Bill to Regulate and Control the Development and Management of Ground Water, 2005

[7] Supra note 5.

2.3. Groundwater Bill, 2011

Hoping to salvage the situation, the Ministry introduced yet another Bill in 2011[8]. Though the text seemed to show major improvements in approach, it culminated in futility due to overarching practical difficulties. For example, the Bill commendably addressed community participation in resource management, but failed to empower the Panchayats/Gram-Sabhas to carry out such duties adequately; similarly, though the Bill provided for aquifer management and conservation, the lacking state data on aquifer sustainability and the levels caused it to end in inanity. Deficient knowledge of practical realities also caused the drafters to incessantly delegate powers to various local bodies, not only convoluting the executive process but also risking indiscriminate decision-making by ill-equipped people in power.

Succeeding all these legislations is the Groundwater Bill of 2016. The next chapter is dedicated to discussing the salient features of this Bill, with special emphasis on the principle of subsidiarity embedded in it.

3. CHAPTER II: THE GROUNDWATER BILL, 2016 AND SUBSIDIARITY

In this chapter, I shall *first,* discuss the Model Groundwater Bill of 2016, and segue into the principle of subsidiarity embedded in it. Before the pivot, however, I shall also briefly discuss the Principle of Subsidiarity itself to effectively situate the 2016 Bill in this analysis.

3.1. Where Credit Is Due

One of the foremost features of the Bill is the introduction of the doctrine of public trust in groundwater. Though the case of *M.C. Mehta v. Kamal Nath*[9] had already extended this doctrine to surface water almost 25 years ago, there was hitherto no conclusive legislative or appellate judicial action that brought groundwater under the public trust. Only one Supreme Court judgement of *State of West Bengal v. Kesoram Industries* stated as obiter, that "deep underground water belongs to the State in the sense that doctrine of public trust extends thereto"[10]. The most recent affirmation of this judgement was done in 2021 by the Gujrat High Court while holding in the case of *Kapila Palkesh Patel v. State of Gujarat*, that the petitioners "have no right in respect of the Ground Water, which belongs to our Great Nation…"[11]

[8] Draft Model Bill for The Conservation, Protection and Regulation of Groundwater, 2011.
[9] *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388.
[10] *State of West Bengal v. Kesoram Industries* (2004) 10 SCC 201, para 387.
[11] *Kapila Palkesh Patel v. State of Gujarat* 2021 SCC OnLine Guj 2288, para 68.

Another important development is the clear legislative recognition given to the fundamental right to water in the Bill. Though the infusion of water as a part of the right to life under Article 21 has been asserted since the early 1990s[12], Section 3(1) (a) is the first-ever provision to integrate this right as an objective to be achieved, by specifically providing under Section 10(1), that drinking water holds the highest priority among other uses of groundwater. The aforementioned provision also links the right to water to the realisation of other rights like the right to food, a clean environment, food security, etc.[13]

The Bill also commendably introduced the widely recognized principle of environmental law called the 'Polluter Pays' principle, which provides, that "once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity"[14]. Section 7(3) of the Bill incorporates this principle by stating, that the "appropriate government and supporting institutions shall apply the precautionary principle and the polluter pays principle for all measures to conserve, replenish or recharge groundwater"[15]

Apart from the aforementioned three, the Bill also introduces tools and concepts such as impact assessment[16], a series of civil remedies including strict liability for any "substantial harm to groundwater" caused by commercial users[17], imposition of duties of transparency, and proactive disclosure building on the right to information,[18] and the introduction of social-audits; though a majority of these are a regular feature in one law or another, they constitute a novelty in water-law, or at least, in groundwater-legislation. Nevertheless, these developments don't concern the thesis of this essay, and hence shall not be elucidated further[19].

3.2. Subsidiarity and Beyond

In line with the reforms initiated by the 73rd and 74th Constitutional amendments, the 2016 Bill also crystallizes decentralisation principles by basing its regulatory scheme on the principle of

[12] *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420, para 6 and 7
[13] Supra note 3 at 1.
"The priority and charge on groundwater shall be meeting the right to water for life, followed by allocation for achieving food security, supporting sustenance agriculture, sustainable livelihoods, and ecosystem needs."
[14] *Enviro - Legal Action v. Union of India,* 1996 AIR 1446.
[15] Supra note 3 at 1.
[16] ibid, Section 7(4).
[17] ibid, Section 28(11).
[18] ibid, Section 25.
[19] For more, refer: CAG and Ministry of Jal Shakti, Union of India, *Report of the Comptroller and Auditor General of India on Ground Water Management and Regulation,* 2021.

subsidiarity. The approach itself is not unprecedented, as the 2016 Draft Water Framework Bill[20] too called for the same; however, the legislative concretisation of the principle indeed is. Before discussing the details of such concretisation, however, I shall first briefly discuss the subsidiarity principle itself.

The principle of Subsidiarity allows a central or higher authority to only perform those tasks that cannot be performed by the local government at the local level. It stems from the belief that individual rights exist as a matter of natural law. "Because rights belong naturally only to individuals, social entities…may legislate only to the extent that individuals or smaller social units lack competence".[21] As deftly elucidated in the 2019 case of *Abdurahiman P v. Kerala*, it guarantees independence to a "lower authority in relation to the higher authority"[22], by ensuring that the latter does not interfere with the decision-making authority of the former.

The 2016 Bill aims to base its groundwater-management framework on the principles of subsidiarity and decentralisation. It provides the necessary institutional framework in Chapter-VI, by mandating all panchayats and municipalities to form a committee for groundwater management. Section 13 details the institutional framework, constitution, and functioning of such committees in rural areas, while Section 14 deals with urban water management. The enablement of the Subsidiarity principle is made apparent by the functioning rubric allotted to each level in the proposed multi-tier institutional framework. The higher-level institutions coordinate activities and take decisions only on matters requiring coordination between multiple local institutions. For example, the district council synchronizes the management plans for aquifers shared between various panchayats and municipalities.[23]

One cannot deny that the infusion of the principle of subsidiarity in groundwater management is a move well appreciated. Being long overdue, it also complements the recognition of groundwater as a public trust, by creating a bottom-up institutional structure, where each government acts as the trustee at its level by bearing accountability for the decisions taken at that level. Nevertheless, I argue in the next chapter, that the situation is far from ideal. I contest, not the merit in the principle itself, but the method of its incorporation and its practical ramifications.

[20] The Draft National Water Framework Bill, 2016, Sec 18(e).
[21] Calabresi, Steven G., and Bickford, Lucy D., "Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law" (2011). Faculty Working Papers. 215.
[22] *Abdurahiman P v. State of Kerala,* 2016 SCC ONLINE KER 2667.
[23] Supra note 3.

4. CHAPTER III: PROBLEMS

In this chapter, I argue that incorporating the subsidiarity principle in the present spatial-temporal point of groundwater law evolution would do nothing to ameliorate the situation, and might instead, worsen it. I shall provide two lines of argumentation to effectively establish the same: in the *first,* I argue using the broader scheme of property and groundwater legislation, that any incorporation of decentralisation principles would be futile, or at least, minimally effective if the law doesn't first de-link land, property and water rights; in the *second*, I argue through a close-reading of the 2016 Bill itself, that the provisions incorporated only seem bright in theory, but juxtaposed with the practical-realities of the country, would provide negligible-relief to aid the primary concern of groundwater exploitation.

