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ABOUT INDIAN INSTITUTE OF LEGAL STUDIES

The Indian Institute of Legal Studies established in the year 2010 has evolved into a unique system of imparting legal education not only in North Bengal but also as an emerging education and Research Centre in the SAARC region with the establishment of the Centre for SAARC on Environment Study & Research. Acknowledged as one of the best law colleges in India, IIIS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. IILS is an institute that promotes holistic study in Law in the form of short-term courses, field work, experiential learning, and Clinical legal classes in addition to the regular undergraduate course. Post Graduate courses and Research Centre are already functional, which will mature into doctrinal courses.

The Institution takes pride in hosting workshops for police officers of North Bengal on Human Rights and Cyber Crimes, where the institute was privileged to have the presence of eminent police officers and scholars from different corners of the country. The Bureau of Police Research & Development, Ministry of Home Affairs, Government of India had approved the organising of a vertical interaction course for IPS officers on Criminal Justice Delivery System which was witnessed by the gracious presence of the Hon'ble Judges of the Supreme Court of India and the various High Courts.

The Institution has been organising a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. The Institute had started with organising a national seminar on the "Civil Justice Delivery System". Today, it has reached the peak of organising international seminars with the SAARC Law Summit & Conclave being the blooming one.

Even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that had undertaken the initiative of conducting online classes for the students of both UG and PG courses to reach out to the students through online teaching learning mechanism from the very initial period of lockdown. Also, the college has successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt.

The Institution's vital location, its active participation in imparting knowledge and moulding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region. The emphasis in academic development with

Its adoption of inter-disciplinary and practical approaches has aided its students to gain a deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

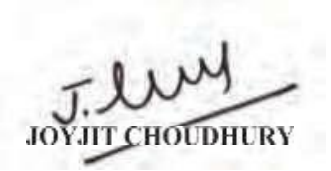
MESSAGE FROM THE PATRON

SHRI JOYJIT CHOUDHURY

Founder Chairman

Indian Institute of Legal Studies

In the wake of the Covid-19 pandemic, the world has embarked on a journey of healing, where each passing day brings renewed hope and resilience. Amidst the shadows of personal and professional losses, humanity emerges, forging new pathways of strength and perseverance. As the adage goes, "When one door closes, another opens," the darkness that enveloped us has sparked in us an indomitable spirit, empowering us to craft our destinies amidst adversity. In the face of great challenges, we, as members of the esteemed Indian Institute of Legal Studies, Siliguri, have persevered to uphold the noble spirit of education and academic pursuit. With unwavering determination, we have ignited the flames of research, inspiring students, scholars, academicians, and passionate contributors to delve into the vast realms of knowledge. It fills me with profound joy and a sense of pride to bear witness to the remarkable journey of the IILS Law Review, crafted by the esteemed members of the Indian Institute of Legal Studies, Siliguri. I extend my heartfelt appreciation to all those who have contributed tirelessly, transforming invaluable ideas into meticulously crafted pieces of intellectual excellence. Together, we continue to uphold the noble tradition of scholarly inquiry and dissemination, enriching the legal landscape with our collective wisdom and insight.



MESSAGE FROM EDITOR IN CHIEF

Dr. Trishna Gurung

Principal-in-Charge

Indian Institute of Legal Studies

It is with immense pleasure that I present to you the latest issue of the *IILS Law Review*. This journal remains committed to fostering high-quality academic discourse in the legal field, offering a platform for rigorous analysis, critical evaluation, and thoughtful commentary on contemporary legal issues.

As we continue to steer the evolving legal landscape, this issue echoes our journal's dedication to addressing both traditional and emerging areas of law. From discussions on constitutional and environmental principles to explorations of nuanced legal challenges concerning digital evidences, surrogacy, and socio-economic policy, the *IILS Law Review* strives to provide its readers with thought-provoking scholarship. We take great pride in featuring valuable contributions from academicians, legal scholars, practitioners, and students. Their research not only augments our understanding of law but also sparks evocative debates that shape the future of legal practice and jurisprudence.

I extend my heartfelt gratitude to the authors, reviewers, and the editorial board for their persistent efforts and dedication in maintaining the high standards of this journal. I am self-assured that the diverse perspectives presented in this edition of the journal will inspire, educate, and challenge our readers.

Thank you for your continued support and engagement with the *IILS Law Review*. We look forward to your feedback and contributions in future editions.

Best Regards,

Dr. Trishna Gurung, Editor-in-Chief, *IILS Law Review*

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INCLUSIVE JUSTICE: GENDER STEREOTYPES & DISTRICT COURTS

Dr. Humayun Rasheed Khan[1]

Abstract: *Equality and justice are pious constitutional goals enshrined in the preamble and specific constitutional provisions to achieve an egalitarian order in our society. These two constitutional promises clearly indicate the valued premises on which our legal system and various institutions should operate. But does it operate on these valuable aspirations? Unfortunately not, so how to achieve this goal? This paper aims to address the unique role that a woman plays in her family and society and will cover different aspects of gender identity. It covers the international and Indian Constitutional regime for gender equality and gender justice and how the practical realities indicate a scenario which is otherwise. The paper will also highlight as to how silently gender stereotypes operate in different institutions consciously or unconsciously and its deep pernicious impact on the psyche of women in modern times. The discourse will then turn to the directions of Supreme Court both in Aparna Bhat and Patan Jamal Vali judgements. In the light of directions of Supreme Court, all the judges at all levels have to not only avoid language that trivialize the women victim or witnesses (written and oral) themselves but must also ensure that neither any staff member nor lawyers nor litigants use such language in judicial proceedings or in the courtroom.*

Keywords: *Gender identity, Gender equality, Stereotypes, Inclusive justice.*

I. INTRODUCTION

It is said that gender identity is a socio-cultural and political construction that segregates society into diffracted identities with different values and citizenships. The identity of the gender is constructed and formulated differently for men, women and transgender. Women are often treated as second-class citizens, and transgender are largely perceived as non-subjects in the society. The gender identity in a patriarchal system not only recognizes the status of femininity, masculinity and the transgender in a structured way, but also constructs the gendered notion of the body, sexuality, production and reproduction. Gender identity at times operates as a distinct character and at other, functions along with other multiple

[1] Professor, National Judicial Academy India, Bhopal.

marginalities creating a sense of graded powerlessness through class, caste and ethnicity by making a particular gender of the community more vulnerable and powerless to others.[2]

Thomas Piketty says that the development of centralized State in the 18th and 19th centuries was even accompanied, at times by a kind of hardening at systematization of the patriarchy. Gendered rules were codified and generalized throughout nation and among social classes, such as the asymmetry of rights between spouses in the frame work of the Napoleonic Code or inequality of electoral rights in many countries.[3]

It is a harsh reality that socio-cultural construction and structural inequality makes women and transgender more vulnerable to violence in the society. Violence against women is often perpetrated by the dominant gender in different spheres, and violence therefore is often used as a tool for the subordination and powerlessness of women and transgender. Women face several forms of violence such as rape, sex-selective abortions, and domestic violence in the Indian society. Gender-based violence has several physical and psychological implications as it victimizes and violates the very ethos of autonomy and dignity of an individual. However, the subjectivity of gender also has possibilities for realization of agency and resistance against its victimhood, violence and exclusion.[4]

In fact, gender is the manifestation of the diverse subjects constructed through several processes. In patriarchal societies, male, female and transgender individuals are created as subjects of a particular kind. For instance, the male members of the society are expected to be dominant, superior, persuasive, successful citizens in comparison with other gender identities or subjects.[5] They are expected further to control subordinate gender subjects, especially women. The construction of gender subjectivity is carried out through several structures, processes, institutions, ideologies and so on.[6]

The violence exercised against the gender adds to the process of creation of a subject or subjectification. On the one hand, the society relegates women to the private sphere and it is also often thought that women remain safer within the family.[7] Paradoxically, however, women face several types of powerlessness and violence such as domestic violence, sexual assault, and dowry torture leading to dowry death within the family. The vulnerable gender

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[2] Sahu Skylab, *Gender, Violence and Governmentality*, 1 (Routledge, 1st South Asian ed. 2022).
[3] Thomas Piketty, *A Brief History of Equality*, 184 (Harvard Univ. Press, 2022).
[4] Brien, B., & Penna, S., Postmodernism as Theoretical Resource: Analyzing the Cultural Construction of Inequalities and Struggles around Social Inclusion and Exclusion, in *Social Policy Review* 8 1996.
[5] See generally *Gender Norms and Masculinity*.
[6] Sahu Skylab, *Gender, Violence and Governmentality*, 1 (Routledge, 1st South Asian ed. 2022).
[7] Devi Nirmala, Domestic Violence against Women in India – An Analysis, in *Gender Violence and Social Exclusion* 11-20 (Bhumi Anil ed., Serial Publications, 2011).

further remains subjected to several types of violence such as sexual violence, acid attack and are also often killed in the name of the honor. The manifestation of gender violence influences the construction of the female gender and maintenance of their secondary and subordinate position in Indian society.[8]

II. INTERNATIONAL LEGAL REGIME ON ELIMINATION OF DISCRIMINATION AGAINST WOMEN

The promotion of gender equality and empowering of women is one of the eight Millennium Development Goals (MDG)[9] to which India is a signatory. The pairing of the two concepts of women's empowerment and gender equality into one MDG implicitly recognizes that gender equality and women's empowerment are two sides of the same coin: progress towards gender equality requires women's empowerment and women's empowerment requires increased gender equality. Since India is signatory to few international conventions as well, one of them is, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[10], adopted in 1979 by the UN General Assembly, which is often described as an International Bill of Rights for Women. By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

(a) To incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;

(b) To establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and

(c) To ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

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[8] Sahu Skylab, *Gender, Violence and Governmentality*, 1 (Routledge, 1st South Asian ed. 2022).
[9] U.N. Dep't of Econ. & Soc. Affairs, *Millennium Development Goals Report 2015* (2015).
[10] Convention on the Elimination of All Forms of Discrimination against Women, 1979.

III. INDIAN CONSTITUTIONAL MECHANISM FOR GENDER EQUALITY

Equality and justice are pious constitutional goals enshrined both in the preamble and specific constitutional provisions to achieve an egalitarian order in our society. We have many provisions in our constitution to ensure gender equality and gender justice such as article 14, 15(3), 16(1), 39(a), 39(d), 39A, 42 and 51A(e). Although all laws are not gender specific, the provisions of law affecting women significantly have been reviewed periodically and amendments carried out to keep pace with the emerging requirements.

There are more than a dozen Acts which have special provisions to safeguard women and their interests but the most important legislations are the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Protection of Children from Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, 2015 and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. In fact, POCSO and JJ Act are youth specific legislations which take special care of the welfare of child and both these legislations provide detailed procedure for almost all the stages of a criminal prosecution with special emphasis on care, protection and a sensitive attitude towards women and children.

The Apex Court has issued several guidelines to ensure fair treatment to women and protect their rights in ***Delhi Domestic Working Women's Forum***[11] where six working ladies who were travelling in Muri Express were raped by seven army personnel.

In ***VishakhaCase***[12] the Supreme Court has laid down executive guidelines for Sexual harassment of Women at workplace which culminated into what is now known as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Then, the Supreme Court in ***Vineeta Sharma Case***[13] held that daughters would hold equal coparcenary rights in Hindu Undivided Family (HUF) properties even if they were born before the 2005 amendment to the Hindu Succession Act, 1956 and regardless of whether their father had died before the amendment. These cases, indeed, laid down the foundation on which gender equality debates geared up in our country.

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[11] *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.
[12] *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241.
[13] *Vineeta Sharma v. Rakesh Sharma,* Civil Appeal Diary No. 32601 of 2018.

IV. UNDERSTANDING GENDER VIOLENCE

Most sociologists entrust violence to the domain of criminology and deviance. However, violence could be so well ingrained within the so-called normal social order, or when violence becomes innately structural, it is not considered a deviant act, rather an integral part of the social order as well. Violent actions are considered a normal part of the human collection of strategic social behavior, and they may influence a person more intently than any other form of violence.

Thus, violence may not be visible episodes of hostility. Instead, violent actions are a normal part of the human strategic social behavior. Violence incorporates a diverse array of actions as an integral feature of social life. While analyzing the position of women in the patriarchal society, one cannot ignore how violence is exercised against the female gender as a normal and accepted part of the social behavior and relationships.[14] Marital rape, in this context, is often seen as normal; wife beating and suffering of women in a family are also considered as an accepted practice. The nature of structural violence could be expressed both latently and overtly yet it works to strengthen the patriarchal society. Patriarchal power also works in a way that shapes the idea of the people where the subordinate gender such as women or transgender themselves consciously or unconsciously believes that they are weaker sex, subordinate to the dominant gender.[15]

Violence against women is most often perpetrated by an intimate partner. Violence related to reproduction and sexual violence perpetrated by the intimate partner is also often seen as normal. As far as the perpetrators of violence are concerned, usually they are the members of the family, the community or the state apparatus (based on legal or illegal parameters) in general, or the state personnel in particular, may perpetrate violence. However, the patriarchal power structure operates in such a way that it shapes the mind and the idea of human beings. As a result, the person who is a victim while operating through the power dimension remains unconscious and unaware of her own agency and may act against her own self or own identity. When a woman in a patriarchal society commits suicide after rape to protect her honor and to escape the shame and humiliation, she perpetrates greater violence against her own self, and in turn acts in favor of the patriarchal

[14] Devi Nirmala, Domestic Violence against Women in India – An Analysis, in *Gender Violence and Social Exclusion* 11-20 (Bhumi Anil ed., Serial Publications, 2011).
[15] Sahu Skylab, *[2022]* at 12-13.

structure and patriarchal values that give ultimate importance to women's chastity and its violation in any way is seen as deviant.[16]

In India, Dalit women remain double vulnerable towards violence; on the one hand, Dalit men have control over the sexual and economic labour of "their" women. On the other hand, they remain subordinate to the upper-caste communities. Violence is also the core outcome of the gender-based inequalities shaped, compounded and intensified by caste discrimination (Guru 1995; Irudayam et al. 2014). Women from minority religions also are very vulnerable to sexual violence, especially rape. Rape is also used as a weapon of political and social vengeance by the dominant religious groups against the minority community (Kannabiran 1996; Menon 2012).

The impact of violence as per context and experience of different groups of women could be diverse.[17]For instance, for a female sex worker (street based), a housewife, a lesbian and a dalit woman, while facing multifarious sexual contexts, their understanding, acceptance level and the very experience of violence and suffering remain varied. Even among the sex workers, street-based sex workers could be more powerless and vulnerable to violence than the escorts. Similarly, a transgender sex worker may have some unique experience of violence as against female sex workers.

V. GENDER DISCRIMINATION, PUBLIC RESISTANCE AND LAW

In the patriarchal society of India, subordinate groups in general and women in particular are subjugated or treated as subordinates, as a large section of them accept the unequal gender power relationship within the society. However, the acceptance of power or dominance does not exclude the possibility of resistance. The process of resistance is followed by the interplay of power and powerlessness and agency. Resistance is deliberate or intentional action or is a response to the powerful or dominant forces of the society by the subordinate, powerless groups followed by the realization of their agency.[18]

Apart from the day-to-day resistance in India, especially in the post-independence period, there have been long-lasting ongoing women's movements raising diverse women's issues in the country. As far as gender and violence issues are concerned, in post-independent India, contemporary women's movements in their earliest phases in the late 1970s have been dealing with the diverse forms of growing violence against women. In the

[16] Sahu Skylab, *[2022]* at 12-13.
[17] Sahu Skylab, *[2022]* at 15.
[18] Sahu Skylab, *[2022]* at 181.

process, movements raised issues such as dowry torture, rape, sexual harassment in the workplace, domestic violence and so on. The women's movements led by different feminist activists, organizations, grassroots-based sporadic movements (having the aim of ameliorating the position of women in society), an individual woman protagonist and so on, have been resisting against and retaliating with the societal forces the state and the judiciary to enable and ensure a violence-free society.[19] As a result, they have been demanding the initiation of new laws, amendment in laws and adequate implementation of the laws in an unbiased manner. In the process, at some time women's movements also collaborate with the state as well as oppose the state.[20]

V. ADDRESSING STEREOTYPES IN COURTROOM

The Supreme Court of India while considering the issue of violence based on gender and the practice of gender stereotypes, observed that gender violence is most often unseen and is shrouded in a culture of silence. Violence against women in India is systematic and occurs in the public and private spheres. It is underpinned by the persistence of patriarchal social norms and inter-and intra-gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex but on other grounds too, such as caste, class, ability, sex orientation, tradition and other realities.[21]

The court said that the silence of society on gender violence, gender stereotypes and any other kind of discrimination needs to be broken. In doing so, men perhaps more than women have a duty and role to play in averting and combating violence against women. The Apex Court observed in ***Aparna Bhat Case***[22] that the judges can play a significant role in ridding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of these stereotypes discriminate against women or denies them equal access to justice.