4.1. De-linking Land and Water Rights

The practice of landowners exercising absolute control over the groundwater under their land has continued despite the state not recognising it as ownership. Popular perception fuels the vicious cycle of perceived entitlement to these resources. Legislative response to such 'ownership' has been silent, as the discourse also extends to the political realm, making strong policy intervention politically inviable. Informal groundwater markets, illegal selling of water, and absolute non-recognition of it as a fundamental right at the ground level, have plagued not only the practical reality but also policy and legislative interventions; for, such interventions have time and again been addressed only through property rights in land.[24] In fact, the World Bank too suggested 'establishing property rights in water' as opposed to land, as among the foremost legal remedies proposed to combat failing groundwater reserves.[25] Surprisingly, however, legislators haven't considered the nexus of land-water-property to be a factor while addressing falling water tables.[26]

One might argue that the 2016 Bill effectively combats this challenge by declaring water to be held by the state in public trust.[27] However, the argument that legislations continue to look at water rights to be flowing from land rights still holds water. Though Sections 9(1) and 9(3) of

[24] Supra note 5.

[25] World Bank, *Deep Wells and Prudence – Towards Pragmatic Action for Addressing Groundwater Overexploitation in India,* (2010), <https://openknowledge.worldbank.org/handle/10986/2114>, p. 47.

[26] Philippe Cullet, 'Model Groundwater (Sustainable Management) Bill, 2017: a new paradigm for groundwater regulation', (2018), Indian Law Review, 2:3, 263-276, DOI: 10.1080/24730580.2019.1565567; *also see* Vishal Narain, 'Institutions, Technology, and Water Control', (2003), Orient Longman, New Delhi, 215

[27] Supra note 3. Section 9(3) The 2016 bill forwards Section 9(2) of the 2011 Bill and considers groundwater as a "common-pool resource" and "common heritage of the people" held in public trust. The trustee of groundwater is the appropriate government at that level.

the Bill declare groundwater to be held in public trust, the immediate Section 9(4) provides, that "the appropriate government shall ensure that the use of groundwater by any person on their land does not deprive other persons of their right to groundwater for life, in case these persons are dependent for their right to groundwater for life on the same aquifer".[28] Thus, the perception that the right to the first usage of groundwater is held by the landowner continues headstrong. Rights of non-owners are viewed as ancillary to those of owners, and usage rights can be given to non-owners only 'in case' they are dependent on it 'for life'; meaning, any requirement for water below the threshold of 'for life', shall not be entertained.[29] Consequently, even the 2016 Bill, though commendably bringing the concept of public trust to groundwater management, continues to maim itself through the land water property linkage.[30] Thus, if even the limited measures addressing groundwater over-use do nothing but attempt to indirectly control the landowner's use of 'their' groundwater, any provision stressing community ownership will remain a hollow attempt.[31]

Consequently, if such emphasis on holding groundwater in public trust remains meaningless, so does the emphasis and declaration on subsidiarity. The purpose of subsidiarity is to foster local decision-making and self-governance.[32] For groundwater management, this translates to better allocation and fairer distribution of aquifer resources. However, if groundwater rights continue to be linked *de facto* to land, and all other non-owner rights are viewed as ancillary to that of the land owner, one would see no real improvement in the allocation, perception, or distribution of these resources. In consequence, if the basic objective of meaningful allocation isn't met, the principle of subsidiarity topples over, and any textual incorporation of the public trust doctrine or the principle of subsidiarity continues to remain futile.

Thus, the first legislative course of action is to de-link land, water, and property rights: merely not by blind incorporation of 'public trust' clauses, but by a holistic overhaul of the groundwater legal framework to systematically dismantle all notions of groundwater rights stemming from property rights. Hence, the 2016 Bill falls short, not because it doesn't incorporate the concept of holding groundwater in public trust; but, because it does so in a vacuum, by not first dismantling the land-water-property nexus: the principal reason for the

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[28] Supra note 3. Section 19(4). *Also see* Sections 19(2) and 19(1).

[29] Section 2(p) of the 2016 Bill defines 'for life'.

"…means the basic safe water requirements for realising the fundamental right to life of each human being…"

[30] Supra note 25.

[31] The gravity of this nexus is also felt in judicial decisions. In the 2003 Kerala High Court judgement of *Perumatty Grama Panchayat v. State of Kerala*, 2004 (1) KLT 731, (also called the Plachimada case), the court held, that the owner is entitled to extract groundwater from his land, as long as no specific regulation prohibits him from doing so.

[32] Supra note 20.

failure of attempts at meaningful groundwater allocation in the past.[33] This will push the legal framework away from the present model of mere regulation of groundwater usage by land owners, to a more comprehensive model of community-based ownership.

4.2. Devil in the Details

It is uncontested that the practical realities of the country are plagued with discrimination based on caste, creed, religion, and economic status. Since the landed are usually the powerful upper class, non-owners receiving neglectful groundwater amenities are more often than not, from the lower class/caste.[34] In the final part of the essay, I shall critique specific provisions and policies of the 2016 Bill, to argue why they undermine the true application of the principles of equality, subsidiarity, and fairness by overseeing this crucial factor contributing to the disparity in resource allocation.

4.2.1. Conservation Fee

Previous legislative policies and bills, (for example, Sections 13(6) (c), 19(5), and 32(1) (d) of the Groundwater Bill, 2011), maintained provisions for the recharging of aquifers to be conducted by industries and commercial entities overexploiting groundwater. However, the present Bill has done away with these provisions and has introduced the concept of 'conservation fees' instead. Section 19(6) of the 2016 Bill provides, that "…water user associations may levy and collect from the farmer or any other person using groundwater such fees, as they may deem appropriate."

The critique is two-fold. *First,* there exists a procedural vacuum for the determination of what an 'appropriate' fee entails. *Second,* levying the fee pro-rata on the extraction quantity, though may seem feasible in theory, will only lead to further exploitation, as the one who pays more, keeps extracting more; especially so, since no limit on groundwater extraction is notified in the present Bill. Thus, the rich (often from the upper class) continue exploiting, while the resource accessibility of the underprivileged remains static. This undermines the objective of holding groundwater in public trust, and consequently, also the principle of subsidiarity as explained above.

[33] Idib at 30.
[34] Vani, Cullet and Kamala Sankaran, 'Water in India: Constitutional Perspectives', Water and the Laws in India, SAGE Publications, 2009.

4.2.2. Lack of Capacity

Section 13(1) of the 2016 Bill, provides for the constitution of a Gram Panchayat Groundwater Sub-Committee, "vested with all the functions and powers required to protect and manage groundwater resources" under the Bill. However, while the functions of the committee are listed in the succeeding Section, the composition or the procedure of composition is not commented upon. My criticisms are two-fold: *first,* defining the composition of the committee is imperative to ensure appropriate representation of all stakeholders, including the economically and socially weaker sections. Having no defined committee composition risks the resurfacing of social inequalities in its formation, functioning, and decision-making, directly hampering the core purpose of subsidiarity: the vesting of everyone equally with the natural right to decide for themselves.