The Apex Court also observed that judges play at all levels a vital role as teachers and thought leaders. It is their role to be impartial in words and action at all times. If they

[19] Violence could be perpetrated by institutions such as family, community and society, and the State.
[20] Sahu Skylab, *[2022]* at 182.
[21] *Aparna Bhat & others v. State of Madhya Pradesh & another*, AIR 2021 SC 1492
[22] *Aparna Bhat & others v. State of Madhya Pradesh & another*, AIR 2021 SC 1492

falter, especially in gender related crimes, they imperil fairness and inflict great cruelty in the casual blindness to the despair of the survivors.[23]

It is noteworthy to mention that Supreme Court issued directions for training in above mentioned case which are as under;

> *"The National Judicial Academy is hereby requested to devise, speedily, the necessary inputs which have to be made part of training of young judges, as well as form part of judges continuing education with respect to gender sensitization, with adequate awareness programmes regarding stereotyping and unconscious biases that can creep in judicial reasoning."*[24]

It was also directed that the training program, its content and duration shall be developed by the National Judicial Academy, in consultation with State Academies. The course should contain topics such as appropriate court examination and conduct and what is to be avoided.

To make the judicial system sensitive towards differently abled persons, the Apex Court issued guidelines in ***Patan Jamal Vali Case***[25] to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. The sensitization program should cover the full life cycle of case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. The emphasis should also be on the importance of interacting directly with the disabled persons.

The Supreme Court in the above-mentioned case while referring to 'intersectionality' observed that "intersectional analysis requires an exposition of reality that corresponds more accurately with how social inequality are experienced. The Supreme Court also observed that such contextualized judicial reasoning is not an anathema to judicial inquiry."[26] The Supreme Court, then issued the following directions;

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[23] *Aparna Bhat & others v. State of Madhya Pradesh & another*, AIR 2021 SC 1492, para 53.
[24] *Aparna Bhat & others v. State of Madhya Pradesh & another*, AIR 2021 SC 1492, para 47.
[25] *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190.
[26] *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190.

> "*The National Judicial Academy and State Judicial Academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. The training should acquaint judges with the special provisions concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above."*[27]

Needless to say, that in this highly advanced and technically equipped present world, judges play a vital role at all levels. The debate, discussion and endeavors to achieve gender equality and through that gender justice is an old debate and continues to be so as unfortunately we have not achieved the target of gender equality despite our efforts for about 74 years. Were our efforts half-hearted? Did we take genuine steps? What are the major obstacles in the path of gender equality and gender justice? These are some serious questions that we need to ask ourselves and find out the answers as the answers to these fundamental questions will certainly show us the right path ahead.

The Supreme Court in ***Patan Jamal Vali Case***[28] discussed in detail the issues of gender, caste and disability prevalent in our society and reflected on social inequality which is experienced on day-to-day basis in our society. It is essential in the interest of fairness and justice that judges should not judge a woman who comes before them with prejudices. Whether they are coming in the capacity of victim or witness or any other capacity, judges must try to accommodate them proper place and they must try to listen to them from their perspective in whatever capacity they have come up keeping away all the biases regarding gender.

However, it is equally important that the issue of gender injustice should not be perceived as a war between the two sexes as societal bonds are based upon integration, mutual dependence and respect. It is true that the male sex is most of the time blamed as the disseminator of gender injustice; but it cannot be ignored that the male sex also suffers from and feels pained at gender injustice as the woman subjected to injustice is sometimes his mother or his daughter or sister or wife. Therefore, perceptional and attitudinal changes

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[27] *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190, para 39.
[28] *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190

are needed for greater social awareness and sensitization which breeds equality of the sexes and not rivalry of the sexes.

VI. JUDGES MUST AVOID THE USE OF LANGUAGE THAT TRIVIALISES THE VICTIM/SURVIVOUR

The Supreme Court of India in ***Aparna Bhat Case***[29] while setting aside a judgment of Madhya Pradesh, High Court wherein the Court had imposed a bail condition upon the accused of outraging the modesty of his neighbor to request the victim to tie the rakhi around his wrist, observed that;

> *"Using rakhi tying as a condition for bail, transforms a molester into a brother, by a judicial mandate. This is wholly unacceptable, and has the effect of diluting and eroding the offence of sexual harassment. The act perpetrated on the survivor constitutes an offence in law, and is not a minor transgression that can be remedied by way of an apology, rendering community service, tying a rakhi or presenting a gift to the survivor, or even promising to marry her, as the case may be, the law criminalizes outraging the modesty of a woman."*

The court held that the "use of reasoning or language which diminishes the offence and tends to trivialize the survivor, is to be avoided under all circumstances". The judgment illustrated certain conduct and actions as irrelevant for adjudication - to say that the survivor had in the past consented to such or similar acts or that she behaved promiscuously, or by her acts or clothing, provoked the alleged action of the accused, that she behaved in a manner unbecoming of chaste women, or that she had called upon the situation by her behavior, etc.

The court said that such attitudes should "never enter judicial verdicts or orders" or be "considered relevant while making a judicial decision". They cannot be reasons for granting bail or other such reliefs. Imposing conditions that implicitly tend to condone or diminish the harm caused by the accused and have the effect of potentially exposing the

[29] *Aparna Bhat & others v. State of Madhya Pradesh & another*, AIR 2021 SC 1492.

survivor to secondary trauma, such as mandating mediation processes in non-compoundable offences, mandating as part of bail conditions, community service (in a manner of speaking with the so-called reformative approach towards the perpetrator of sexual offence) or requiring tendering of apology once or repeatedly, or in any manner getting or being in touch with the survivor, is especially forbidden.

Hon'ble Apex Court further observed that the law does not permit or countenance such conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what is a serious offence". All courts were directed that greatest extent of sensitivity is to be displayed in the judicial approach, language and reasoning adopted by the judge. Even a solitary instance of such order or utterance in court, reflects adversely on the entire judicial system of the country, undermining the guarantee of fair justice to all, and especially to victims of sexual violence.

VII. EVALUATING THE TESTIMONY OF DISABLED VICTIM WITH SENSITIVITY

The Apex Court in ***Patan Jamal Vali Case***[30] issued several directions with regard to evaluation of evidence of a disabled female witness in the context of SC/ST Act, 1989 issues of identity, gender, and disability as well as sensitization of trial and appellate judges on cases involving survival of sexual abuse. The court said that the testimony of prosecutrix with disability or a disabled witness is neither weak nor inferior if it satisfies the criteria of inspiring judicial confidence in her testimony. Blindness of a prosecutrix meant only the absence of visual contact with the world but she can still identify persons around her by their voice. The testimony of such blind prosecutrix is entitled to equal weight as that of a prosecutrix who would have been able to see and identify the accused.

The Apex Court further said that the term 'atrocity' has not been defined so far. It is considered necessary that not only the term atrocity should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. The Court also noticed that the 'caste' is difficult to cast away.

[30] *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190.

VIII. GENDER-NEUTRAL APPROACH IN JUDICIAL DECISION MAKING

In the 21st Century, Judges should take a pragmatic approach in dealing with the relevant issues, especially in cases of sexual offenses against women and young judges should be trained from the beginning towards gender sensitization and gender-neutral judgments and also Class III and Class IV employees working in the courts should be given sensitization training at regular intervals.

In addition to the sensitization of judges, it is essential to sensitize police officials, NGO members, Lady Shelter home/Nari Niketan employees, Mediators and Counselors of Family Courts who come across the women as victim, complainant, witnesses and accused is also required. Sensitization of public at large through DLSA, Nukkad Natak, and Awareness program at village, Muhalla and at other prominent places is need of the hour.

It is necessary to ensure at all levels that no derogatory language or remarks against victim/witness/accused to be used, which diminishes the dignity of such women. During cross examination of victim or female witness use of derogatory words against the dignity of women should not be allowed by court. Court should use powers u/s 165 of Indian Evidence Act as and when required to stop gender stereotypes and gender injustice.

It is a bound duty of courts that gender bias in adjudication should be identified and urgently need to be addressed. A trial judge must use his powers to intervene effectively to prevent discrimination against women in court proceedings. There is also a need to develop gender neutral attitude and skills. Judges must appreciate evidence with a gender-neutral perspective.

IX. CONCLUSION AND SUGGESTIONS

There were several organizations and activists similarly working towards demanding legal assurance and legal reform to curb sex-selective abortion, to ensure the legal measures against domestic violence, to get recognition for transgender and to ensure a safe and non-criminalized environment for sex workers. Most importantly, the movement or resistance by the sex workers' and feminists' understanding and call for the sex workers entitlements remains diversified in nature. Although these groups unanimously oppose the criminalization and violence against sex workers, the radical feminists group in India perceives prostitution as problematic and thus argues against legalization. Another section of feminists while critically understanding sex work and trafficking as two sides of the same coin oppose legalization of sex work. However, a large section of sex workers

themselves demand both legalization and recognition of the status of sex workers along with assured state welfare measures for the community.

Civil Society Organizations have been making continuous demands for the formulation of certain policies that could directly or indirectly reduce gender violence or provide adequate rehabilitation to the victims of violence. However, a mere demand of policies could not be adequate enough for reversing the attitude of violence, rather enforcement and implementation of policies for the population group is required. Moreover, a diverse mechanism of redressal of violence and conflict resolution and negotiation techniques could be explored by pluralistically targeting a small-scale population, while keeping the socio-cultural specificity in mind. There is a need for critical engagement of the movement to highlight the gendered law and gender-biased judgements, as such incidences clearly question the existence and importance of the law and the governmentality of the state as well.

It is essential for achieving the constitutional goal of gender equality and gender justice to ensure that concrete steps are taken at the micro-level as well. The courts working at the district level have a pivotal role to play as it is at this level the common people have first interface with the judiciary. When a woman is produced before Magistrate, he should invariably ask the woman of the treatment given to her by the police and of any other problems she has encountered in the situation. Every effort should be made to resolve those difficulties. When woman is examined in court as accused or as witness, due courtesy and decency should be shown. If circumstances so demand in the interest of modesty and privacy of woman, the trial should be held in camera or the woman may be examined on commission as required in law. Judges and court staff including the court Moharrir and Parokars should avoid use of stereotyped role in reference to women characterization. The courtroom atmosphere should be conducive, healthy, sensitive and sympathetic to women.

The judiciary is there to decide cases and deliver justice according to law but courts at district level frequently face witnesses who are not well versed either in language or understanding and to understand these witnesses is an uphill task for the courts. It is one of these areas where these courts need to be sensitized in order to put a proper question and bring out the truth when a woman appears in the court for evidence or other purposes.

To achieve the goal of gender justice, it is imperative that judicial officers, members of the bar, and court staff are made aware of gender prejudices that hinder justice. To achieve these goals, a gender sensitive approach is fundamental to equip judges to exercise their discretion with sensitivity and avoid the use of gender-based stereotypes while deciding

cases or passing orders. The purpose is to have open discussions, and comprehensive deliberations with the aim to impart techniques to be more sensitive in judicial approach while hearing and deciding cases particularly those relating to sexual assault, and eliminating entrenched social bias, especially misogyny.

There is a need for change in the mindset of the society and destroy the prejudices that damage the future of the girl child. A concerted effort to sensitize the society in eradicating gender inequality is needed. Judges, administrative officers, lawyers including public prosecutors, police officers should play the central role in bringing this ‘much awaited change’ in our society. Let us be proactive at all stages – pretrial, trial and even post trial to ensure that none is allowed to practice in any form gender stereotypes and gender discrimination before our courts and gender stereotypes should never enter our judicial reasoning in any manner as well. It is high time that every woman is treated equally and given every opportunity required to grow to her full potential.

RED DAYS BEHIND BARS: THE STRUGGLES OF MENSTRUATION IN JAIL

Anjum Sanjer[1]

***Abstract**: Despite growing global awareness of menstrual hygiene, the needs of female prisoners are still widely neglected. Society often overlooks the struggles these women face in managing their periods while incarcerated. Reports from the Commonwealth Human Rights Initiative (CHRI) and Boondh in 2022 highlight the humiliation and discomfort prisoners endure, often forced to deal with menstruation in shared, unhygienic conditions. This lack of privacy and dignity not only affects physical health but also leads to severe psychological impacts, heightening feelings of shame, stress, and depression. In India, this issue has received minimal attention, with limited research available on the subject. The article, therefore, uses a qualitative approach to delve into the menstrual experiences of incarcerated women, drawing on a variety of sources, including news reports, academic research, and institutional reports. Consequently, this article draws on international narratives to shed light on the experiences of women incarcerated abroad who face menstrual challenges. By examining these foreign accounts, this article aims to highlight the potential similarities and unique difficulties that Indian female prisoners might be enduring, especially considering the country's prevailing low literacy rates on menstrual hygiene. The Fifth National Family Health Survey (NFHS) indicates that 90% of women with at least 12 years of schooling use safe period products. However, earlier surveys reveal a significant disparity: only 20% of young women aged 15-24 employ hygienic methods during menstruation.[2] This gap highlights the widespread lack of menstrual hygiene awareness among women in India. Moreover, the intersection of menstruation with other vulnerabilities—such as mental health challenges and trauma, which are common among incarcerated women—complicates the issue further. Pre-existing conditions heighten their risk of developing menstrual-related health complications. By examining these overlapping factors, the article aims to bridge gaps in current understanding and advocate for more humane and effective menstrual hygiene management systems within India's prisons.*

***Keywords:** menstruation, equity, menstrual justice, menstrual victimization, incarceration*

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[2] Rucha Wankhede, *World Menstrual Hygiene Day 2023: What are India's challenges?*, THE HINDU, (Aug. 28, 2024, 10:25 PM), https://www.thehindu.com/sci-tech/health/menstrual-hygiene-day-india-challenges-taboo-period-equity/article66900205.ece/amp/.

1.1. INTRODUCTION

As a state evolves from a police-centric approach to a welfare-focused one, its core philosophy shifts toward prioritizing the well-being and rights of all citizens, including those behind bars. In this framework, safeguarding the health and dignity of women prisoners becomes a crucial duty. However, it's alarming that the issue of period poverty among incarcerated women continues to be dismissed as unimportant. In Indian society, deeply rooted in customs and traditions, the stigma around menstruation is still widespread, extending even into prisons. This cultural taboo makes it difficult for women to openly express their menstrual needs, further reinforcing societal silence on the matter. Female prisoners, in particular, are denied their fundamental rights, including the right to dignity, privacy, health. This denial can lead to serious health issues. According to radical feminist theory, patriarchy oppresses women by exerting control over their bodies[3]. This is evident in our current criminal legal system, wherein under the *Bharatiya Nyaya Sanhita*[4] 2023, clause 63 fails to criminalize marital rape, clause 69 criminalizes consensual sex based on a false promise of marriage while clause 84 criminalizes the enticement or taking away of a married woman, undermining her personal freedom, reflecting patriarchal values by punishing women's choices and reinforcing male control. These examples highlight how patriarchy permeates societal structures, including the prison system, leading to structural violence. This systemic oppression contributes to instances of menstruation victimization among incarcerated individuals. Furthermore, prisons were designed primarily for male inmates, from the way uniforms fit to rules intended to control male social dynamics and violence, and medical services often neglecting basic needs of women. Women are often treated as an afterthought in this system and the traditional belief that women are less likely to commit crimes has exacerbated this oversight, resulting in inadequate facilities for female prisoners. The inadequate attention given to menstruation in prisons results in serious violations of human rights. Women behind bars already face a host of difficulties, and the lack of access to menstrual products and proper hygiene facilities worsens their situation. This neglect not only mirrors society's indifference but also fuels ongoing discrimination and hardship. It underscores the pressing need for in-depth research and meaningful policy changes to address this issue effectively.