Second, despite having specialised committees, panchayats simply do not possess the ability to triumphantly implement the provisions of the Bill. In fact, in an empirical study done by the Navjyoti India Foundation, panchayat members themselves accepted, that "the comprehensive understanding of the hydrogeology, groundwater basins, basin boundaries and flows across them including spatial and temporal information on groundwater levels…and many other complex issues" required to effectively implement Bill's provisions, is lacking at the Gram Panchayat level.[35] This again hampers equitable allocation, as decisions taken at the ground level would remain superficial and partially informed, making it prone to easy influence by the upper class/caste.

4.2.3. Regulatory Inadequacy

Despite dedicating two Chapters[36] to Offences, Redressal and Dispute Resolution, one of the most apparent flaws in the Bill is its lack of regulatory measures ensuring strict adherence to its provisions. The Bill, through Section 28(4), places considerable reliance on the aggrieved taking complaints to the Grievance Redressal Officer[37] for any violation of the plan implementation. However, I argue, that the country's practical realities ensure the failure of such a redressal mechanism: *first,* the notion that an officer of the Block Panchayat level would

[35] Navjyoti India Foundation and International Policy Analysis Network, '*Recommendations on Draft Model Bill for Conservation, Protection, Regulation and Management of Groundwater, 2016'*, 2016.
[36] Chapter XI, 'Offences, Penalties and Liability', 2016 Bill; *and* Chapter XII, 'Dispute Resolution'.
[37] The powers of the Redressal Officials majorly flow from the 2011 Groundwater Bill, which allotted all grievances to such officers that emerged in their respective region (for example, Sections 47(6), 48(5), 49(9), etc of the 2011 Bill). They are given similar adjudicative powers and obligations as a common court, and any advances can be taken up at the Gram Nyayalyas set up under the Gram Nyayalayas Act, 2008.

be equipped enough to scientifically recognize and prove a violation of the water security plan seems utopian and far-fetched.[38] This involves not only a complex determination of groundwater flow pathways but also considerable adjudicative prowess.

Second, though the bill constitutes a Grievance Redressal Officer, his role is limited to any violation caused during the *implementation* of the management plan; no body/authority exists to deal with the issues of individual rights violation caused by flaws in the *process* of making the plan itself.[39] Thus, forcing the common folk to file writs in the superior courts to fight against marginalisation of communities or inequitable distribution of water, further pushes serious violations under the rug, causing extreme miscarriages of justice.

5. CONCLUSION

The Global population places great reliance on groundwater due to its perceived safety and easier accessibility. Thus, while extraction and exploitation are constantly on the rise, access and distribution haven't necessarily improved. Such uncontrolled exploitation, along with other naturogenic and anthropogenic causes has caused aquifers to dry up and constantly deteriorate in quality[40]. To address such deterioration and inequity of distribution, governments across the world are constantly experimenting with regulatory policy reforms.

The Groundwater Bill of 2016 is a result of one such attempt from the Indian government to regulate and conserve aquifers. In this piece, I have attempted to critically analyse this Bill, majorly through the principle of subsidiarity. In the first chapter, I traced the trajectory of major Indian groundwater legislation: from the Indian Easement Act, 1882, to the 2011 Groundwater Bill. In the second chapter, I proceeded to analytically discuss the 2016 Bill itself, and its interplay with the principle of subsidiarity. Finally, Chapter III homed the argument on why incorporating the principle of subsidiarity in the manner done could worsen the objective of effective groundwater management. I argued that the 2016 Bill falls short, as it fails to create a divide between groundwater usage and land ownership; any incorporation of the public-trust doctrine without the systematic dismantling of this nexus would not scratch the surface of

[38] The Navjyoti Foundation survey too returned similar concerns over the capability of the Redressal Officer to effectively adjudicate over such concerns. Further, concerns were also raised over the frequency of receiving legitimate complaints: one doesn't usually complain against one's neighbor for extracting excess water.

[39] The Navjyoti Foundation survey also recommended the constitution of an independent ombudsman at the State level; "The Grievance Redressal Officer can continue to have the mandate in the cases of a violation of an existing binding plan notified by the local authority. But the ombudsman would be responsible to deal with rights-based issues where the process itself may have been flawed while preparing the plan."

[40] Coyte, Singh, Furst, Mitch and Vengosh, 'Co-occurrence of geogenic and anthropogenic contaminants in groundwater from Rajasthan, India', (2019), Volume 688, Science of The Total Environment Doi: https://doi.org/10.1016/j.scitotenv.2019.06.334.

equitable resource allocation. Further, in the latter half of Chapter III, I critique the specific provisions of the bill, to argue: *first,* that the introduction of 'conservation fee' in the 2016 Bill undermines both, the objective of holding groundwater in public trust, and the principle of subsidiarity; *second,* that the functioning of Gram Panchayat Groundwater Sub-Committee as expected in the Bill is utopian, as *firstly,* not defining the composition of the committee risks the resurfacing of social-inequalities in its functioning and decision-making, inhibiting the core purpose of subsidiarity; and *secondly,* panchayats do not possess the ability to triumphantly implement important provisions of the Bill. *Finally,* I argued that the regulatory measures enshrined in the bill are inadequate, and may end up pushing serious rights violations under the rug.

GAMING VS. GAMBLING:
THE SEEMINGLY INNOCENT WORLD OF REAL-MONEY GAMING

D Donna Gadiel, Rithu T

ABSTRACT

Gambling has existed in India for centuries and has been monitored and penalized by various statutes. With technological and economic developments in society, there is increased availability and affordability of the internet and smart devices. Online gaming industries are thriving especially, Real Money Games (RMGs) such as Rummy, Poker, and Fantasy games. Despite the fact that online gambling has been banned by several states, there is only a fine line between real- money gaming and gambling. The absence of central legislation regarding internet-based gaming has allowed various interpretations by courts regarding what falls under the category of games of skills and chance. Considering recent events, RMGs are in the spotlight for their destructive ill-effects on individuals while simultaneously promoting the economy. This article aims to cover the key issues relating to the illegality of gambling and the interpretation of the courts. Understand the basics of online games involving money stakes and whether wagering amounts to gambling. Additionally, contextualize the merits of online games to India's economy and its wounding side-effects on the players and society. The article also intends to provide suggestions relating to the current legal system surrounding online gaming with hopes to cover the grey areas prevailing in law and analyse certain gaming laws and regulations implemented in China to control gaming addictions.

1. LEGALITY OF GAMBLING AND BETTING

Gambling and betting are deep-seated in the progression of society. Its presence can be felt from pole to pole among various cultures and often thought to have been present before the **Paleolithic period, that is, before** written history. Gambling and playing with dice can be observed in Mahabharata and other works of literature. Gambling in India dates back to the 7300's BC, yet its references were made in 430 BC[1]. The increase in its widespread presence

[1] How has gambling changed throughout history?, available at:// https://auralcrave.com/en/2019/12/19/how-has-gambling-changed-throughout-history/ (last visited on June 6, 2022).

resulted in unfavourable social issues like gaming addiction and destituteness.