[3] Kathryn Tapp, For men, by men: Menstrual Victimization and the Weaponization of Period Products in Carceral Settings, 20 WH 1, 2 (2024).
[4] Bharatiya Nyaya Sanhita, 2023, § 63; 69; 84.

1.2. INSIGHTS INTO MENSTRUATION WITHIN CORRECTIONAL FACILITIES

Menstruation has historically been shrouded in taboo, often viewed as a source of impurity and danger.[5] This stigma is not exclusive to any single society, but rather a persistent belief across cultures and eras.[6] For instance, Aristotle and other early thinkers regarded menstrual blood as an undeveloped form of life, while the Roman philosopher Pliny the Elder believed that menstrual blood had destructive powers. He claimed it could render seeds infertile, kill insects and plants, cause fruit to fall from trees, dull razors, and drive dogs mad. He even suggested that a menstruating woman's presence could cause miscarriages in animals and lead to women losing their pregnancies.[7] In modern times, remnants of these beliefs persist. In Nepal, for example, the practice of chhaupadi continues in some communities, where menstruating women are considered impure and are isolated.[8]

These historical and cultural stigmas have permeated various aspects of life, including the treatment of menstruation in correctional facilities. Patriarchal societies, where menstrual topics are treated as shameful or private, often overlook the challenges menstruating women face. This taboo extends to prisons, where menstruation remains an unspoken issue. Brenda Murphy, a former Irish Republican prisoner, recounted an incident where a young woman, who started her period during an interrogation, asked a male officer for sanitary napkins and a place to wash. The officer, visibly disgusted, responded, "Have you no shame? I have been married for twenty years, and my wife would never mention things like that.[9]" Such responses illustrate the deep-rooted societal discomfort surrounding menstruation, even in critical settings like prisons.

Incarcerated women experience these challenges acutely. Menstruation is often treated as a personal matter, yet the lack of access to quality menstrual products and proper hygiene facilities turns it into a public hardship. This dynamic is captured by the concept of the "menstrual concealment imperative," coined by Jill M. Wood, which describes the societal pressure to hide menstruation.[10] Women are compelled to keep their menstrual status hidden to avoid judgment and maintain dignity. One incident in a Connecticut prison exemplifies this:

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[5] Margaret E. Johnson, Menstrual Justice, 53 U.C. Davis L. Rev. 1, 16 (2019).
[6] Malaka M. Shwaikh, Prison Periods: Bodily Resistance to Gendered Control, 20 JFS 33, 35 (2022).
[7] Margaret, *supra* note 4.
[8] Scroll Staff, Isolating a Menstruating Woman Will Soon Be a Punishable Offence in Nepal, SCROLL (Aug. 25, 2024, 11:40 PM), https://scroll.in/latest/846761/.
[9] Malakha, *supra* note 5.
[10] Flow Incognito: The Menstrual Concealment Imperative, Monthly Dignity (Aug. 18, 2024, 11:40 PM), https://monthlydignity.com/flow-incognito-the-menstrual-concealment-imperative/.

a woman's menstrual pad, of poor quality, fell to the ground, and to avoid embarrassment, she quickly stepped on it to conceal it. This speaks to the societal expectation that menstruation is something shameful, impure, and even pathological, reinforcing patriarchal notions that menstruating bodies are weak and undesirable. Compounding this issue, prison authorities often provide inadequate or poor-quality period products, and in some cases, these products are priced beyond inmates' reach. Moreover, there is a lack of recognition that menstrual experiences vary among women. Male guards frequently make derogatory comments, referring to menstruating women as "bloody" or making remarks about unpleasant smells. Legal scholar Martha Nussbaum argues that men's disgust toward women's bodies, particularly due to a fear of contamination from menstrual blood, can lead to anger and dehumanization. Nussbaum points to an incident involving then-presidential candidate Donald Trump, who attempted to shame debate moderator Megyn Kelly by implying she had "blood coming out of her wherever."[11] This kind of disgust-driven anger is often directed at vulnerable groups, particularly incarcerated women.

As a result, many women in prison resort to using birth control or other medications to suppress menstruation, which can have significant long-term health consequences after their release. Despite recommendations in India's 2016 Model Prison Manual, which calls for adequate water supply and proper washroom facilities for women prisoners, these guidelines are frequently ignored, leaving women to navigate their menstrual cycles in a state of neglect and deprivation. This reality highlights the urgent need for systemic reform in addressing the menstrual health needs of incarcerated women. The silence surrounding menstruation in prison, driven by societal and patriarchal stigmas, perpetuates a cycle of neglect, shame, and discrimination. Recognizing and addressing these challenges is a critical step toward restoring dignity and human rights to women behind bars.

1.3. A COMPARATIVE LOOK AT THE PERSONAL NARRATIVES OF INCARCERATED INDIVIDUALS

In India, the strong cultural taboo surrounding menstruation makes it difficult for women to discuss their needs openly, let alone ask for more sanitary products, especially if the prison staff is male and the women are housed in sections of male prisons. During meetings, they request sanitary pads from their families. However, when their father or brother visits, they often feel too embarrassed to make the request. This reluctance is compounded by the shame

[11] Margaret E. Johnson, Menstrual Justice, 53, U.C. Davis L. Rev. 1, 20, (2019).

associated with menstruation. An inmate at the Mysuru Central Prison described how she was made to gather her soiled sanitary pads and put them in plastic bags before throwing them away. Certain institutions forced women to use ragged clothes and rags, which put their health and menstrual hygiene in grave danger, or purchase sanitary items from the prison canteen.[12] The National Crime Records Bureau indicates that out of the 23,772 women in Indian prisons, 77% are within the reproductive age range of 18 to 50 years and are likely to experience regular menstruation.[13] A study conducted in June 2023 in a Maharashtra prison revealed severe inadequacies in water supply, hygiene, and sanitation, which significantly impact menstruating women who require more water during their periods. Approximately 50 women are compelled to share just two toilets for all their needs, including using the restroom, changing pads, and washing clothes and utensils. Additionally, the study found that prison authorities rely on NGOs for the provision and distribution of sanitary napkins, which are often of substandard quality.[14] One of the ex-prisoners said, "Women inmates are unaware of menstrual health, including topics such as why women get periods every month, irregular menstrual cycles, hygiene, and disposal methods. Awareness camps should be arranged on a regular basis not only for women inmates but the staff too."[15] However, given the limited research on the personal experiences of menstruating women in Indian jails, the article relies on narratives from foreign inmates who experience menstruation while incarcerated. The decision to incorporate international narratives stems from the absence of substantial research on menstruation in Indian female prisons.

Prisons are centres of power, and the inmates' hygiene may be strictly regulated in order to maintain the prisoners' powerlessness. An American prisoner named Chandra Bozelko, who served more than six years at the York Correctional Institution in Niantic, Connecticut, described that, "to ask a macho guard for a tampon is humiliating. But it is more than that: it is an acknowledgment of the fact that, ultimately, the prison controls your cleanliness, your health and your feelings of self-esteem."[16] An ex-convict who now covers prisons for a news article described her own experience managing her period while incarcerated, which included begging for supplies, enduring uncomfortable jokes from male guards who gave them out, making plans

[12] Rakshita Mathur, On World Menstrual Hygiene Day, a peep into the needs of female inmates, THE LEAFLET, (July 27, 2024, 4:35 PM), https://theleaflet.in/on-world-menstrual-hygiene-day-a-peep-into-the-needs-of-female-inmates/.
[13] Himani Gupta, M. Sivakami, Menstrual hygiene in Indian prisons, THE HINDU, (Aug. 27, 2024, 4:35 PM), https://www.thehindu.com/sci-tech/health/menstrual-hygiene-in-indian-prisons-explained/article68222812.ece.
[14] *Id.*
[15] Rakshita, *supra* note, 10.
[16] Malakha, *supra* note 5, at 37.

to avoid being humiliated during strip searches, and carefully timing tampon changes to avoid being seen by a guard or a group of male detainees wearing orange jumpsuits.[17]

In certain U.S. prisons, women are allowed to obtain sanitary pads whenever they need them. However, in many other facilities, the distribution of feminine hygiene products is entirely at the discretion of the guards. This situation allows prison guards to exert control over menstruating women, often leading to abuse of power and the expression of misogynistic attitudes. For instance, a prisoner reported that a guard at Rikers Island Prison "threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they did not know when they would next be able to get tampons." Even when feminine hygiene products are available, they are frequently of poor quality, lacking adequate absorbency, sufficient quantity, or essential features like wings. Consequently, women are often forced to use these products longer than is safe or recommended.[18] Using makeshift products often led to health complications. One woman clarified that while she was careful to wash her hands, not everyone was, and there was no hygienic or safe method to keep the products. You are essentially playing Russian roulette with your reproductive health, she continued, since getting an infection, developing toxic shock, or needing a hysterectomy are all possible outcomes of your game. These are not supposed to occur as a result of your confinement.[19] A former inmate revealed that the scarcity of hygiene products for women in prison is not solely driven by financial constraints. Although ensuring personal hygiene should align with the prison's own interests, the denial of adequate sanitary supplies is often a means of asserting control. Stains on clothing erode inmates' dignity, serving as a relentless reminder of their helplessness.[20] In one instance, a young woman reported that female officers isolated her, demanding she undress, surrender her sanitary pad, and squat while they conducted a dehumanizing search with flashlights aimed at her vaginal and anal areas.[21] A federal investigation into Tutwiler prison for women in Alabama found that prisoners had to choose between the shame of going without menstrual products for months or being raped by men in authorities. In Florida, a state

[17] Keri Blakinger, Opinion: Why I'll never forget having my period in prison, CNN, (July 18, 2024, 9:55 PM), https://edition.cnn.com/2022/08/23/opinions/women-in-prison-period-reproductive-health-blakinger/index.html.
[18] Amy Fettig, Menstrual Equity, Organizing and the struggle for humanity dignity and gender equality in prison, 41, Colum. J. Gender & L 76, 79, (2021).
[19] Kathryn Tapp, For men, by men: Menstrual Victimization and the Weaponization of Period Products in Carceral Settings, 20, WH, 1, 6-7, (2024).
[20] Chris Bobel et.al., The Palgrave Handbook of Critical Menstruation Studies, SPRINGER LINK, (Sept. 23, 2024, 9:55 PM), https://doi.org/10.1007/978-981-15-0614-7_5.
[21] Margaret E. Johnson, Menstrual justice, 53, U.C. Davis L. Rev. 1, 44, (2019).

representative was horrified by stories from incarcerated women who used socks as pads and traded sex for sanitary products, which they shared with legislators.[22]

In her essay, Kate Smith describes a female prisoner in an English jail who asked to be allowed to wash and change her undergarments once her menstruation started. Refused her request and had to stay in her filthy panties. One thing these stories all demonstrate is that shame has a color rather than a name.[23] The logic of masculinism is clear: female wardens and prison guards are just as important in maintaining this within the prison system as male guards and officers. They cooperate to impose a sense of helplessness on women by controlling their bodies and their personal demands. Further, the specifics may vary, the core challenges facing menstruating women in Indian prisons and those around the world are strikingly similar. Both groups face cultural stigma, inadequate access to hygiene products, poor sanitary conditions, and a prison system that uses control over menstruation as a tool of power.

1.4. MENSTRUAL HEALTH MANAGEMENT STANDARDS FOR INCARCERATED WOMEN

The United Nations Rules for the treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) adopted by the UN General Assembly in December 2010 addresses the specific needs of women offenders and prisoners, acknowledging that traditional prison system and policies have largely been designed for men. These guidelines represent the current international standards for how women prisoners should be treated, though they are not legally binding. Rule 5 specifies that facilities for women prisoners must cater to their unique hygiene needs. This includes providing free sanitary towels and ensuring a constant supply of water. Such provisions are especially important for women who are cooking, pregnant, breastfeeding, or menstruating. The rule's commentary stresses the need for easy access to sanitary and washing facilities, as well as safe disposal options for used items. Hygiene products like sanitary towels should be available in a manner that avoids embarrassment, ideally through self-service or distribution by female staff. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

[22] Kathryn, *supra* note 2, at 39.
[23] *Id.*

(CPT) notes that failing to provide these essentials can be considered a form of degrading treatment.[24]

The United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules (2015), guide states in treating prisoners with inherent dignity and respect. Rule 18 mandates providing prisoners with necessary water and toiletries for health and cleanliness, while Rule 19 requires regular changing and washing of underclothes to maintain hygiene. Adequate and clean toilets, as well as suitable bathing and shower facilities, are essential. These standards apply to all prisoners, including menstruators. Rule 35 ensures that a physician or public health body regularly inspects and advises on hygiene, sanitation, and cleanliness, which is crucial for menstrual hygiene management.[25]

The 2016 Model Prison Manual (MPM) by the Bureau of Police Research & Development, Ministry of Home Affairs, provides guidelines for states in India to integrate into their prison regulations. It sets standards for water, sanitation, and menstrual hygiene, stipulating that ample water must be available for female prisoners, especially those menstruating. The MPM mandates that women be supplied with necessary toiletries, including sanitary towels, to maintain personal cleanliness and health.[26] Despite international efforts to uphold and protect the human rights of women prisoners, India lags behind, as highlighted by a CHRI report.

In 2019, Britain enacted a law to provide free sanitary products to all female and transgender male prisoners, ensuring that menstruating detainees are treated with respect. The Home Office also announced that the law would be revised to require police to ask every female detainee as soon as possible if she needs free pads or tampons.[27] U.S. lawmakers have also worked to secure menstrual care protections for prisoners. In 2017, Senators Cory Booker and Elizabeth Warren proposed the Dignity for Incarcerated Women Act, which aimed to ensure that federal prisons provide menstrual care products. Shortly after, the federal prison system decided to offer these products for free, a policy that was later formalized under the First Step Act.[28] The

[24] United Nations Office on Drugs and Crime, UN Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders with their Commentary, (Aug. 28, 2024, 9:16 PM), https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.
[25] United Nations Office on Drugs and Crime, The UN Standard Minium Rules for the Treatment of Prisoners, (Aug. 23, 2024, 9:35 PM), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.
[26] Bureau of Police Research and Development Ministry of Home Affairs Government of India New Delhi, Model Prison Manual for the Superintendence and management of prisons in India, (Aug. 20, 2024, 8:30 PM), https://www.mha.gov.in/sites/default/files/2022-12/ModelPrisonMan2003_14112022%5B1%5D.pdf.
[27] Lin Taylor, Free sanitary products now available for female prisoners in the UK, (Aug. 29, 2024, 7:29 PM), https://www.weforum.org/agenda/2019/04/uk-to-provide-all-female-prisoners-with-free-sanitary-products/.
[28] First Step Act, S.756 (2018).

First Step Act of 2018 is a federal law in the U.S. that requires all federal correctional facilities to provide high-quality tampons and sanitary pads at no cost to all inmates, regardless of gender.[29]

While these standards may look good on article, they often fall short in real-life situations. The lack of effective enforcement means that menstruating women frequently experience physical, mental, and emotional challenges that are not adequately addressed. Although regulations are in place to support them, the actual conditions often fail to meet these standards, leading to a range of issues such as poor facilities and insufficient care. This gap between policy and practice highlights the need for better enforcement and more robust measures to ensure that these standards genuinely benefit those they are intended to support.

1.5. THE TOLL OF MENSTRUAL VICTIMISATION

The serious repercussions of inadequate management of menstrual hygiene are highlighted by Dr. Prajwala Addagatla, a gynecologist and medical advisor at Democratic Sangha. A woman's health may suffer long-term effects from diseases such urinary tract infections, bacterial vaginosis, and yeast infections, all of which are greatly increased by poor hygiene during her period. Serious reproductive health disorders, such as endometriosis and pelvic inflammatory disease (PID), which can cause persistent discomfort and fertility troubles, can also be brought on by poor hygiene practices. Additionally, bad menstrual hygiene might interfere with everyday activities since women may not be able to fully participate in their routines due to fear of leaks and shame.[30] Due to the dearth of menstruation supplies in jails, women who are detained are more susceptible to these health problems.

In the case of *Maneka Gandhi v. Union of India*[31], the Supreme Court stated that the right to live is not just about physical existence; it also encompasses the right to live with dignity and respect. Building on this, the Court in *Francis Coralie v. Union Territory of Delhi*[32]observed that "the right to life includes the right to human dignity and everything that entails it, such as the necessities of life, which are things like enough food, clothing, and a roof over one's head, as well as things like the ability to read, write, and express oneself in a variety of ways, as well

[29] Margaret E. Johnson, Menstrual Justice, 53, U.C. Davis L. Rev. 1, 48, (2019).
[30] Akanksha Agnihotri, Menstrual Hygiene Day: 5 consequences of poor menstrual hygiene management on women's health and tips to improve it, HINDUSTAN TIMES, (Sept. 8, 2024, 7:40 PM), https://www.hindustantimes.com/lifestyle/health/menstrual-hygiene-day-5-consequences-of-poor-menstrual-hygiene-management-on-womens-health-and-tips-to-improve-it-101685181976113.html.
[31] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[32] Francis Coralie v. Union Territory of Delhi, 1981 AIR 746.

as the freedom to move around and interact with other people. It also includes the right to basic necessities, which are things like clothing and shelter over one's head and the ability to perform bare minimum acts of self-expression." Furthermore, the report of All India Committee on Jail Reforms (Mulla Committee)[33], 1980-83 emphasizes that everyone has the right to bodily integrity and should be treated as a human being. This implies that denying women proper menstrual hygiene and privacy not only infringes on their right to basic necessities but also their fundamental human dignity and bodily integrity.

It is also pertinent to refer to the landmark judgment in *State of Maharashtra vs. Madhukar Narayan Mardikar*[34], wherein, the Indian Supreme Court ruled that "no one can invade a woman's privacy as and when one likes and even a woman of easy virtue is entitled to privacy." This principle underlines the inviolable nature of the right to privacy, regardless of a woman's background or lifestyle. Applying this precedent to the context of menstrual victimization, it is evident that subjecting women to inadequate menstrual hygiene facilities and lack of privacy during menstruation, constitutes a violation of their fundamental right to privacy. Moreover, the Mandela Rules of 2015 also stress the need to protect prisoners' privacy, which has frequently been violated as evident from the above narratives. Rule 50 mandates that the regulations for searching prisoners and their cells must comply with international law, considering global standards and norms while ensuring prison security. The intrinsic dignity and privacy of the individual should be respected, and searches should adhere to the legality, proportionality, and necessity criteria. Prisoners cannot be subjected to harassment, intimidation, or needless privacy invasion as a result of Rule 51 searches. According to Rule 52, invasive searches such as strip and body cavity searches must only be carried out when absolutely necessary. Alternatives to these intrusive searches should be looked for by prisons. If such searches are necessary, they must be carried out in secret by personnel who have the same sex as the prisoner and who are trained in the field.[35]

[33] Bureau of Police Research & Development, All-India Committee on Jail Reform, (Aug 23, 2024, 12:35 PM), https://www.mha.gov.in/sites/default/files/Mulla%20Committee%20-implementation%20of%20recommendations%20-Vol%20I.pdf.
[34] State of Maharashtra vs. Madhukar Narayan Mardikar, AIR 1991 SC 207.
[35] United Nations Office on Drugs and Crime, The UN Standard Minium Rules for the Treatment of Prisoners, (Sept. 12, 2024, 9:35 PM), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

1.6. RECOMMENDATIONS TO REFORM

The primary goal of the prison system is to reform offenders and prepare them for a successful reintegration into society. Mahatma Gandhi aptly stated, "Crime is the outcome of a diseased mind and jail must have an environment of hospital for treatment and care." However, mistreatment of prisoners, such as inadequate access to basic necessities like menstrual products, undermines this goal. When prisoners face such indignities, their mental and physical health deteriorates, making it difficult for them to engage in rehabilitative programs and personal development. Poor treatment in prisons can foster a sense of resentment and hopelessness among inmates. This environment is counterproductive to rehabilitation, as it fails to provide the necessary support and resources for personal growth. Addressing these issues is crucial for reducing recidivism and ensuring that the correctional system fulfils its rehabilitative purpose. By treating inmates with dignity and providing the necessary resources, prisons can better support the reintegration of offenders into society, ultimately promoting public safety and reducing repeat offences. To ensure the privacy and dignity of women prisoners, toilet walls should be raised or doors installed to create segregated enclosures. Menstruating prisoners should have access to at least 135 litres of water daily and improved water quality. They must also receive 4-6 menstrual sanitary pads per day, as recommended by the Ministry of Women and Child Development, with proper menstrual waste management in place.[36]

Employing more women as correctional staff or prison guards can significantly benefit incarcerated individuals who menstruate. Having female guards allows these inmates to feel more comfortable and familiar when discussing menstrual issues. This can lead to better communication and understanding, ensuring their specific health needs are addressed more effectively. Moreover, female staff may be more attuned to the challenges faced by menstruating inmates, fostering a more supportive and empathetic environment within the correctional facility. Another possible solution is to compensate these women adequately for the work they perform in jail, enabling them to achieve financial independence and purchase necessary menstrual products. In Delhi, a factory at Central Jail, Tihar, in collaboration with

[36] Commonwealth Human Rights Initiative and Boondh, Short report on Menstrual Hygiene Management in India's women prisons, HUMAN RIGHTS INITIATIVE https://www.humanrightsinitiative.org/download/1590647964CHRI%20&%20BOONDH%20Recommendations%20on%20Ensuring%20Menstrual%20Hygiene%20in%20Prisons.pdf.

the NGO Pahal, trains inmates to make sanitary pads and offers them job opportunities.[37] Guiding female inmates to create low-cost sanitary pads for use within the prison and for sale outside could be beneficial. By encouraging education, open discussions, and raising awareness, prisons can help break the stigma surrounding menstruation. This would not only improve access to menstrual products, possibly even for free, but also challenge societal norms, promoting the overall well-being of incarcerated women. A 2011 study discovered that many college-aged men had internalized the social stigma associated with menstruation since they had not been taught about it as children. This frequently produced a lack of empathy and gave rise to actions like bullying girls who were menstruation and policing women's bodies in terms of menstrual cleanliness.[38] Sociologist Andre Beteille has observed that "law only determines the direction society should take; culture shapes the actual direction." Thus, in order to undermine cultural norms like patriarchy and promote a society that is more inclusive and compassionate, education and awareness are crucial.

In countries like the U.S., a variety of menstrual products are available, and many women prefer tampons though they are not provided generally. However, in India, there is lack of menstrual products other than sanitary napkins, which further restricts women's options and access to suitable hygiene products in prison settings. This lack of variety and awareness exacerbates the difficulties faced by incarcerated women during their menstrual cycles. Therefore, it is crucial to recognize that menstrual hygiene needs vary among individuals. While pads are a common option, other products like tampons, menstrual cups, and reusable cloth pads are also essential to accommodate different preferences and requirements. States must provide a variety of these products to address the diverse needs of menstruating individuals, ensuring their comfort, health, and dignity. By doing so, states can promote better menstrual hygiene and reduce the stigma and challenges associated with menstruation.

Contrary to the societal belief that "people won't understand how one feels until experiencing it themselves," promoting gender inclusivity can be a solution. This approach emphasizes that empathy and understanding can transcend personal experience. By fostering inclusivity, environments can be created that better address the needs and challenges faced by all individuals, including those related to menstruation in settings like jails. Lastly, it is vital to recognize that menstruation affects not only cisgender women but also transgender and non-

[37] Rakshita Mathur, On World Menstrual Hygiene Day, a peep into the needs of female inmates, THE LEAFLET, (Aug. 27, 2024, 4:35 PM), https://theleaflet.in/on-world-menstrual-hygiene-day-a-peep-into-the-needs-of-female-inmates/.
[38] Margaret E. Johnson, Menstrual Justice, 53, U.C. Davis L. Rev. 1, 50-51, (2019).

binary individuals, each of whom faces unique challenges regarding menstrual health. Current research in India overlooks the experiences of these groups. Although they might represent a small portion of the prison population and there is limited awareness of their presence in Indian society, it is essential to conduct research that addresses their menstrual health experiences.

1.7. CONCLUSION

Maya Angelou's profound observation, "We all should know that diversity makes for a rich tapestry, and we must understand that all the threads of the tapestry are equal in value no matter their color," captures the essence of valuing every individual's inherent worth. This sentiment is particularly pertinent when addressing the needs of menstruating prisoners. Tackling menstrual issues within jails transcends merely breaking societal taboos; it is fundamentally about equity and justice.

Despite their incarceration, women remain vital members of society, deserving of dignity and humane treatment irrespective of their offenses. Just as every thread in a tapestry contributes to its overall beauty, providing proper menstrual care—including access to hygiene products, adequate facilities, and medical support—is crucial. This approach ensures that menstruating women are treated with the same respect and care as any other group. By recognizing and addressing these needs, we foster a more just and humane society that respects the dignity of all individuals, regardless of their circumstances. A welfare state must therefore prioritize the provision of adequate menstrual hygiene products and ensure sanitary conditions within prisons to uphold principles of dignity and equality. This includes guaranteeing regular access to sanitary products, proper medical care, waste disposal, and supportive services tailored to the specific needs of women. Implementing these measures not only demonstrates the state's commitment to welfare but also reinforces its role as a protector of human rights and individual well-being, even within the confines of incarceration.

Drawing from personal experience, Chandra Bozelko says that "having access to sanitary pads is a basic human right – not a luxury. Women must be allowed to maintain their dignity during their menstrual cycle, just as no one should have to beg to use the restroom or be handed toilet article."[39] Similarly, Jennifer Weiss-Wolf, a leading advocate for menstrual equity, emphasizes that "for a fully participatory society, laws and policies must ensure menstrual products are safe and affordable for all. Access to these products affects a person's ability to work, study,

[39] Chris Bobel et.al., The Palgrave Handbook of Critical Menstruation Studies, SPRINGER LINK, (Sept. 01, 2024, 9:55 PM), https://doi.org/10.1007/978-981-15-0614-7_5.

stay healthy, and engage with the world with dignity. Addressing issues of poverty, stigma, or lack of resources is in everyone's interest."[40]

Nelson Mandela's astute reflection, "No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but by its lowest ones," serves as a touching reminder of the importance of how we treat those who are most vulnerable. The lack of research in this critical area emphasizes a broader issue: the persistent stigma and indifference towards menstruation in incarceration settings. The pressing question remains—how long will we continue to overlook this critical issue? It is high time to address these challenges with the seriousness and urgency they deserve, ensuring that every individual, regardless of their circumstances, is treated with the dignity and respect they inherently deserve.

[40] Margaret E. Johnson, Menstrual Justice, 53, U.C. Davis L. Rev. 1, 50-51, (2019).

ANALYSIS OF THE REGULATORY FRAMEWORK FOR RIDE-SHARING SERVICES AND INSURANCE IN INDIA

Harsh Gautam[1]

***Abstract**: The article explores the intricate regulatory landscape governing ride-sharing services in India, with a particular focus on platforms such as Ola and Uber. Within this legal framework, the classification of these platforms as intermediaries, as delineated in Section 93 of the Motor Vehicles Act of 2019, in conjunction with the Motor Vehicle Aggregators Guidelines of 2020, serves as a cornerstone. The researcher delves into the transformative reclassification introduced by the 2019 amendment to the Motor Vehicle Act, which designated cab services as intermediaries. The article sheds light on the regulatory implications surrounding bike taxis, exemplified by the case of 'Rapido' and its ban in Delhi. This instance underscores the evolving nature of regulatory challenges within the ride-sharing industry, particularly concerning insurance coverage and operational regulations. In addition to scrutinizing the Motor Vehicle Aggregators Guidelines issued in 2020, the researcher meticulously identifies areas within these guidelines that may potentially favour certain interests over others. By offering a comprehensive analysis of the regulatory nuances governing ride-sharing services and insurance in India, the researcher's work contributes significantly to the legal discourse in this domain. It underscores the paramount importance of prioritizing safety, fairness, and regulatory clarity within the burgeoning ride-sharing industry. In essence, the researcher's article serves as a compelling exploration into the regulatory challenges and opportunities inherent in the realm of ride-sharing services, urging policymakers and stakeholders to engage in a deliberative dialogue aimed at refining and fortifying the regulatory framework to better serve the interests of all stakeholders involved.*

***Key-words**: Ride sharing service, Insurance, regulation, India.*

1.1. INTRODUCTION

The Motor Vehicles Amendment Act of 2019 introduced significant changes to the Motor Vehicle Act of 1988[2], specifically by amending Section 93 to incorporate provisions related to

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[2] Motor Vehicles Act, 1988, No. 59, Acts of Parliament, 1988 (India).

cab aggregators like Ola[3] and Uber[4]. These aggregators are categorized as digital intermediaries, a classification defined within Section 93 of the 2019 Motor Vehicles (Amendment) Act[5]. As a result of this amendment, cab aggregators now constitute a distinctthird category, following canvassers and agents, and they are required to adhere to the regulations outlined in the Information Technology Act of 2000[6]. This new classification also encompasses bike taxis, which have faced certain disagreements with state governments. The primary objective of bringing cab aggregators under the purview of this act is to enhance the safety of passengers and pedestrians. This action is in response to the common habit of taxi drivers utilizing portable electronics to communicate online and for navigation, which raises safety concerns.

1.2. DEFINITIONS

An ***aggregator*** functions as a digital intermediary or platform through which passengers can link up with drivers for transportation services.[7] This makes Ola and Uber examples of such aggregators. Their services are accessible via a mobile app on a communication device. A ***rider***, on the other hand, is an individual who utilizes the aggregator's app to secure transportation to their desired destination, facilitated by a driver who is part of the aggregator's network.[8] The Motor Vehicles (Amendment) Act, 2016 addresses the licensing of aggregators, which are described as online marketplaces or digital intermediaries that passengers can use to arrange transportation with drivers. This section sets the foundation for regulating ride-sharing services by requiring aggregators to obtain licenses from state governments to operate legally.[9]

1.3. RATIONALE FOR DESIGNATING A CAB AS AN AGGREGATOR

The introduction of technology-driven apps such as Uber and Ola have significantly improved India's road transportation system, offering an efficient means of travel. However, the drivers for these cab services commonly rely on handheld devices for navigation, posing safety risks for passengers and pedestrians. In response, the Indian government enacted the Motor Vehicles

[3] Harish Dugh, *Government issues new guidelines for Ola, Uber: Here is all you need to know*, ZEE BUSINESS TODAY (Nov. 22, 2020, 06:09 PM), https://www.zeebiz.com/india/news-government-issues-new-guidelines-for-ola-uber-here-is-all-you-need-to-know-142113.
[4] FORTUNE INDIA, https://www.fortuneindia.com/venture/will-new-guidelines-hurt-ola-and-uber/ (last visited Nov. 24, 2023).
[5] Motor Vehicles (Amendment) Act, 2019, No. 32, Acts of Parliament, 2019 (India).
[6] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[7] Motor Vehicles (Amendment) Act, 2019, § 1A, No. 32, Acts of Parliament, 2019 (India).
[8] Motor Vehicles Aggregator Guidelines, 2020, § 1(17).
[9] Motor Vehicles Act, 1988, § 93, No. 59, Acts of Parliament, 1988 (India).