Gambling to this date has a multitude of negative attributes associated with it and it is seen as detrimental to societies and families.
The legislatures understood the undeniable need to regulate the same in India and introduced the Public Gaming Act, of 1867[2] bringing forward a remarkable window of opportunity during the colonial period. The aforementioned Central Legislation prohibited and penalized any games thought to have been won merely on the basis of chance and probability, except lotteries. Further, it prohibited owning, possessing, and being present in a common gaming house. It is crucial to bear in mind that the Act excluded **any game or contest where the outcome is a reflection of the skill or judgment of the participant and not chance or probability.**

After Independence, the duty to regulate gambling activities was transferred to States as per Entry 34 of Schedule 7 of the State List[3]. The West Bengal Gambling and Prize Competition Act, 1957[4], Bombay Prevention of Gambling Act, 1887[5], Kerala Gambling Act, 1960[6], Goa, Daman and Diu Public Gambling Act, 1976[7], etc are enacted by their respective states to control gambling and betting. The majority of the States have either prohibited or made exceptions to some games, except Goa and Sikkim which legalized including setting up casinos.

2. JUDICIARY'S INTERPRETATION: SUPREME COURT AND HIGH COURTS

As previously mentioned, the Act regulates and penalizes only games of chance. Section 12 of the Public Gaming Act, 1867[8] provides for an exception to certain such games which are considered a game of mere skill.
As the list of games that fall within the said category remains unestablished, the role has been allotted to the courts. The State laws expressly mention excluded games. One viewpoint is that

[2] The Public Gambling Act, 1867 (Act 3 of 1867).

[3] The Constitution of India, art. 246.

[4] West Bengal Gambling and Prize Competition Act, 1957 (Act 32 of 1957).

[5] Bombay Prevention of Gambling Act, 1887 (Act 4 of 1887).

[6] Kerala Gambling Act, 1960 (Act 20 of 1960).

[7] Goa, Daman and Diu Public Gambling Act, 1976 (Act 14 of 1976).

[8] The Public Gambling Act, 1867 (Act 3 of 1867), s. 12.

the courts have legalized elite forms of gambling like horse racing by giving it the status of a 'game of skill' while outlawing various card games played by the lower and middle-class society.

The Supreme Court in **Dr K.R Lakshmanan vs. State of Tamil Nadu**[9], held horse racing to be a lawful sport as it involves the evaluation of the contestant's physical capacity. Moreover, it involves the assessment of their evaluative skills. Further, the court stated that horse racing as a sport depended on training and skills acquired by training, such as, speed and endurance.

The Supreme Court in **Andhra Pradesh vs. K. Satyanarayana & Ors**[10] held that Rummy was a game of skill and acknowledged that the player required considerable skill to memorize, hold and discard the cards.

The Supreme Court in the **M.J. Sivani case**[11], held that no game could purely be a game of skill but the skill may simply overpower the chance. According to the judgement, there were two categories of games namely, "a game of mere chance" and a "game of chance and skill". The Court applied the dominant factor test to aid in the determination of whether the winning of the game was skill or chance.

In **Varun Gumber vs Union Territory of Chandigarh & Ors**.[12] , a learned Single Judge of the Punjab & Haryana High Court held that an online game Dream fantasy 11 is a game of skill, in accordance with the principles of the Supreme Court in Satyanarayana and K. R. Lakshmanan.[13] Subsequently, It was held that players would need skills akin to a real sports team manager.[14]

3. ONLINE GAMES INVOLVING REAL MONEY

As mentioned earlier, gambling as well as forms of betting can be found in Indian Mythology.

[9] 1996 AIR 1153, 1996 SCC (2) 226

[10] 1968 AIR 825, 1968 SCR (2) 387

[11] *M.J. Sivani vs State of Karnataka*, (1995) 6 SCC 289.

[12] CWP No. 7559 of 2017

[13] *Supra Note* 10 at 3

[14] *Ravindra Singh Chaudhary vs. Union of India*, D.B.Civil Writ Petition No.20779/2019

Although, there are rigid laws relating to gambling that penalize and regulate games involving chance. The rampant growth of online modes of games could be felt during the Covid-19 lockdowns, especially due to low- cost internet service and the widespread popularity of games on social media platforms. "Real Money Gaming" (RMGs) has diversified, adapting and profiting off of the loyal mindset of Indians and the craze towards sports teams. Fantasy sport related games in India are expected to touch $3.7 billion by 2024[15]. Although the covid-19 pandemic and internet access have supported the rise of RMGs, the most crucial reason would be the lack of legislative regulations relating to online gaming. The Court in *KR Lakshmanan v State of Tamil Nadu & Anr*,[16] held that online fantasy games involve substantial skill and are business activities, and thus protected under the Constitution[17]. Article 19 (1) (g) carries the right *'to practice any profession, or to carry on any occupation, trade or business.'*

4. ARE RMGs PART OF ONLINE GAMBLING?

The Public Gaming Act being enacted during the pre-internet ages fails to mention online gambling, therefore, making this branch of games a grey area in the law. Several loopholes can be utilised to bet and gamble. People residing in India can freely participate in betting and gambling in casinos situated abroad. The use of VPNs (Virtual Private Network) help avoiding tracing of their IP address (Internet Protocol). Considering the non-existence of the internet during the time of the enactment of the Act, it is still unfortunate that clarifications and amendments are still not in force, now that online gambling and betting are prevalent globally. Moreover, even the Information technology Act[18] failed to mention online gaming. Gaming and Gambling are differentiated on the basis of the predominating factor that is, whether the chance of winning is based mostly on skill or chance. An additional argument used while debating the difference is the motive for the play. Game of skill is often played for the sake of entertainment and relaxation. Whereas, Gambling is done purely with the motive of earning and the pleasure received from earning money. Sometimes it becomes increasingly difficult to distinguish between gaming and gambling because of a serious lack of knowledge regarding the mechanism of games.

[15] FPJ Web Desk, *"Future of fantasy sports in India"* Free Press Journal, May. 24, 2022.

[16] 1996 AIR 1153, 1996 SCC (2) 226.

[17] The Constitution of India, art. 19.

[18] The Information Technology Act, 2000 (Act 21 of 2000).

In India, monetary stakes can be placed on online card games like Rummy, Poker and Fantasy sports. Despite this, they are legally not considered gambling as even though chance may play a part, the skill the player needs to possess to win is greater[19]. Nevertheless, as previously mentioned, the interpretation regarding a game falling within the ambit of gambling depends on the application and interpretation by courts and it often varies. Apps that involve monetary stakes are strictly monitored by app stores like Google Play Store, but despite that, it is popularly speculated that these games use algorithms that predetermine the winners and make the game seemingly come off as a skill-based game. There is an ongoing popular theory that online Rummy games utilizes a "random number generator" to generate true and pseudo numbers. Although, not all RMGs are taking advantage of the players, the possibility of misappropriation cannot be ignored. Research papers show that Game Action Information Mining (GAIM) framework for multiplayer online card games is possible and can identify information about the players which may be quite valuable.[20] Through the player's decision during the course of play, determination of whether they are "conservative, skilled or risk-taker" can be made. Additionally, it is also possible to determine if they exhibit addictive tendencies.[21] Though this may tremendously help the game makers to improvise the application, it can also be used to prey on innocent players by psychologically manipulating them to continue playing. Cyber laws still being a new and improving field in India, make it difficult to regulate and investigate the loopholes.