(Amendment) Act of 2019, which imposes penalties for the use of mobile devices while driving, with fines ranging from Rs. 25,000 to 1 lakh for rule violations and traffic infractions.[10]

The 2019 Motor Vehicles (Amendment) Act amended Section 93 of the 1988 Motor Vehicles Act emphasizing the necessity for agents and canvassers to obtain licenses from the relevant state authorities. It prohibits individuals from engaging in activities related to the distribution and collection of goods carried by vehicles or selling tickets for public transportation without the required license.[11] As a crucial component of road safety and the fight against corruptionin India's transportation system, this amendment extended its scope to include cab aggregators, recognizing the pivotal role of innovation and technology in transforming India's transportation landscape.

This amendment acknowledges the significance of innovation and technology in reshaping India's transportation sector, specifically including cab services as digital intermediaries under Section 93 of the 2019 Motor Vehicle (Amendment) Act. As transportation falls under the jurisdiction of state governments, the bill permits cab aggregators to obtain licenses from these authorities and mandates compliance with the provisions outlined in the Information Technology Act of 2000.

1.4. HOW THE MOVE IS BEING PERCEIVED?

This decision to officially classify cabs as aggregators is a significant step toward enhancing the safety of passengers and pedestrians on Indian roads and curbing corruption within the country's transportation system. This classification grants the Central Government the authority to establish a unified policy. Prior to these amendments, various states had their own distinct policies for aggregators,leading to variations in fare rates, the number of passengers permitted in a vehicle, and, in somecases, the absence of any regulations. In a recent incident in Karnataka, for instance, the local transport department revoked Ola cabs' license due to allegations of violating aggregator rules by operating two-wheeler bikes and taxis without the necessary permissions.[12]

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[10] Motor Vehicle Act, 1988, § 184, No. 59, Acts of Parliament, 1988 (India).
[11] *Supra* at 9.
[12] Pranav Mukul, *Explained: What are the latest guidelines for cab aggregators like Ola and Uber in India?*, THE INDIAN EXPRESS (Dec. 3, 2020, 12:18 PM), https://indianexpress.com/article/explained/explained-the-new-guidelines-for-cab-aggregators-7072019/.

Through this amendment, the Central Government gains the ability to create guidelines that address localized issues such as traffic congestion, which all states are required to adhere to.The Central Government has also acknowledged taxi aggregators as significant stakeholders in this context.

1.5. REGULATION OF AGGREGATORS

The objective is to govern the cab aggregator sector, requiring aggregators to establish a registered office in India as a company complying with the Companies Act. They must also adhere to the Information Technology Act of 2000 and its associated rules, including intermediary guidelines.

Licensing Requirements: Aggregators must apply for licenses in the states where they intend to operate, with state government-issued licenses being a mandatory prerequisite for conducting business. State governments are obligated to follow the guidelines issued by the Central Government when granting licenses. They must ensure that the aggregator initiates operations within six months of receiving the license; otherwise, the license is revoked. An aggregator's license can be suspended in cases of systemic failures impacting driver and rider safety, contractual breaches, recurring financial disputes related to fares, unjustified surge pricing, significant financial fraud, or safety standard violations, among other reasons.

Regulation of Fare: The base fare for a trip is determined based on the city tax rate as indicated in the Wholesale Price Index (WPI). Surge pricing is capped at 1.5 times the base fare, while the minimum charge is capped at 50% of the base fare. The aggregator's share is limited to 20%, with the driver receiving 80% of the total fare. Cancellation charges for both drivers and riders are capped at 10% of the total fare, not exceeding 100 INR. Aggregators can offer fares as low as 50% below the base fare and surge pricing at a maximum of 1.5 times the base fare.[13]

Driver Hiring Protocols: In addition to conducting comprehensive background checks and medical examinations on drivers, aggregators must provide an Induction Training Program covering app usage, adherence to relevant Motor Vehicle Laws, safe driving, first responder training, gender sensitivity, and cab hygiene. The guidelines mandate that drivers take a 10-hour break and limit daily driving to a maximum of 12 hours.[14]

[13] MoRTH. (2018). Road Accidents of India. New Delhi: Ministry of Road Transport and Highways.
[14] MoRTH. (2016, December 15). Report of the committee constituted to propose taxi policy guideline to promote urban mobility. New Delhi, Delhi, India.

Aggregator Compliances: Aggregators must ensure that vehicles conform to motor vehicle laws, insurance, and emission standards. They are required to maintain a 24/7 control room to oversee cabs and provide call center support, along with a valid telephone number for addressing grievances and assisting drivers and riders. Aggregators must also offer options for women to carpool with women to enhance safety.

App-Related Conditions: Aggregator apps must be available in Hindi, English, and the state's regional language. App data should be stored on Indian servers for a minimum of 3 months and a maximum of 24 months, accessible to government authorities. Customer data cannot beshared without the customer's written consent.

Powers of the Competent Authority: The Competent Authority has the authority to take Suo moto action against aggregator wrongdoings, including suspending licenses. If there are multiple suspensions in one financial year, the license may be revoked. Furthermore, any blatant offenses or failure to obtain necessary licenses and NOCs could result in license revocation. When a license is suspended, the aggregator must cease all operations. Aggregators can appeal against the authority's order within 30 days to the State Government. The State Government can request information from aggregators for compliance, conduct searches, and investigations when deemed necessary.

1.6. ISSUE OF BIKE TAXIS

The legal landscape surrounding bike taxis in India is a little ambiguous. "Contract carriage" is the term used to describe a vehicle used for commercial purposes under the Motor Vehicles Act, 1988 ("Act"). Section 2(7) defines a contract carriage as follows:

> *"...a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorised by him in this behalf on a fixed or an agreed rate or sum – (a) on a time basis, whether or not with reference to any route or distance; or (b) from one point to another, and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey, and includes – (i) a maxicab; and (ii) a motorcab notwithstanding that separate fares are charged for its passengers;"*

The preceding definition relates to a vehicle utilized for commercial purposes in India. The word "Motor Cab" is used in the definition of a contract carriage. It is defined as "*...any motor*

vehicle constructed or adapted to carry not more than six passengers excluding the driver for hire or reward" in section 2(25) of the Act.[15]

Additionally, the Act[16] defines the term "motor vehicle," stating that any vehicle with fewer than four wheels is not to be regarded as a "motor vehicle" for the purposes of the Act. Combining the three definitions above, one could conclude that since a motorbike is a two-wheeler, it does not fall within the description of a "motor cab" or a "motor vehicle." Therefore, it can be concluded that Indian law does not technically recognize the use of motorcycles for business purposes within the scope of a carriage contract.[17]

The government is aware of the problem, and over time, reports on it have been made public by a number of government ministries. The Central Government said in its position on bike taxis in "The Report of the Committee constituted to review issues relating to taxi permits"[18] from 2016 that the State Transport Department may provide two-wheeler taxi permits along the same lines as those for city taxis. This will enable citizens to have access to an economical and useful last-mile connection option. To assist make better use of idle assets, it is strongly urged that present private bikes be converted to this kind of transportation. State governments may also consider the possibility of converting current private bikes into taxis online.

The 2016 report of the Committee on Urban Mobility Support[19], which was established by the Ministry of Road Transport and Highways, also included recommendations for bike sharing taxi policy guidelines. Among other measures, State transport ministries were recommended to allow two-wheeler taxis in order to ease India's chronic last mile connectivity challenges. It also recommended employing personal bikes for these kinds of rides and offering an internet service for converting personal bikes into taxis. Furthermore, bike sharing is included as an inexpensive option for first and last mile connections in the 2018 NITI Aayog report[20] on shared mobility, which also provides several implementation options for bike sharing.

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[15] *Supra* at 2.
[16] Motor Vehicle Act, 1988, § 2(28), No. 59, Acts of Parliament, 1988 (India).
[17] HINDUSTAN TIMES, https://www.hindustantimes.com/cities/delhi-news/bike-taxis-illegal-will-frame-rules-to-ensure-safety-govt 101676923010043.html (last visited Jan. 14, 2023).
[18] MoRTH. (2016). Report of the committee constituted to review issues relating to taxi permits, New Delhi, Delhi, India.
[19] *Supra* at 14.
[20] NITI Aayog, Rocky Mountain Institute, and Observer Research Foundation, *Moving Forward Together: Enabling Shared Mobility in India*, 2018.

The Central Government has asked the State Governments to examine enabling private bikes to be transformed into taxis so that they can be used for commercial reasons and the legislation surrounding such. It has also advised that bike taxis be allowed for commercial use. Nevertheless, bike taxis are not governed by any central legislation. At the moment, the administration of each state determines whether or not bike taxis are allowed.

1.7. COMMENTS

The Motor Vehicle Aggregator Guidelines of 2020 highlight the government's effort to exercise control over the industry. The imposition of limits on commission rates aims to regulate how these businesses generate income. According to these guidelines, both the driver and the passenger should share the burden of cancellation fees, which must not exceed 100 rupees. While the concept of female pooling is a positive one, the guidelines are criticized for their regressive nature, as they appear to introduce bureaucratic red tape and increase compliance costs, contributing to inefficiency.[21]

The guidelines also cap surge fees at 1.5 times the base fare, potentially reducing earnings for both aggregators and drivers. The commission previously charged by cab aggregators, at 25%, is now limited to 20%. These guidelines raise questions, particularly regarding the requirement for aggregators to ensure drivers have logged in for 30 hours and the stringent selection process for drivers. It seems redundant to check whether drivers know how to drive when they already possess a driving license. The allocation of 2% of the fare to the state government's coffers appears unjust, creating the perception that consumers are being unfairly taxed simply for using an aggregator instead of local taxi services.[22] In addition to the points mentioned, these guidelines aim to address issues like reducing traffic congestion, pollution, and regulating shared mobility. The goal is to promote increased use of public transportation to mitigate environmental harm and protect human well-being. The guidelines also call upon state governments to establish a regulatory framework that holds aggregators accountable for their operations.

1.8. CHALLENGES OF EXISTING LEGAL FRAMEWORK:

While these amendments represent a significant step forward in regulating ride-sharing services, some challenges and gaps still exist. Recent case laws and sections of the Act help

[21] F. No. 1601 't19/2019-T, Motor Vehicle Aggregator Guidelines, 2020 (Issued on Nov. 27, 2020).
[22] Notification No.-06/Taxi Sewa/2018-403, Bihar Taxi Aggregator Operational Directives, 2019 (Issued on Jan. 10, 2019).

shed light on these issues.

Inadequate Coverage: One of the ongoing debates pertains to the adequacy of the prescribed insurance limits. Recent case laws have highlighted situations where the existing limits may not be sufficient, particularly in cases of severe accidents or injuries. There are ongoing discussions about whether these limits should be increased to ensure that victims receive adequate compensation. In a recent case involving a severe accident caused by a ride-sharing vehicle, the compensation awarded to the victims was found to be insufficient to cover their medical expenses and other losses. This case brought attention to the need for re-evaluating insurance limits.[23]

Driver Training and Background Checks: The law does not specify comprehensive standards for driver training and background checks, leaving room for interpretation. Ensuring driver quality and safety remains a challenge, as some recent cases have shown instances of drivers with questionable backgrounds being allowed to operate on these platforms. A case involving a ride-sharing driver with a criminal record raised concerns about the effectiveness of background checks conducted by ride-sharing companies. The case highlighted the need for stricter regulations in this regard.

Surge Pricing Regulation: The Motor Vehicles (Amendment) Act doesn't explicitly address surge pricing, a common practice among ride-sharing services. Issues related to price regulation continue to be a point of contention. Recent cases have included disputes over surge pricing, with passengers arguing that they were charged excessively during peak hours. A case involving a surge pricing dispute brought attention to the need for guidelines or regulations concerning price transparency and fairness during peak demand periods.[24]

Data Privacy and Security: The collection and use of user data by ride-sharing companies have raised concerns about data privacy and security. Recent cases have exposed vulnerabilities in data protection and the potential misuse of user data. A case involving a data breach at a ride-sharing company led to concerns about the privacy and security of user information. The

[23] Aditi Shrivastava, *Hail no more! Ola, Uber's ride growth slows to a crawl*, ECONOMIC TIMES (Jan. 4, 2020) https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/hail-no-more-ola-ubers-ride-growth-slows-to-a-crawl/articleshow/69641990.cms.
[24] John Egan & Les Masterson, *Rideshare Insurance: Do You Need It If You're an Uber or Lyft Driver,* FORBES ADVISOR (Oct. 4, 2023) https://www.forbes.com/advisor/car-insurance/rideshare-insurance/.

case underscored the need for robust data protection laws and regulations.[25]

1.9. CONCLUSION:

The concept of categorizing cabs as intermediaries under the Motor Vehicle Act of 2019 is commendable because it significantly enhances safety measures for passengers, pedestrians, and drivers. The Motor Vehicle Aggregator Guidelines of 2020[21] represent an attempt to address pollution and congestion issues. However, there are several shortcomings in these guidelines, suggesting that the government is imposing a rather inflexible approach to regulation, making them challenging to assess. To address these issues, the central government should consider revising the guidelines to introduce more flexibility. This would help eliminate unnecessary hurdles in the driver licensing process, mitigate the impact of the surge fee, which is currently capped at 1.5 timesthe base fare and negatively affects both aggregators and drivers, and rectify the reduction ofthe commission charged by cab aggregators, which was formerly 25% but is now limited to 20%, thus adversely affecting the business. The regulatory framework for ride-sharing services and insurance in India has made significant progress, thanks to the Motor Vehicles (Amendment) Act of 2016. This act laid the groundwork for the recognition and regulation of aggregators, setting insurance requirements to ensure the safety and financial security of both passengers and drivers.

However, as the ride-sharing industry continues to evolve, it is imperative for the government, stakeholders, and industry players to work together to address these challenges and ensure that the regulatory framework remains relevant, fair, and effective. Adequate insurance coverage, stricter regulations for driver background checks, guidelines for surge pricing, and robust data privacy measures are crucial to the continued growth and safety of the ride-sharing industry in India. Recent case laws serve as practical examples of the challenges and gaps in the current regulatory framework. They highlight the need for continuous scrutiny and adaptation to ensurethat the evolving needs of the industry are met and that passengers and drivers are adequately protected in this transformative and dynamic sector.

[25] Anna Fleitoukh & Kentaro Toyama, *Are Ride-Sharing Platforms Good for Indian Drivers? An Investigation of Taxi and Auto-Rickshaw Drivers in Delhi*, IFIP JOINT WORKING CONFERENCE ON THE FUTURE OF DIGITAL WORK: THE CHALLENGE OF INEQUALITY (IFIPJWC), Hyderabad, India. 117-131 (2020).

DECODING THE INTERSECTION OF STREET ART AND COPYRIGHT

Ms. Amruta Oke[1] & Dr. Ankit Singh[2]

Abstract**:** *The concept of copyright can be traced back to the 17th century. What began as Statute of Anne, has come a long way. It has been reshaped, remade, and reproduced into various versions suitable for that epoch. A law, even as old as this one, has gone through numerous changes and accommodated upcoming concepts that would fall under the domain of copyright. Under the umbrella of Original Literary, Dramatic, Artistic and Musical works, emerging concepts seem to be carving their own niche for protection. When it comes to art, it has been used to express what could not be expressed by words. May it be silly drawings made by children or paintings made on walls for decorating the walls, it is filled with expressions. Lately, such art has been found adorning the walls of the street. Whether it a simple word painted or an elaborate scenery, it carries an expression of an idea and the same is liable to be protected under copyright laws. This paper seeks to assess the copyrightability of such an ephemeral form of art and related implications.*

Key-words**:** *Street Art, Graffiti, Copyright, Artistic Work, Infringement.*

1.1. INTRODUCTION

Graffiti is defined as "usually unauthorized writing or drawing on a public surface".[3] Murals is defined as, "applied to and made integral with a wall or ceiling surface". Murals are widely associated with artwork on walls of historical monuments such as the caves of Ajanta Ellora, ceiling of the Sistine Chapel by Michaelangelo, etc. and are usually sanctioned and paid to be made whereas, graffiti can be found on walls of the city or buildings wherein an artist splashes his heart out on the walls. Celia Lerman lists down two definitions of graffiti. While discussing the broad meaning, she refers to "an artistic movement that includes several different styles (spray paint graffiti, street art and stencils), which, in turn, are associated with different socio-

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[3] Merriam Webster Dictionary.

cultural groups." Only spray-paint graffiti has been considered in her narrow definition.[4] Therefore, going by the author's definition, street art forms a part of graffiti.