5. POSITIVE EFFECTS ON THE ECONOMY

Keeping aside the negative connotations associated with gambling in the minds of society due to social evils that have taken place with gambling being the cause. Indebtedness due to losing money on online games has led to murders, thefts and suicides in India. Young individuals are often trapped in the hands of insolvency as a result of online gaming habits and take life-

[19] Parth Chadha, "Skill-based real money gaming is not gambling", *The Hindu Business line,* Sep. 15, 2021, available at < https://www.thehindubusinessline.com/opinion/skill-based-real-money-gaming-is-not-gambling/article36458914.ece#:~:text=Skill%2Dbased%20real%20money%20gaming%20is%20not%20gambling%20%2D%20The%20Hindu%20BusinessLine> (last visited on Jun. 6, 2022).

[20] SHARANYA ESWARAN, "GAIM: GAME ACTION INFORMATION MINING FRAMEWORK FOR MULTIPLAYER ONLINE CARD GAMES (RUMMY AS CASE STUDY)." 12085 *ADVANCES IN KNOWLEDGE DISCOVERY AND DATA MINING* 435– 448 (2020).

[21] Ibid

threatening steps including crimes and self-harm.

As previously mentioned, the pandemic gave the RMG industry a growth spurt wherein registrations for Poker websites, betting apps and fantasy sports apps hit new highs. Especially the Fantasy sports platforms earned a revenue of Rs 2,400 crore in 2020[22]. India's obsession with sports was triggered with the help of hiring sports celebrities and mascots to advertise their apps. Tax on online gaming is planned to be increased from 18% to 28% and this will undoubtedly affect customers[23]. However, it might still be a positive measure wherein people keep the tax amount in their mind when they win a prize.
Increased global interest in investments in online gaming companies can be seen. Considering the overflowing number of investors, the local companies would need to expand to cater to the demanding international competition.[24]

Similar to India, the USA also gives the States to regulate laws relating to gambling. However, unlike India where very few states have legalised casinos, States like New Jersey make millions of dollars because of casinos[25]. Another merit of RMGs and other online games is the increase in employment opportunities.

6. NEGATIVE EFFECTS ON PLAYERS AND SOCIETY

Despite the possibility that the above-mentioned speculations regarding the algorithms getting tampered with by the companies are proved to be untrue and mere false allegations, the fact that real money game industry continues to thrive by fanning the flames of players' greed for earning money instantaneously with low efforts remains true and unrebutted. Undeniably, the

[22] Guest, 'The Curious Case Of Indian Fantasy League(S)', *Financial Express*, May 9, 2021 3:28:05 pm, available at <https://www.financialexpress.com/industry/technology/indian-fantasy-league-fantasy-apps-fantasy-league-indian-mobile-fantasy-game-apps-dream11-mycircle11-dream11-fantasy-cricket-game/2248669/> (last visited on June 6, 2022)

[23] "Tax-The Bugbear For India's Online Gaming Industry", available at: https://www.medianama.com/2022/05/223-online-gaming-industry-tax-demands-views/ (last visited on June 6, 2022).

[24] Ankur Singh, "Emergence of real money gaming in India, and how it has become a massive industry" *Times of India Blog*, Mar. 4, 2022.

[25] "Online Gambling in the United States in 2021" The Daily Gazette, Nov. 30, 2020.

most consequential of the disadvantageous effects is the slow and dangerous development of gambling addiction. When a player receives a cash prize from winning a game, the brain's reward system is triggered and releases dopamine which gives pleasure and the motivation to continue further.[26]

Certain studies highlight that some players may be more susceptible to gambling addictions due to their genetic and psychological predisposition. Gamers often experience a sense of control over the game due to their confidence in their skills.[27]

Real Money games and gambling that are played online can be dangerously addicting due to their availability, vast and easy access, ability to place large money stakes, etc[28]. The internet plays the role of a safe haven for individuals to play for uninterrupted hours. Players often fail to comprehend the fact that they are losing real hard-earned money after continuous gaming owing to the use of digital currency like credit cards, net banking, etc.[29][30]

When society is concerned, the increased rates of unemployment are a serious issue. Moreover, players who reach stages of addiction and other repercussions slacken the portion of a competent workforce. In recent times, we have experienced crimes that were triggered due to online gaming. Due to the lack of legal regulation on RMGs, fixing the above-mentioned problems seem unattainable. Gaming addictions not only affect the individual, in fact, when online gaming involving money goes out of hand, its impact is detected on the family as a whole. Irritability due to addictive habits, lack of sleep and decreased financial position leading to a reduced standard of living are common issues faced by families. The chances of divorce rise when problems arise between husband and wife. Children also experience abandonment and may feel neglected. Children that grow up with parents or adults who suffer gaming addictions may exhibit the same as they grow older.

[26] Patrick Anselme, "What motivates gambling behaviour? Insight into dopamine's role" 7 Frontiers in Behavarioural Neuroscience 182 Published (2013).

[27] Luke Clark, "Langer's illusion of control and the cognitive model of disordered gambling", 117 *Society for Study of Addiction* 1146-1151 (2022).

[28] Sally Monaghan, "Responsible gambling strategies for Internet gambling: The theoretical and empirical base of using pop-up messages to encourage self-awareness", 25 *Computers in Human Behavior* 202-207 (2009).

[29] Wood RT, Williams RJ, Lawton PK. "Why do Internet gamblers prefer online versus land-based venues? Some preliminary findings and implications", 20 J Gambl Issues (2007);20:235–252.

[30] Abby McCormack, "A scoping study of the structural and situational characteristics of Internet gambling." 3(1) Int J Cyber Behav Psychol 29–49 (2013)

7. SUGGESTIONS

Despite players giving their consent by agreeing to the terms and conditions and are driven purely by curiosity, greed and the intense need for dopamine secretion, the blame is equally shared by the online gaming companies and lack of control. There are no proper regulating bodies for the consolidation and overall regulation of companies. Concerns were previously voiced regarding the speculations about the misappropriations of game algorithms. There is a requirement for legal protection for the individuals in such cases. Since laws relating to cyberspace in India are still developing, it may be difficult to legislate regarding online gaming. Given the perceived lack of boundary in the cyberspace, there is a huge grey area while addressing various areas of the internet. Questions regarding whether taxes are paid properly by the company and the inflow and outflow of foreign exchange and if it is in accordance with the Foreign Exchange Management Act, 1999[31] (FEMA) and other statutes remain a question at present.

Players do not recognise the seriousness of the issue till they lose a significant amount of money and in most cases it becomes too late to reverse the harm caused. Individuals indulge in desperate measures to play more in hopes of winning to cover their losses, resulting in a vicious cycle. The government must acknowledge the seriousness of the matter surrounding online gaming and spread awareness by conducting campaigns. Additionally, it is also important that gaming companies implement a strict screening process regarding the player's age. China is an inspiration when it comes to curbing online gaming addiction. In China, Tencent Holdings Ltd uses facial recognition to prevent minors from games during the night. Anyone who fails the facial recognition test is stopped from playing. Minors cannot cheat by using their parents' identities as they must pass the facial recognition system.[32]

Although it is being employed for all sorts of online games, its implementation for RMGs in India could be pertinent considering the reports of minors committing suicide due to losing money on online gaming platforms. China also limits minors to play only between 8 pm and 9

[31] Foreign Exchange Management Act, 1999 (Act 42 of 1999).

[32] Sofia Brooke, "What to Make of the New Regulations in China's Gaming Industry" Nov. 16, 2021, available at <https://www.china-briefing.com/news/what-to-make-of-the-new-regulations-in-china-online-gaming-industry/> (last visited on Jun. 6, 2022).

pm on weekends[33]. There is also a constraint on how much money can be spent on the games. It is no doubt that the type of government in India is inconsistent with that of China but it is not inappropriate to regulate online gaming activities, especially keeping the public interest in mind. Several other cases concerning minors and gaming addiction are on the rise. A shocking case took place in Madhya Pradesh where an 11-year-old minor hanged himself after spending Rs. 6000 on a game without his parent's permission. Steps must be implemented to curb minors from utilizing their parent's identifications and devices for gaming transactions. Gaming addictions also lead to other mental issues and children may lose socializing abilities and develop other negative effects. Setting a time frame where gaming can be played can prevent individuals, both minors and majors from staying up at night and skipping work or school. By regulating gaming time during weekends, individuals can spend their time socialising with their families and friends. When the amount of money which can be spent in a day is set, it can help avoid impulsive spending on games. It can also benefit people by making them understand the value of money and stop them from mindless gaming.

The States have properly been administering their role of penalising gambling activities in India. However, it would be commendable if central legislation is passed for the sake of online gaming, specifically real money games[34]. A strict screening process should be developed, if possible, to ban or strictly monitor people who have a history of addictions and crimes as psychological factors play a significant role in a person's gaming problems especially when money is involved.

A popular observation is that online gaming involving real money only acts as additional entertainment for individuals and revenue for the economy whereas its negative effects include business losses, and societal degradation through crimes like murder, theft and suicides[35]. It is downright visible that the disadvantages of online gaming outweigh the pros. Inauspiciously, it will continue as long as regulations are made. It is impractical to close down the entire RMG industry considering the fact that people consent to it voluntarily. No matter what the ill effects, the economy needs growth. The steps required to make it safer than it is now lie in the hand of the government.

[33]Matt Haldane, "China vs video games: why Beijing stopped short of a gaming ban, keeping Tencent and NetEase growing amid crackdown" *South China Morning Post,* Nov. 19, 2021.

[34] Tanisha Khanna, "The Time for a Central Law for India's Online Gaming Industry is Now" XII *National law review* 157 (2022).

[35] Earl L. Grinols, "Too Many Negative Side Effects to Online Gambling" *The New York Times, Jul. 29, 2010.*

8. CONCLUSION

Legislation in India has moved towards a progressive and modern approach, which is evident from various amendments and new statutes. Judgements from courts also seem to follow a uniform code and allow for a common interpretation. However, India is still lacking when laws relating to online gaming are concerned. There is a requirement for the modernization of gaming laws and proper regulatory bodies for the same. The government would also require to bring a middle stance between economic and societal well-being when dealing with the RMG industry. On a positive note, the States have been able to successfully penalize and monitor land-based gambling to a great extent and the same can be done for internet-based gaming.

CASE COMMENTS

CASE ANALYSIS (IRAC METHOD) ON SAHARA INDIA REAL ESTATE CORPN. LTD. AND ORS. VS. SECURITIES AND EXCHANGE BOARD OF INDIA AND ORS.

Ashwin Singh

1. CASE DETAILS

FORUM SECURITIES APPELLATE TRIBUNAL, MUMBAI	
CAUSE TITLE	SAHARA INDIA REAL ESTATE CORPN. LTD. AND ORS. VS. SECURITIES AND EXCHANGE BOARD OF INDIA AND ORS.
CITATION	MANU/SB/0119/2011, (2011)5CompLJ401(SAT), (2011)5CompLJ401(SAT), [2011]110SCL217(SAT)
DECIDED ON	18th October 2011
STATUTES/ LAWS CONCERNED	SECURITIES CONTRACTS (REGULATION) ACT OF 1956 SEBI ACT OF 1992 COMPANIES ACT OF 1956 SEBI (DISCLOSURE AND INVESTOR PROTECTION) GUIDELINES OF 2000 SEBI (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) REGULATIONS OF 2009

APPELLANTS	SAHARA INDIA REAL ESTATE CORPN. LTD. AND ORS
RESPONDENTS	SEBI AND ORS.
CORAM	PRESIDING OFFICER:JUSTICE N.K. SODHI MEMBERS: P.K. MALHOTRA & S.S.N. MOORTHY

2. CASE ANALYSIS: IRAC METHOD

2.1. Overview of the Case: Facts & History

2.1.1. Facts of the Case

The facts in the instant case revolve around Optionally Fully Convertible Debentures (hereinafter OFCD) [1] that was issued by appellant[2]. The Appellant has in their general meeting decided to crowdsource via the usage of unsecured OFCDs through private placement & without any public announcement.[3] Whilst dealing with the IPO of other Sahara group, SEBI noticed in the disclosures about the OFCDs & how funds are being raised by the appellants, which is presumably in contravention of Companies Act[4], SEBI Act[5], Guidelines[6] & Regulations[7]. After which necessary information was sought by SEBI from the company, however even after extension no information was provided.[8]

Since the information was not provided, SEBI started an investigation. As a result of which the company was directed not to offer its OFCDs and to keep from the securities market. After

[1]Investopedia. (2021). Fully Convertible Debenture (FCD). [online] Available at: https://www.investopedia.com/terms/f/fully-convertible-debenture.asp [Accessed 18 Nov. 2021]. [2] Two Companies of Sahara group, namely Sahara India Real Estate Corp Ltd (SIRECL) & Sahara Housing Investment Corp Ltd (SHICL).

[3] This was in effect from 25th April 2008 up to 13th April 2011.

[4] COMPANIES ACT, 2013 Act No. 18 OF 2013.

[5] SEBI ACT, Act No. 15 OF 1992.

[6] SEBI (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2009 No. LAD-NRO/GN/2009-10/15/174471. [7] SECURITIES CONTRACTS (REGULATION) ACT, 1956 Act No. 42 OF 1956.

[8] Sebi.gov.in. (2011). SEBI | Order in the matter of issuance of Optionally Fully Convertible Debentures by Sahara India Real Estate Corporation Limited (Now known as Sahara Commodity Services Corporation Limited) and Sahara Housing Investment Corporation Limited [SAT Appeal No.131/2011] [SC Civil Appeal No. 9813 & 9833 of 2011] [SC CP(C) 1820-1822/2017] Available at: https://www.sebi.gov.in/enforcement/orders/jun-2011/order in-the-matter-of-issuance-of-optionally-fully-convertible-debentures-by-sahara-india-real-estate-corporation limited-now-known-as-sahara-commodity-services-corporation-limited-and-sahara-housi-_20091.html [Accessed 18 Nov. 2021].

which the appellant filed a writ petition to Allahabad High Court (hereinafter HC), whilst SEBI challenged the order of the HC in Supreme Court (hereinafter SC). Simultaneously Final order by SEBI was passed wherein the appellants were found in contravention of law and directions were issued, subsequently, the SC also dismissed the Petition.