Such pieces of art are depictions of cultural and traditional sentiments. The streets of America in 1920s and 30s were adorned with graffiti albeit, then these were the works of gang members rather than having any artistic merit to it. Train carriages were sprayed with graffiti as well.[5]

A blog post on Art defines[6] graffiti as: "*a creation of art that portrays people's emotions, artistic expression, or politics in backdrops, characters, or creative words. Graffiti is a common type of street art that is mainly done on public walls on city streets – typically without any prior permission. Graffiti is commonly done as an act of rebellion, marking territory, making a statement, or raising awareness*." Thus, graffiti comprises of text as well as images applied on surfaces.

Graffiti and street art act as a medium of expression for communities. From being found on walls, made by some gangs, street art has come a long way today. One of such art was Created by Shilo Shiv Suleman in Jaipur, in honor and love of the Queer community. Another artwork depicting the late singer Lata Mangeshkar, was found on the walls in Mumbai. Thus, it is not just threats, clues or mere texts anymore, but an arena of deep messages and appreciations on the walls.

Street paintings, sculptures, murals and graffiti are the forms of street art which are found all over the world. While the debate over whether these are illegal is rampant, they are none the less pieces of art as far as copyright laws are concerned. This paper is concerned about unsanctioned art made over the walls on a street and discusses copyrightability of the same.

When such a debated type of art intersects with the need to protects the rights of artists, the intersection with copyright comes into play. What copyright seeks to protect and how far is it practically possible to protect contemporary art forms has been explored further in this paper. To explore practical implications, first it is necessary to explore whether street art with all its forms falls into the scope of copyrightable subject matter. Assistance of various jurisdictions such as UK and USA have been taken to analyse copyrightable subject matter and to analyse whether illegal art can be protected.

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[4] Celia Lerman, PROTECTING ARTISTIC VANDALISM: GRAFFITI AND COPYRIGHT LAW, 2 NYU J. Intell. Prop. & Ent. L. 295 2012-2013.

[5] Maric, Bojan. "The History of Street Art." Widewalls, 2014, www.widewalls.ch/magazine/the-history-of-street-art. (Last accessed on 19.10.2023 at 22:54).

[6] "Graffiti vs. Mural: What Are the Differences?" Eden Gallery, 2021, www.eden-gallery.com/news/graffiti-vs-mural (Last accessed on 21.10 2023 at 11:28).

1.2. STREET ART AS COPYRIGHTABLE SUBJECT MATTER

The main idea behind the enactment of copyright laws was to protect the creative labour of authors. The author can exploit his work in whichever way he wants it to as he has the exclusive right to do so. The author can also assign or license his work. After the 'term of copyright' expires, the work falls into public domain i.e., the public can use the work as per their whims and fancies. In Indian Jurisdiction, 'original literal, dramatic, musical, and artistic' works are protected whereas in derivative works, 'cinematographic films and sound recordings' are protected.[7] For copyright to subsist in a work, it should fall under the ambit of copyright, should be original and should also be fixated.

The copyright jurisprudence requires that the expression must be original, as was held in Fiest Publication's case.[8] It makes no difference if the idea is not original. The expression should not be a copy of some other work, although it could be 'inspired' or 'derived' from it. Inspired and derivative work should have some elements that make such work different from the original and stops it from coming under the area of 'copied work'. In *Bleistein v. Donaldson Lithographing Co.*[9], the Court emphasized on the personal expression of an artist rather than creative or artistic merits. In *Alfred Bell & Co. v. Catalda Fine Arts, Inc*.[10], Court observed that,

> "*The test is valid when the author is trying to create some additions or advancement in other artist's work instead of working on something original of his own. The Bleistein test can be satisfied even if the author was attempting to perfectly reproduce another work, rather than create an original work of his or her own. If the item exhibits a "distinguishable variation" from another work, the law presumes that such a variation bears the imprint of the author's person, thereby entitling the work to copyright protection. Even if the variation is accidental, the copier is still the origin of that variation*."

Apart from being an 'independent creation', the work should also contain some amount of creativity. This stand was taken in Fiest Publication's case by the US Supreme Court. The 'sweat of the brow' doctrine valued the fruits of labour, investment and skill of the author while the doctrine of "modicum of creativity" values the variation and creativity of the author. There is no expectation that the creativity should be high but even a minimum amount is sufficient to

[7] Indian Copyright Act, 1957, § 13.
[8] *Feist Publications v. Rural Telephone Service Co*., 499 US 340.
[9] *Bleistein V. Donaldson Lithographing Co.*,188 U.S. 239 (1903).
[10] *Alfred Bell & Co. V. Catalda Fine Arts, Inc*, 191 F.2d 99 (2d Cir. 1951).

make the product stand out. This doctrine "sweat of the brow" was used in *Walter v. Lane*[11] and later in the case of *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd*[12] where the Court said that, "it is immaterial whether work is wise or foolish, accurate or inaccurate, or whether it has any literary merit."[13] This doctrine was rejected by Indian courts and the concept of "flavour of minimum requirement of creativity" was introduced.

Copyright subsists in a work, the moment it is created. That is, unlike trademarks, patents or other Intellectual Properties, it doesn't have to be registered. Although, one of the conditions to get copyright is that the work must be 'fixated'. Fixation in copyright law means recording. The mode of fixation does not matter, only that it should be in a tangible medium. The Copyright Act, 1957 does not define fixation. For any material to qualify as work, it must be fixated. As Laura A. Heymann points out,

> "Under U.S. copyright law, fixation is what creates both an author and a commodifiable subject, neither of which exists as a legal entity in copyright law before the act of fixation occurs. It transforms the creative process (and its subject) from a contextual, dynamic entity into an acontextual, static one, rendering the subject archived, searchable, and subject to further appropriation. Even in contexts in which there is no competing claim as to control, fixation still works to bound the fruits of creative effort, engendering distance between the author and audience. Fixation thus causes a kind of death in creativity even as it births new legal rights. Fixation is what allows the subject to be commercialized and analysed; it is what marks the transformation to subject in the first place."[14]

The interpretation clause of the Copyright Act, 1957 defines artistic work as,

"*artistic work*" means, —

i. a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
ii. a [work of architecture]; and
iii. any other work of artistic craftsmanship;"[15]

Thus, to qualify as an artistic work, it should not necessarily possess any artistic quality; it can be devoid of any merit but shall still qualify as artistic work. This ambiguous language of

[11] *Walter v. Lane*, [1900] AC 539.
[12] *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd*, [1964] 1 WLR 273.
[13] *Eastern Book Company v. D.B. Modak*, 2002 PTC 641.
[14] Laura A. Heymann, How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide, 51 Wm. & Mary L. Rev. 825 (2009), pg. 830. https://scholarship.law.wm.edu/wmlr/vol51/iss2/14
[15] Indian Copyright Act, 1957, § 2(c).

legislation makes it difficult to decode as to what exactly is 'artistic merit'. What might be pleasing, inspiring and creative to one eye might appear offensive, obscene and bland to one. Where any expression through art becomes obscene and goes against public morality, it gets hit by the reasonable restrictions imposed upon Freedom of Speech and expression under the Indian Constitution.[16]

As the inception of most of the legislations in India can be traced back to the legislations of the United Kingdom, it is necessary to refer the CDPA[17], 1988. Section 4 of the Act reads,

"Artistic works.

(1) In this Part "artistic work" means—

(a)a graphic work, photograph, sculpture or collage, irrespective of artistic quality,

(b)a work of architecture being a building or a model for a building, or

(c)a work of artistic craftsmanship.

(2) In this Part—

- "building" includes any fixed structure, and a part of a building or fixed structure;
- "graphic work" includes—

(a) any painting, drawing, diagram, map, chart or plan, and

(b) any engraving, etching, lithograph, woodcut or similar work;

- "photograph" means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;
- "sculpture" includes a cast or model made for purposes of sculpture."

The language of the section is quite inclusive and street art, in whichever form, falls under the copyrightable subject matter. Some of these arts are created within a matter of time while some takes days to complete. This span of time required to complete does not in anyway change the copyrightability of the Art.[18] Even the typical ways in which an artist signs his name on the walls[19] is copyrightable subject matter.[20] Reliance can be placed on *IPC Magazines Ltd v. MGN*

[16] The Constitution of India, 1950, Article 19(2).
[17] Copyright, Designs and Patents Act, 1988.
[18] Bonadio Enrico, Street Art, Graffiti and Copyright: A UK Perspective, pg. 2. https://doi.org/10.1017/9781108563581.011
[19] Refer the way Banksy signs his name, for instance.
[20] Bonadio Enrico, Street Art, Graffiti and Copyright: A UK Perspective, pg. 5.

Ltd[21] wherein, the way in which the claimant styled the word Woman in white on a red background was arguably copyrightable.

Usually known as tags or throw ups in the graffiti community, if they are taken as typefaces then they are indeed exempted from copyright infringement under Section 54 and 55 of the CDPA as "an artistic work consisting of the design of a typeface". The copyright laws protect works containing high level of creativity as well as works which, for a certain class of people may appear to be rubbish. Overruling the de minimis rule[22], trivial subject matter such as newspaper headlines are considered copyrightable[23]. Going by the same logic, it could pave a pathway for protection of tags and throw-up. Graffiti is an illegal form of Art usually portrayed to rebel by miscreants, while Street art, moreover, is often purely artistic. Unlike spray-paint graffiti, street art is an aesthetic work that the general public is able to interpret and with which the public can connect.[24] Even if street art is made illegally, its scope of protection under copyright law does not diminish. This has been made apparent in *Creative Foundation v. Dreamland*[25] wherein it was held that illegally produced artworks should be protected.

As of the USA scenario, the *5pointz case*[26] plays an important role as it included graffiti artists and street artists under the VARA[27]. It is important to note at this stage that illegal graffiti was excluded from the purview of this Act as it is "hardly classifiable as fine arts".[28] The US court in Hanrahan's case[29] recognised a certain mural having stature in the society and for its destruction, damages were awarded to the plaintiff. The issue regarding illegal graffiti and copyright on the same was discussed, albeit tangentially, in *Villa v. Pearson Educ., Inc.*[30]. The artist had taken action against a publisher for publishing a picture of his work in its strategy guide for a videogame without the artist's permission. It was taken as a defence that this cannot count as infringement as the art in the first place was made illegally. The court held that, "the claim that the work was not copyrightable due to its illicit origin would require investigating the circumstances under which the work was created". The debate whether illegally created art

https://doi.org/10.1017/9781108563581.011
[21] *IPC Magazines Ltd v. MGN Ltd* [1998] FSR 431.
[22] The rule says that some works are too insignificant to attract infringement and protection in the first place.
[23] *Newspapers Licensing Agency v. Meltwater Holding* [2010] EWHC 3099 (Ch) [72]*; Newspapers Licensing Agency Ltd. v. Meltwater Holding BV* [2012] RPC 1 (CA).
[24] https://jipel.law.nyu.edu/vol-2-no-2-2-lerman/#_ftn1 (last accessed on 24.10.2023 at 21:21).
[25] *Creative Foundation v. Dreamland & Others* [2015] EWCH 2556 (Ch), *11 September 2015*.
[26] *Cohen et al. v. G&M REALTY L.P. et al*., Case No. 13-CV-05612(FB) (RLM).
[27] Visual Artists Rights Act, 1990.
[28] *Botello v. Shell Oil Co.* 280 Cal. Rptr. 535 (Ct. A 1991).
[29] *Hanrahan v. Ramirez*, No. 2:97-CV-7470, 1998.
[30] *Villa v. Pearson Educ., Inc.*, 2003 WL 22922178 (N.D. Ill. Dec. 9, 2003).

could be protected has not been settled in the US jurisprudence, although in plethora of cases[31] it can be seen that the courts did not investigate into the legality of art created.

In India, most art form found on the streets are traditionally and culturally relative as against the tags and throw ups found in the west.[32] Copyright in typefaces or minimum arts is not that prevalent in India.[33] The Delhi High Court observed that, "in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of the nation".[34] This shows that unless a work attains the status of modern national treasure, its integrity from destruction cannot be saved. This creates a huge loophole as art works which do not qualify upto these standards could easily be destroyed and right of integrity couldn't be saved. Even legally created art is not protected against destruction.[35]

1.3. RIGHTS OF STREET ARTISTS: AN IP PERSPECTIVE

While the statutory protection lies on one hand, on the other the practical application and the extent to which these provisions can be applied has to be balanced. Such practical hindrances are not only because of barriers in the form of practical application but also are due to factors on the part of artists.

Contemporary art types such as particular makeup, sand art and so on have one problem that runs common with street art. The problem is that these artistic expressions are made for a fleeting time period. The subsequent problem is that, the existence is not permanent. And hence, it is very difficult to permanently fixate such art types. Conventional art such as paintings and drawings, once made remain on the material it was made and therefore can be said to be permanently fixated; the only way they can be destroyed is if someone physically disposes them off. When asked where is the art on which copyright subsists, one can easily show the conventional art types. If we consider sand art, then each time a wave of the ocean washes over, the art is destroyed. The only way to preserve it is to store it in electronic media like photographs or cinematographic films.

Now, the copyright subsists over these electronic media and not the art itself. The same is for street art. If anytime it is vandalised or washed over, the copyrighted art vanishes like it never

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[31] *Reece v. Mark Ecko Unlimited*, 2011 U.S. Dist. Lexis 102199 (2011); *Mager v Brand New School*, 78 USPQ 2d 1389 (2004).

[32] Saikia Nandita, "*Street Art, Graffiti, and Copyright Law: India",* Cambridge Core, pg. 272. https://doi.org/10.1017/9781108563581.018.

[33] *Aananda Expanded Italic* (15.01.2002, Registrar of Copyrights, New Delhi, India) MANU/CP/0001/2002.

[34] *Amarnath Sehgal v. Union of India* (21.02.2005, Delhi High Court, India) MANU/DE/0216/2005.

[35] *Raj Rewal v. Union of India* (28.05.2019, Delhi High Court, India) CS(COMM) No.3/2018.

existed. If the artist does not record it in any medium, then the art is lost forever. Courts have opined that even if an art piece is ephemeral in nature, "should in principle be protected as a three-dimensional work made by an artist's hand."[36] If the stance taken in Infopaq's decision[37] is to be taken into consideration, then one must not demarcate an intellectual creation as a particular type; it should be protected nevertheless. Thus, a discourse from permanent fixation can be adopted in the light of this decision.

Another problem that has been persisting is that, such art is not made in protected spaces. It is made in open spaces where anyone, as per their whims and fancies, can paint over the already existing material.[38] If the artist uses such materials that are of degrading quality, then natural factors such as rain can easily wash off the art; people could also water it down and it will come off. If it is made on a building or any sort of construction, it could be taken down along with the construction itself. Artists have had to repair their art countless times over the years and it seems to be a non-feasible and tedious option of maintenance. Taking on a rather stern tone, Adrian Wilson who is an artist himself says that, if one cannot deal with the harsh truth of their street art being destroyed, they should move on to indoor or canvas work.

The removal and preservation of street art give rise to a significant controversy, primarily centred on the conflicting rights of artists for self-expression and property owners for control over their properties. Street art, commonly viewed as a manifestation of public art, mirrors the cultural and social identity of a community. Advocates of the same contend that the removal of street art suppresses artistic expression and eliminates crucial voices from public spaces. Conversely, property owners assert their rights to manage and uphold their property, contending that street art encroaches upon their ownership and may contribute to vandalism.