2.1.2. Procedural History

The Present Case has a multi-level procedural history, which is produced below:

- The foremost procedure started with the investigation by SEBI.
- After which a Writ Petition was filled in the HC, whose order was challenged in the Supreme Court.
- After the SEBI final order under directions from SC, the petition before the SC was also dismissed.
- Thereafter the appeal of SEBI order is being filled.

2.1.3. Brief Judgment of the Tribunal

In the judgment, the tribunal upheld the order in question and the appeals were dismissed.

3. POINTS OF CONTENTION: ISSUES VIS-À-VIS RULES

3.1. Issue I

Whether the disclosure through Red Herring Prospectus (hereinafter RHS) by the appellant was Complete.

3.1.1. Rule

Sections 55 to 58, 60 & 67 of Companies Act[9]are applicable. The application of the Rules is focused on audience OFCDs were marketed to & to all the current shareholders. Alongside the legal validity of the information given in the RHS.

3.2. Issue II

[9] Sections 55, 56, 57, 58, 60 & 67, COMPANIES ACT, 2013 Act No. 18 OF 2013.

What is the nature of OFCDs as securities & whether the same would come under the regulatory jurisdiction of SEBI?

3.2.1. Rule

Sec. 2 in SCRA[10], Sec. 2 in SEBI Act[11], and Clause 45(AA) in Sec. 2 in Companies Act[12] are applicable here. Whereas Chapter IV[13] & Sections 11 & 55A[14] of the SEBI Act along with Section 60 of the Companies Act were the rules applicable concerning the jurisdiction of SEBI in the instant case.

3.3. Issue III

The concomitant issue is whether OFCDs issued by the present companies are required to be mandatorily listed on a Stock Market Exchange.

3.3.1. Rule

Sections 55A, 60 & 73 of the Companies Act[15] were referred to, to understand the allotment of shares & debentures along with the listing by an unlisted company.

3.4. Issue IV

Whether untrue statements recorded by the full-time member are legal & acceptable in the matter at hand?

3.4.1. Rule

Section 11 & 55A of the Companies Act[16] along with Section 2 & 28 of SCRA[17] were referred to throw light on this issue & the roles of the Central Government, Tribunals & SEBI with regards to the collection of facts & usage of the same.

[10] Section 2, SECURITIES CONTRACTS (REGULATION) ACT, 1956 Act No. 42 OF 1956.
[11] Section 2, SEBI ACT, Act No. 15 OF 1992. [12] Section 2, THE COMPANIES ACT, 2013 Act No. 18 OF 2013.
[13] Chapter IV, SEBI ACT, Act No. 15 OF 1992. [14] Section 11 & 55A, SEBI ACT, Act No. 15 OF 1992.
[15] Sections 55A, 60 & 73, THE COMPANIES ACT, 2013 Act No. 18 OF 2013.
[16] Sections 11 & 55A, COMPANIES ACT, 2013 Act No. 18 OF 2013.
[17] Section 2 & 28, SECURITIES CONTRACTS (REGULATION) ACT, 1956 Act No. 42 OF 1956.

4. ANALYSIS: FINDING THE PUNDIT IN THE JUDGMENT

4.1. Issue I

Although the appellant has contended that the RHS[18] was issued to private parties and for public at large, yet the memorandum was issued to over 30 million, inviting to buy OFCDs. Law concerning this states that if any offering for subscription is being made to over 49 people, then the same shall be seen as public issue & is nothing but advertisement.[19] The knowledge of company that offer was being made to over millions & is going to be subscribed by millions, played a crucial role. Furthermore, the current shareholders of company were not informed of same, which effectively results in a major breach of law.

Even the conduct of RoC has been questioned, as same was supposed to have been aware of the 20,000-crore target by private placement. Furthermore, the same couldn't be raised through 49 people, should've been sufficient for him to raise some queries, however the same was not done.[20]

4.2. Issue II

The Prime contention in this issue from the appellant side was that the OFCDs are not securities and thus SEBI does not have the necessary jurisdiction over them. For this, the SCRA and the definitions provided within it needs to be referred. Since the appellant was referring to the OFCDs as a hybrid, the definition of the same was referred to under Sec. 2(19A) in Companies Act[21]. Through a combined understanding of the word "securities" & "hybrid", OFCDs are debentures, as specified in their name themselves, the tribunal concluded the OFCDs to be form of hybrid, yet as one security that comes within the

[18] Sections 32, COMPANIES ACT, 2013 Act No. 18 OF 2013.
[19] Sections 60 & 67, COMPANIES ACT, 2013 Act No. 18 OF 2013.
[20] Firstpost. (2011). Sahara scam: SAT blasts RoC for "dereliction of duty" -Business News , Firstpost. [online] Available at: https://www.firstpost.com/business/sahara-caper-sat-blasts-roc-for-dereliction-of-duty 110918.html [Accessed 18 Nov. 2021].
[21] Sections 2(19A), COMPANIES ACT, 2013 Act No. 18 OF 2013.

jurisdiction of SEBI. The focus was that SCRA is inclusive legislation & covers every "Marketable Securities" of which the OFCD forms a part.[22]

After this, the tribunal focused on Sec. 11, 11A & 11B of SEBI Act[23] and the powers & scope of SEBI itself. The tribunal focused upon the aim behind the creation & the wide powers of SEBI, which are ultimately aimed at protecting interests of investor.[24] This combined with the presence of OFCDs as securities led to the conclusion that SEBI indeed has jurisdiction over the present securities matter.[25] The situation in SEBI act as special legislation was focused upon, the special powers granted to investigate & adjudicate were the prime points of contentions in the present issue.[26] It was also focused upon that in situations wherein interest of investor is concerned, there is absence of conflict of interest between the SEBI & the Ministry of Corporate Affairs. [27]

4.3. Issue III

The next uninterrupted line of arguments now focuses on the prime issue within the present case, whether the listings of the OFCDs are required by law or not. For this Sec. 67 of Companies Act[28] was referred which deals with the offering securities to the public. Furthermore, Section 53 was also referred to where issue of OFCDs being public issue was debated upon.[29] The tribunal on both the facts weighed heavily on the respondent side and concluded that the listing of OFCDs was necessary. Furthermore, the transferability of the OFCDs was also noted to be important factor in terming the same as security. This also confirmed that SEBI was correct in taking action as a *prima facie* issue.