For a person who is blind to the beauty of art, specifically street art, anything made on his property will be nothing but defacement. The sine qua non of artistic works is not the aesthetic merit that comes with the art. The practice and procedure manual on artist works makes it clear that, "Any work which is an original creation of an author or an owner fixed in a tangible form, is capable of being entered into the Register of Copyrights, irrespective of the fact that whether such work possess any artistic quality or not".[39] The problem arises when the person cannot comprehend the art and therefore thinks it to be too insignificant to be protected. Therefore,

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[36] *Metix (UK) Ltd v. G.H. Maughan (Plastics)*, [1997] FSR 718.
[37] *Infopaq v. Danske*, C-5/08.
[38] Sarah Cascone, "Cleaning Vandalised Street Art", April 21, 2021 https://news.artnet.com/art-world/cleaning-vandalized-street-art-1960146#:~:text=%E2%80%9CThe%20main%20problem%20with%20preserving,the%20artist%20Rock%20Black%20Block (last accessed on 29.01.2024 at 20:03).
[39] Practice and Procedure Manual: Artistic Work, 2018, pg. 2.

the debate between whether property rights of owners' triumph over expression rights of artists has been birthed.

1.4. COPYRIGHT CHALLENGES AND COPYRIGHT ENFORCEMENT IN STREET ART

A painting made on a canvas by a painter should get the same protection as that of a painting made on walls. The only difference is that the one who paints on canvases would eventually be termed as artist and would get economic benefits out of it, while the one who paints on walls would never be able to protect his work. This mostly happens because street artists are not that well educated or have very less capital to hire IP team. Such art made on walls, is exploited by people with deep pockets and the artists do not have the resources to assert their copyright and monopoly over it. Some ways of infringement of copyright in street art may be summarized as follows:

1. Compilation of photographs of street art in a book without taking permission; or
2. Taking photographs of street art without taking permission; or
3. Printing street art/ graffiti on T-shirts without permission from artists; or
4. Featuring art in cinematograph films and videos without permission; and
5. Removing the art from the streets and bringing it indoors.

The major challenge in enforcement of rights is the difficulty in protecting moral rights. Even though the statutory requirement of original Literary, Dramatic, Musical and Artistic is fulfilled, at times it is practically difficult to extend protection. This difficulty mostly arises due to nature of work which is sought to be protected. Street Art is no alien to this hardship.

The copyright regime in India awards not just the negative right but also neighbouring rights. These are known as moral rights and they are further branched out as right of paternity and right of integrity. While paternity rights enable the public to trace back an art to the artist, right of integrity gives a right to take action against any destruction of the art and reputation of the artist. The ephemeral nature of Street Art makes it difficult to strictly grant integrity rights to the artist. As discussed above, street art is the most susceptible to vandalism and attack, maintaining integrity of the Art becomes next to impossible. Further, it is equally difficult to trace the perpetrator who defaces and destroys such piece of Art which reduces the scope to take any action. Therefore, even though street art might tick all the parameters of 'artistic work', due to its transient form granting every right from the bunch is backbreaking.

One of the problems in India, when it comes to protecting the Art is the lack of hygiene practiced in the country. Walls adorned with beautiful art have become tainted with spits,

vomits and urine. To protect art from such literate illiterates is turning out to be a tough task. Even after installation of urinals and taking effective sanitary measures, people still manage to decorate walls with their unwanted excreta thereby, reducing the beauty of street art manifolds. In such scenario, street art finds it difficult to survive.

1.5. CONCLUSION & SUGGESTIONS

> "A liberal tolerance of a different point of view causes no damage. It means only a greater self-restraint. Diversity in expression of views whether in writings, painting or visual media encourages debate. A debate should never be shut out. 'I am right' does not necessarily imply 'You are wrong'. Our culture breeds tolerance – both in thought and in actions."[40]

Decades after the emergence of street art, litigants have now, in 2023, knocked on the doors of court to obtain copyright protection for the same.[41] This case shall be a historic decision and the first of its kind on the copyrightability of street art albeit, the case is majorly concerned with fair dealing of the plaintiff's mural by the defendant. It remains to see how the Court deals with these issues; the matter is still sub-judice. It is effectively established that street art as artistic work fits into the definition provided by the legislations of UK, USA and India. While the first two are progressed nations, the courts there have recognised street art as art and has taken efforts to protect it; they have made efforts to protect the same even where the artists are unknown. But in the later nation, a problem still persists as the public and the courts fail to appreciate street art as one of the most creative and ephemeral forms of art. The artist pours his thoughts and paints them on the wall. The picturesque result is a sight to behold!

Thus, it can be concluded that in Indian jurisprudence, statutory limitations are not the result of lack of protection to street art rather it is lack of awareness, appreciation and the sheer will of the citizens to protect pieces of art. The uneducated or the literate illiterates of the society are the biggest menace to the preservation of art in India. Beautified walls do not stay the same for long periods of time; in other nations artists fear that other artists may draw over their pieces while in India artists fear that someone might excrete over their piece. Even after the progress in the country, there remains a section of people in the court which turns a blind eye towards the retention of beauty of the country. It is as simple as it gets for the artist: they must append

[40] Justice Sanjay Kishan Kaul, *Maqbool Fida Husain v. Raj Kumar Pandey* [3] [2008 CriLJ 4107]
[41] *St Art India Foundation & Anr. v. Acko General Insurance* on 10 November, 2023

"©" to their art. When such matter shall reach the courts, the judges should take a liberal approach and include the contemporary pieces of art under the umbrella of copyrightable subject matter.

As part of suggestions, the following measures may be considered:

1. State-based organization may be set up to up an initiative to prepare a detailed directory comprising of photographs of various street art and graffiti found around the various cities of such state with details of corresponding artists. Copyright protection to be sought, commercial exploitation allowed, and royalty shared with such artists.

   Such organisation would operate under the control of the state government and directories specific to each state can be created. However, in case artists are not found or known, then copyright of such art can rest with the organisation which would be exploited to benefit the street art community.

   Thus, if any third party wishes to exploit the art included in the directory, they can easily contact the artists and proceed further with the formalities. If the artist is unknown, then royalty can be accepted by the organisation and same can be utilised for the benefit of street artists statewide.
2. Various conventions and symposiums can be organised wherein such artists would be invited to exhibit their art live, and simultaneously information about their earlier works could be catalogued. Further, incentives could be offered to the artists to enhance their interest in participating in such conventions and showcase their skills.

RIGHT TO LIFE OF AN UNBORN CHILD IN INDIA: A LEGAL PERSPECTIVE

Pallav Ram Bhujel[1]

Abstract**:** *The right to life of an unborn child is a very controversial issue. The issue for consideration is whether an unborn child can be given an important Human Right i.e. right to life, as any other human being or the unborn child is not eligible to hold such rights. In India though different legislations recognize the various rights of an unborn child. The right to life as such is not recognized. This is mainly because recognition of the right to life of an unborn child would lead to conflict with the rights of a pregnant woman. This article mainly tires analyzes the legal status of an unborn child concerning the right to life.*

Keywords*: India, Unborn Child, Right to life, Legal status, Pregnant Woman.*

1.1. INTRODUCTION

The right to life of an unborn Child is a very controversial issue. It has been subject to discussion and deliberation in the national and international arena for a long period. The issue for consideration is whether an unborn child can be given an important Human Right i.e. right to life, as any human being or the unborn child is not eligible to hold such rights. The right to life is considered an important human right. Human rights are rights that are available to everyone who qualifies as a human being.[2] An important question is whether an "Embryo" or "fetus" falls within the definition of "human beings", "Person" and "Human Family"? The legal status of the unborn child is very unclear and confusing in almost all International legal instruments that have defined essential human rights. Sovereign nations all around the world have adopted different legal methods to deal with the right to life of an unborn child. The situation is no different in India. The legislature and judiciary have failed to answer this question properly. This is mainly because the recognition of the right to life of an unborn child will directly obstruct a women's right to abortion

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[2] Nidhi Madan, "History & Development of Human Rights in Indian", 22 IOSR Journal of Humanities and Social Sciences 1, 2(2017).

as part of her right to privacy. This article mainly tires analyzes the legal status of an unborn child concerning the right to life.

1.2. UNBORN CHILD: MEANING AND DEFINITION

Human beings are mainly divided into two genders i.e. Man and women. Thought in the recent years' law and society have given recognition to other genders also but for this paper, only two genders are mentioned. They both play an essential part in the reproduction process ensuring the continuance of Humankind. It is the interaction between the female and male reproductive systems which results in women getting pregnant and out of which a child is born. The Reproductive process normally begins with copulation, followed by approximately nine months of pregnancy bore by the women before childbirth. An unborn child refers to an "embryo" or "fetus" which exists inside the womb of the mother. An "embryo" is defined as a developing human organism starting from fertilization till the end of eight weeks (57 days).[3] Similarly "fetus" means a human organism under development starting from the 57th day till the time of its birth.[4] During this time, the fetus receives all of its vitamins, nutrition, and oxygenated blood from the female via an umbilical cord. The unborn child is incapable of independent existence and is wholly dependent on the pregnant mother for survival.

1.3. RIGHT OF AN UNBORN CHILD UNDER INTERNATIONAL DOCUMENTS

a) The Universal Declaration of Human Rights, 1948

Firstly, we have The Universal Declaration of Human Rights (UDHR), which is a landmark document for the establishment of Human rights. The preamble of the legal document states "equal and inalienable rights of all members of the human family". Article 1 "Human beings are born equal in right and dignity and freedom" applies that a person must be born to be able to acquire human rights. The deletion of the term born in Art 1 was proposed and rejected in the general assembly in favor of the right to life of an unborn.[5] In Art 2 of the declaration, it states "Everybody is entitled to all the rights and freedom outlined in the declaration, without distinction of any kind ……" Art 3 states "everybody has the right to life, security, and liberty". The document has a total

[3] The Pre-Conceptual and Pre-Natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994, S 2(bb).
[4] The Pre-Conceptual and Pre-Natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994, S 2(bc).
[5] See UN GAOR 3rd Comm., 99th mtg. at 110–124, UN Doc. A/PV/99, 1948.

of 30 articles that discusses different rights available to all human beings. The declaration takes note of all essential rights for human beings after being born. There is no mention of any human rights of an Unborn Child. Further, it fails to define who all are included in "People", "Human Family" and "Everyone". This leads us to the grey area in the law where it can be said that UDHR as such does not provide any protection to an Unborn Child directly. It cannot be firmly ascertained that "People", "Human Family" or "Everyone" used in the declaration includes an unborn child and may or may not include an unborn child.

b) The International Covenant on Civil and Political Rights 1966

ICCPR art 6 states that "Every human being has inherent Right to Life". At the time of its formulation, it was argued that the sentence should include ''the right to life is inherent in the human person from the moment of conception".[6] It was done to include the right to life of an unborn child. However, it was rejected and the line "from the moment of conception" was never added. The Human rights committees that are responsible for the application of the covenant have repeatedly emphasized the need to decriminalize abortion.[7] Recognition of the right to life of an unborn child would be problematic for the decriminalization of abortion. The term "every human being" has not been defined which makes it open to interpretation.

c) Declaration on the Rights of Child, 1989

The rights of the Child were first recognized in the Geneva Declaration, of 1924. It states that human beings" owe to the child the best that it has to give". However, it was not legally binding on its member states. The first declaration on the right of a child under the United Nations was made in 1959.[8] The preamble of the declaration states that "appropriate legal protection, before and after birth". The refection, at the most, signifies the duty of the state to provide special care and protection, through nutrition, health, and support to pregnant women.[9] In 1989, the world leaders in a historic step adopted the United Nations Convention on the Rights of the Child. It was

[6] See, UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L.654.
[7] See, Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.104, Concluding Observations of the Human Rights Committe Chile, 30/3/1999, UN GAOR, Hum. Rts. Comm., 65th Session, 1740th mtg. Para.15e: Argentina, 15/11/2000, UN Doc. CCPR/CO/ 70/ARG, Para.14, Concluding Observations of the Human Rights Committee: Costa Rica, 08/04/99, UN Doc. CCPR/ C/79/Add.107, Para.11, Concluding Observations of the Human Rights Committee: Peru, Concluding Observations of the Human Rights Committee: United Republic of Tanzania, 18/08/98, UN Doc. CCPR/C/79/ Add.97, Para.15, Concluding Observations of the Human Rights Committee: Venezuela, 26/04/2001, UN Doc. CCPR/CO/71/VEN, Para.19.
[8] See, United Nation General Assembly Resolution 1386 (XIV).
[9] Rhonda Copelon and Christina Zampas et al, Human Rights Begin at Birth: International Law and the Claim of Fetal Rights, 13 Reproductive Health Matters, 121, 123(2005).

the most broadly accepted treaty regarding the right of a child. The convention defines a child as a human being who has not reached the age of 18.[10] The Human right treaty defines various civil, political, economic, social, health, and cultural rights of children. However, it does not, in particular, recognize the unborn child as a child within the meaning of this convention.

Though the Human Rights of a child are fully recognized under international law, the rights of an unborn child are still a matter of debate. This issue has been subject to deliberation during the process of development of various international documents. The United Nations has repeatedly given recognition to reproductive rights including access to legal and safe abortion for a woman. In the case of the right to life and unborn the international documents have neither overwhelmingly accepted nor rejected the idea. It is subject to interpretation by the sovereign member state in its application.

1.4. RIGHT OF AN UNBORN CHILD UNDER DIFFERENT LAWS IN INDIA

The right to life of an unborn child is a complicated issue. However, other laws in India have recognized the rights of an unborn child and it includes;

a) The Hindu Succession Act, 1956

The Act states that a child in the womb of the pregnant mother is entitled to inherit instate in case of death the interstate takes place when the child is still in the womb of the mother.[11] In the case *M S Subbukrishna v. Parvathi*[12], it was held that a child born after the partition would have a right to claim his father's share in the property partitioned.

b) Indian Succession Act, 1925

The Act gives recognition to the rights of an unborn in two instances. Firstly, the Act provides the domicile of origin of every person of legitimate birth to be in the country in which at the time of birth the father was domiciled, or in the case of a posthumous child, the country in which the father was domiciled at the time of birth.[13] Secondly, the Act gives recognition to a person coming into existence after the death of the testator.[14]

[10] United Nations Convention on the Rights of the Child, Art 1.
[11] The Hindu Succession Act, 1956, S 20.
[12] *M S Subbukrishna v. Parvathi, 2008* (1) KarLJ 438.
[13] Indian Succession Act, 1925, S 7.
[14] Indian Succession Act, 1925, S 112.

c) The Transfer of Property Act, 1882

The TP Act acknowledges the right of an unborn under Sec 13 and 20 of the Act. Sec 13 provides that when interest is created for the transfer of property to an unborn child, a prior interest is to be created in respect of the same transfer. The interest created in favor of the unborn child will not take effect unless and until it extends to the whole of the remaining interest of the person who is transferring the property.[15] Sec 20 deals take into account the circumstances under which an unborn child acquires a vested interest. Where interest is created for the benefit of an unborn child, the unborn child acquires the same at birth, a vested interest, although the unborn child may not be entitled to the same immediately after birth.[16]

d) Indian Penal Code, 1860

The rights of an unborn Child have been placed in the chapter "Offences Affecting Human Body" of the Indian Penal Code. It is dealt with as causing miscarriage and has been made a punishable offense under Sec 312-316 of the Indian Penal Code. The Penal code provides punishment for causing miscarriage under different circumstances.

e) The Code of Criminal Procedure, 1973

The Code of Criminal Procedure indirectly recognizes the right of an unborn child. In case a pregnant woman is sentenced to Capital Punishment, it is mandated that the Capital Punishment be postponed or converted to life imprisonment.[17] The Code of Criminal Procedure indirectly gives recognition to the right to life of an unborn child.

f) The Limitation Act, 1963

The limitation act provides that in case a minor (including an unborn child) is entitled to initiate a suit as well as apply for the execution of a decree, within the provided limitation may do the same after the legal disability ceases to exist.[18]

g) Medical Termination of Pregnancy Act, 1972

The MTP Act does not directly protect the right to life of an Unborn Child. However, it does protect the life of the unborn by limiting abortion except in the case of Rape, failure of

[15] Transfer of Property Act, 1882, S 13.
[16] Transfer of Property Act, 1882, S 20.
[17] Code of Criminal Procedure, 1973, S 416.
[18] Limitation Act, 1963, S 6.

contraceptive pills, mental and physical danger, the risk to the life of the mother, etc.[19] A woman cannot seek abortion on demand but has to have sought an abortion in compliance with Section 3 and 5 of the MTP Act.

h) Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 2002

The PNDT Act, 2002 prohibits the use of technology to determine the sex of the unborn child. This was done keeping in sight the problem of female feticide in India. Female Sex-selective abortion is a major problem in India. The preference for a male child has always been there for various social-cultural reasons. Family planning programs and small family norms coupled with the preference for the male child have added pressure to families for sex selection as a desired way to build a desired family composition.[20] The Act indirectly protects the life of the unborn child.