Now the next issue was whether the present unlisted company would be bound by the jurisdiction was SEBI. With regards to the present issue, the focus was upon the actions of companies. Tribunal referred to Sec. 11, 55A, 60 among others.[30] The tribunal reached the situation wherein they asserted that even though company was indeed unlisted, yet even

[22] SECURITIES CONTRACTS (REGULATION) ACT, 1956 Act No. 42 OF 1956.
[23] Section 11, 11A & 11B SEBI ACT, Act No. 15 OF 1992. [24] Parsoli Corporation Ltd. and others vs. Securities and Exchange Board of India, Appeal no. 146 of 2010 [25] Yogesh Malhan (2013). Optionally fully convertible debentures – whether securities or not. [online] Lexology. Available at: https://www.lexology.com/library/detail.aspx?g=1d3db8c8-64d0-4b38-9b11-6bd6a562ef6c [Accessed 18 Nov. 2021].
[26] Singh, V.K., 2013. Whistle Blowers Policy Challenges and Solutions for India with Special Reference to Corporate Governance. GNLU JL Dev. & Pol., 3, p.5.
[27] Id.
[28] Sections 67, COMPANIES ACT, 2013 Act No. 18 OF 2013.
[29] Sections 53, COMPANIES ACT, 2013 Act No. 18 OF 2013.
[30] Section 11, 55A & 60, COMPANIES ACT, 2013 Act No. 18 OF 2013.

after that the company cannot take usage of illegal means to do away with the clutches of the market regulator.[31] The intentions of company in present situation to raise a herculean amount of funds from millions of people cannot be ignored on the pretext that the offering was issued to private investors only.[32] As a direct consequence of this, it was observed in the tribunal's judgment that the present appellants are also listed companies for scope of understanding. Thus, resultantly SEBI has the necessary authority to deal in matters concerning the issue, allotment & transfer of securities.[33] Multiple judgments referred to in the present issue by the appellants weren't taken for consideration following the limited preview of the learned judges within those judgments.[34]

4.4. Issue IV

The findings of the untrue statement were challenged because SEBI doesn't have the authority to question the companies, the power for the same was reserved to the Central Government or the Company Law Board. With regards to the same, attention should be brought to Sec. 55A of Companies Act[35] and the related explanation by the parliament for removal of doubts. With a reference to the same, SEBI was correct in its actions, according to the legislation & the explanation provided therein and the present contention of the appellant was thereby quashed. Section 11(A) of the SEBI Act[36] was further referred by the appellant & precedents were cited. However, the focus of the present tribunal remained upon the core actions of SEBI under the law and in present case, which as per understanding of the present tribunal was correct. As for the precedents cited, the tribunal, after an individual understanding of all the precedents, concluded that facts in the precedents and the present case were nowhere similar, and thus the same would not be applicable in the present case.[37]

4.5. Post Analysis: The Ratio Decidendi of the Tribunal

[31] Dhanaiah, G. and Prasad, R.S.R., 2016. Frauds in Indian Capital Market-A Study. Journal of Commerce and Trade, 11(2), pp.64-74.
[32] Archana, M.C. and Nidhalkar, V., 2011. Strategies of conglomerates to synergize multiple businesses. [33] Sawhney, D.V. (2012). Sahara vs. SEBI-An In-Depth Analysis Of The Landmark Supreme Court Ruling. [online] Mondaq.com. Available at: https://www.mondaq.com/india/shareholders/203796/sahara-vs-sebi-an-in depth-analysis-of-the-landmark-supreme-court-ruling [Accessed 18 Nov. 2021].
[34] Collector of Central Excise vs. Tata Engineering and Locomotive - MANU/SC/0872/2003 : 2003 (11) SCC 193; Birla Corporation Ltd. vs. Commissioner of Central Excise, Baroda - MANU/SC/2519/2005 : 2005 (6) SCC 95; Jayaswals NECO Ltd. vs. Commissioner of Central Excise, Nagpur - 2007 (13) SCC 807 and Indian Oil Corporation Ltd. vs. Collector of Central Excise, Baroda - 2007 (13) SCC 803.
[35] Section 55A, COMPANIES ACT, 2013 Act No. 18 OF 2013.
[36] Section 11A, SEBI ACT, Act No. 15 OF 1992.
[37] Id

In the concluding paragraph in the judgment the tribunal finished their finding by stating their decision in the judgment. The tribunal also stated the important fact that majority of contentions raised by appellants were dealt with in the discussion therein and some small contentions although not expressly explained could be derived from explanation of main contention itself. In their conclusion, both of the present appeals were dismissed and order for collection of the money raised from the OFCDs was also provided.[38]

5. CONCLUSION

Although the present judgment and the issues herein are primarily associated with a legal understanding. Yet a good part in this decision taken was depended upon the intention of the companies and their activities in accordance. It could be rightly regarded as a landmark judgment & a milestone in India's Corporate law landscape.[39] The Prime benefactors of the present judgment were the Indian Investor, as they in the end got a sanctified regulatory body with absolute power to protect their interests.[40] The present judgment also removed & solved issues relating to several grey areas in law and thus strengthened the Indian Market against another Harshad Mehta Scam.[41] The issue of jurisdiction was also resolved and thus the major grey zone in the corporate governance was also removed.[42]

The present case started a chain event that is even going on right now. After the appeal of the present judgment to the Apex court and an affirmation by the same, the order to the repayment of funds taken was ordered. Sahara group was unable to pay the same back, this resulted in the iconic arrest of the MD of the Sahara.[43] Furthermore, several Litigations have subsequently followed after the present judgment, but all of them have resulted in the side

[38] This as a matter of fact has not yet been complied fully by Sahara group & also become the reason for the downfall of the company.
[39] Flatscher, A. (2012). Financial Sector Regulation Heats up in India amid Sahara Case. [online] CFA Institute Market Integrity Insights. Available at: https://blogs.cfainstitute.org/marketintegrity/2012/09/12/financial-sector regulation-heats-up-in-india-amid-sahara-case/ [Accessed 18 Nov. 2021].
[40] Editor (2014). Case Comment: Sahara India Real Estate Corpn. Ltd. and Others v. SEBI, MANU/SC/0735/2012 – Rostrum's Law Review. [online] Rostrum's Law Review. Available at: https://journal.rostrumlegal.com/case-comment-sahara-india-real-estate-corporation-ltd-and-others v-securities-and-exchange-board-of-india-and-another-manusc07352012/ [Accessed 18 Nov. 2021]. [41] Global Jurix, Advocates & Solicitors (2013). Fight Between Sebi & Sahara May Bring Change In Corporate Law. [online] Mondaq.com. Available at: https://www.mondaq.com/india/corporate-and-company law/270066/fight-between-sebi-sahara-may-bring-change-in-corporate-law [Accessed 18 Nov. 2021]. [42] Kirchmaier, T., Gerner-Beuerle Edited, C., Ahsan, I., Rafael, G. and Bueta, P. (2021). CORPORATE GOVERNANCE IN SOUTH ASIA TRENDS AND CHALLENGES. [online] Available at: https://www.adb.org/sites/default/files/publication/667006/corporate-governance-south-asia.pdf. [43] Dhanaiah, G. and Prasad, R.S.R., 2016. Frauds in Indian Capital Market-A Study. *Journal of Commerce and Trade,* 11(2), pp.64-74.

of SEBI & against Sahara Group.[44] This goes to showcase that the rule of law is crucial and even the directors of huge multi-billion companies are not any different than the common man.[45]

[44] IANS (2020). Sahara files contempt petition in Supreme Court against regulator SEBI. Business Standard India. [online] 2 Dec. Available at: https://www.business-standard.com/article/companies/sahara-files-contempt petition-in-supreme-court-against-regulator-sebi-120120200784_1.html [Accessed 18 Nov. 2021]. [45] Gill, D. and Kathuria, I., 2014. CORPORATE SOCIAL RESPONSIBILITY: A CASE STUDY ON SAHARA INDIA PARIWAR.