Various rights of an unborn child have been recognized by different legislations in India. The unborn child is also subject to protection under different laws in India. However, there is no specific law which recognizes the right to life of the unborn child as such.

1.5. JUDICIAL VIEW ON RIGHT TO LIFE OF AN UNBORN CHILD

The MTP Act, 1971 was challenged in the case *Nanda Kishore v. Union of India*[21] in the year 2005. The issue brought before the Court was that in particular Sections 3(2) a and b and explanations I and II of the same section were unethical and a clear violation of Article 21 of the Constitution of India. The court was asked to determine whether the right to life of an unborn child was violated by the above-mentioned provisions. However, the court refused to enter into this debate and stated that they were only concerned with the validity of the questioned provisions of the MTP Act. The court refused to comment on the status of a fetus. The court held that the MTP Act was valid and in consonance with Art 21 of the Constitution.

In the case of the *High Court on its own motion v. the State of Maharashtra*[22], the Court strongly affirmed that the right to abortion is a fundamental right and held:

[19] Medical Termination of Pregnancy Act, 1972, SS 3, 5.
[20] Sutapa Agrawal, The Sociocultural Context of Family Size Preference, Ideal Sex Composition, and Induced Abortion in India: Findings From India's National Family Health Surveys, 33 Health Care Women Int, 984, 987(2017).
[21] *Nanda Kishore v. Union of India*, AIR 2006 Raj. 166.
[22] *High Court on its own motion v. the State of Maharashtra*, 2017 Cri LJ 218.

"... According to international human rights law, a person is vested with human rights only at birth; an unborn fetus is not an entity with human rights."

The Judiciary in India has time and again refused to answer the question concerning the right to life of the unborn child. This is simply because it would cause more problems than solve any. However, the Judiciary has recognized the right to abortion as part of the right to privacy of pregnant women and concluded that an unborn child cannot have human rights as it is not a recognized human being under International and National law.

1.6. THE SCIENTIFIC, MORAL AND ETHICAL STATUS OF AN UNBORN CHILD

There are a large number of views concerning the view of when an unborn child can be considered a human being. These include:

a) Conception

During the time of conception, the biological characteristics of an unborn child are determined by the genetic code which gives them unique individual characteristics.[23] Further development and birth is thereafter a process of achieving what the unborn child already is. According to John Nooman:

> *"The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information that determines his characteristics, which is the biological carrier of the possibilities of human wisdom, which makes him a self-evolving being. The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information that determines his characteristics, which is the biological carrier of the possibilities of human wisdom, which makes him a self-evolving being. The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information that determines his characteristics, which*

[23] Machteld Nijsten, Abortion, and Constitutional Law: A Comparative European-American Study 59 (European University Institute Florence, 1990).

is the biological carrier of the possibilities of human wisdom, which makes him a self-evolving being."[24]

Secondly, we have potential. There is a chance on less the 1 in 200 million a spermatozoon will be able to develop into a person.[25] However, at the moment of conception, there is an 80% chance that the zygote will develop into a baby.[26]

b) Brain Activities

Electroencephalographic (neurological) waves can be detected at about 6 weeks of fetal development. It implies that the fetal brain has started working.[27] It signifies that "symbolic activity" is based on the anthropological theory which considers a human being qualitatively distinct from the rest of nature because of the capability. As Joseph Fletcher has said

The neocortical function is the key to humanness, the essential trait, the human sine qua non ... To be truly Homo sapiens we must be sapient, however minimally ... The brain is the singular focus of the embodiment of the mind, and in its absence man as a person is absent.[28]

c) Sentience

Sentience includes feeling and sensation distinct from perception and thought.[29] It is the ability to experience sensations of pleasure, pain, enjoyment, and suffering. It is marked by the emergence of the first vertebras of the forebrain. Generally, 18-25 weeks of gestation is considered the lowest boundary for the development of sentience in an unborn child.[30]

d) Quickening

Fetal movement is the most significant form of quickening. It generally occurs between 18-20 weeks of pregnancy.[31] The mother becomes conscious of the movement of the fetus in her abdomen. If the fetus is born at this time it would not be able to survive on its own due to insufficient development of the lungs.

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[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid at 60.
[28] Ibid .
[29] Ibid at 61.
[30] Susan Tiwari, When is the capacity of sentience acquired during human feal development, 1 Journal of Metarnal fetal Development,150, 154(1992).
[31] Carolyn W. Lerum and Geri LoBiondo-Wood, The Relationship of Maternal Age, Quickening, and Physical Symptoms of Pregnancy to the Development of Maternal-Fetal Attachment, 16 Birth, 12, 15(1989).

e) Viability

Viability of Fetal Viability signifies the ability of the fetus to survive outside the uterus. Fetal viability is generally considered to begin from 24 weeks gestation period.[32] At the stage of viability, the fetus is still inside the womb of the mother. However, it is capable of surviving on its own and will need an artificial support system. It has been argued that since a viable fetus is capable of surviving outside the uterus it is similar to an infant baby.[33]

f) Birth

The birth of an infant signifies separate and independent existence. It is no longer a part of the women. Although the fetus is capable of independent existence much before birth, it acquires independent existence only after birth. Though several years of care are further needed till the infant is capable of taking care of itself. Birth is also significant for the recognition of a fetus as a human being capable of holding human rights.

g) Religion

The right to life of an unborn is not just a legal and medical issue, but essentially a moral issue. It encompasses issues of life and death, right and wrong, morality, and the nature of society which make it a major religious concern. Historically, the right to life of an unborn child has been strongly supported by religious institutions. Almost all religions recognize the right to life of an unborn child. In Hinduism, an embryo or fetus is regarded as a living person from conception.[34] Similarly in Buddhism, life begins at conception.[35] In Christianity, the induced killing of an unborn child is considered a sin as an unbaptized soul could never attain salvation.[36] Other religions around the world hold a similar view.

There are many medical, moral, and ethical arguments in favor of the recognition of an unborn child as a Human Being. However, there is no fixed definition that could demarcate a human being from a potential Human Being before birth. A one-week-old embryo and a 6-month-old fetus are

[32] Astrid Christofferson-Deb, A Cultural Calculus of Parenthood at the beginning of life, 26 Medical Anthropology Quaterly,578, 580(2012).
[33] *Supra* note 22 at 63.
[34] Constantin-Iulian Damian, Abortion from the perspective of the eastern religion: Hinduism and Buddhism, 8 Romanian Journal of Bioethics, 128, 132 (2010).
[35] Phillip A Lasco, A Buddhist View of Abortion, 26 Journal of Religion and Health, 215 (1987).
[36] Kathryn G. Milman, Abortion Reform: History, Status, and Prognosis, 21 Case Western Reserve Law Review, 520, 525(1970).

potential human beings. There are various theological, Scientific, and moral reasons for calling one stage of development more human than the other, but there is no rational reason for doing so. The point of the compelling interest of the state to protect the life of the unborn has been made the point of viability. The main basis of this principle can be traced back to the case *Roe v. Wade*[37] which stated that viability is the "compelling point...because the fetus then supposedly has the capacity to survive outside the womb of the mother".

The point of viability is often the cut-off point for Abortion. Abortion laws around the world including India ban abortion entirely after the point of viability except in cases where the life of the mother under threat. The viability threshold has been upheld in the case of *Planned Parenthood* v. *Casey*.[38]

1.7. RIGHT TO LIFE OF AN UNBORN CHILD

Human rights are essential for all human beings to be able to exercise inherent rights and develop. However, in the case of the question of when does a human being acquire Human Rights? It can be best understood that it begins after birth. Though there are various legislations recognize the right of the unborn child. The right to life of the unborn child is not recognized which renders no value to the unborn child. It can simply be said that it is considered a part of the mother and has no independent existence as it has no value. However, the situation changes after the birth of the child. A Child after birth has full human rights and is a recognized human being. The law states as such. There are various scientific, moral and ethical arguments as discussed above that argue that the unborn child has value before birth. However, they are not recognized by law. The main reason for this is that recognition of the right to life of the unborn child would directly oppose the right to abortion of a pregnant woman which is a part of her right to life and liberty. The international organization of Human rights which campaigns for legal and safe abortion cannot simply recognize the right to life of the unborn child and this would lead to more chaos and confusion. This leads us to the grey area in law where certain rights of an unborn child are recognized like the right to inherit property and legal protection from criminal actions but have no human rights.

The right to life of the unborn child is unrecognized by law. However, an unborn child is subject to protection by the state. Sections 312 to 316 of I.P.C, 1860 deals with miscarriage and provides

[37] *Roe v. Wade*, 410 U.S. 113 (1973).
[38] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

punishment for causing or intending to cause harm to an unborn child. The CrPC, 1973 recognizes the right to life of the unborn child in case of a pregnant woman sentenced to capital punishment. The capital punishment is postponed or converted to life imprisonment. Further, Sec 3 of the MTP Act, 1971 the state forbids abortion after 24 weeks unless to save the life of the mother on the grounds of "compelling state interest". It was stated in the case Roe v. Wade that only "compelling interest" could justify the state laws that limit the right. It was stated that the state had a legitimate interest to protect and maintain the health of the pregnant woman and the human life inside her. The Supreme Court of India in *Suchitra Srivastava v. Union of India*[39] held that the right to abortion is subject to certain qualifications. This is because of compelling state interest to protect the life of the unborn child. A compelling state is often used by the Courts to limit the right to privacy it was first developed in the case *Sweezy v. New Hampshire*.[40]

1.8. CONCLUSION

Conclusively we can say that the international instruments have remained silent on the issue because of the various contentions that may arise if the right to life of an unborn child is recognized. Many countries around the world have followed a similar pattern. The situation is no different in India which recognizes and acknowledges many rights of the unborn child but fails to give constitutional recognition of the right to life to an unborn child. The Supreme Court has regarded the interest of the mother as more important than that of the unborn child. However, the state does indirectly protect the potential life of the unborn child. This is mainly done indirectly through other legislation that does not directly deal with rights of an unborn child. Further, the concept of compelling state interest is used to protect the potential life of the unborn child after a point in time during the pregnancy.

[39] *Suchitra Srivastava v. Union of India*, 1994 SCC (6) 98.
[40] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

STRIKING THE RIGHT BALANCE: JUDICIAL OVERSIGHT IN ARBITRATION

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***Abstract*:** *The involvement of domestic courts in international commercial arbitration is crucial, since they are responsible for guaranteeing procedural efficiency and resolving disputes between the parties involved. Although the fact of this engagement is widely acknowledged, there is still disagreement over the exact degree or scope of it. There is an increasing agreement that courts should uphold rather than infringe upon the authority of arbitration panels. Domestic courts in many parts of the world, have a substantial influence on commercial arbitrations. This paper examines the extent of judicial involvement in relation to worldwide trends, and argues for the need to revise arbitration laws. International commercial arbitration is a method of resolving contract disputes that occur across different countries. It aims to maintain fairness in the process and ideally avoids the need for judicial intervention. Nevertheless, courts often interfere when there is a disagreement between parties over processes. Arbitration generally follows a series of processes, including case initiation, appointment of an arbitrator, conducting hearings, and issuing awards. In certain cases, parties may request judicial involvement, which is supported by national legislation. Nevertheless, it is essential to clearly define the level of judicial intervention in order to maintain the independence of arbitration.*

Keywords: *Domestic Court, International Commercial Arbitration, Judicial Intervention, National, Arbitration.*

1. INTRODUCTION

Today's situation of fast globalisation and expanding extraterritorial commerce is inevitably leading to disagreements and confrontations between the parties engaged with such trades. The phrase ‘Time is money’ plays a pivotal role in today’s world, thus instead of resorting to traditional courts, the parties are willing to resolve their differences via alternative dispute resolution procedures. Millions of cases are waiting for their time in the courts, which is an enormous overload. In order to preserve diplomatic commercial connections and even privacy, legal recourse is also avoided. Arbitration is the most widely used and advanced alternative

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dispute resolution method among all the others and convenient way of resolving the disputes. The "Model Law on International Commercial Arbitration" was first established in 1985 by the United Nations Commission on International Trade Law (UNICTRAL), a key body of the UN.[3] In order to form separate arbitration systems, the willing countries accepted the Model Law. One such country is India, which passed the Arbitration and Conciliation Act, 1996 in line with the Model Law in order to harmonise and modify the laws pertaining to both domestic and international commercial arbitration. Before the 2016 Act, the arbitration in India was regulated by the Arbitration Act, 1940. Due to numerous factors, such as autonomy of parties, flexibility and resolving of disputes without any government interference, alternate dispute resolution is popularly emerging as a mode to resolve the conflicts.[4] Arbitration becomes international wherein the parties involved in the dispute are from different nations or jurisdictions.[5] Hence, the disputes are generally resolved in a neutral way wherein the application of international rules that are neutral to both the parties, such as choosing the seat of arbitration which is not home to any of the parties.[6]

Under the New York Convention, it is mandatory for the member countries that there should be enforcement of arbitration agreements and also the awards passed thereof.[7] Therefore, this makes it clear that the countries ratifying the said Convention will have to necessarily enforce both. In order to prevent unwarranted involvement of domestic courts in international business arbitration, the NYC's articles II[8], III[9], and V[10] identify the courts that may be implicated in such arbitration and clarify the objective of their interventions. The specific operations of these courts will be established according to domestic legislation and international agreements.
The Model Law states that only in some instances, the judicial intervention by the Courts will be allowed such as:[11]

[3] Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law (UNCITRAL) (1985).
[4] Gary B. Born. International Commercial Arbitration. Second Edition. Alphen aan den Rijn: Kluwer Law International, 2014.
[5] UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter Model Law), Article 1.3.
[6] Park, William W. "International Arbitration: Emerging Trends and Practices." 50 (1), Columbia Journal of Transnational Law, p. 123-145 (2012).
[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. II.
[8] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. II.
[9] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. III.
[10] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. V.
[11] UNCITRAL Model Law on ICA (1985), art. 5.

(i) Interim Measures[12]

(ii) Appointing Arbitrators[13]

(iii) Set aside of arbitral awards[14]

(iv) Recognition and enforcement of awards[15]

Based on the analysis of this provision and its preparatory studies, it may be deduced that this Model Law greatly restricts the instances when courts can intervene in arbitration proceedings. As noted, the Model Law does not seek to prohibit or limit the "competent court" from participating in specific mediation assistance and oversight functions.[16] Numerous matters, including the appointment of arbitrators, the execution of interim measures, the facilitation of evidence gathering, the nullification of an award, and the recognition and enforcement of awards, are all subject to judicial intervention under the Model Law.[17] Furthermore, it confers upon the judiciary the right to re-evaluate matters relating to the tribunal's jurisdiction in compliance with the terms of the arbitration agreement. Once the arbitration procedure is complete, the Model Law authorizes courts to nullify the decision on specific grounds and permits parties to contest the decision.[18]

An arbitral award can only be invalidated by the court if the party requesting it provides evidence of the following: firstly, if one of the parties involved in the arbitration agreement was unable to understand or comply with the agreement due to a legal incapacity, or if the agreement itself is not legally valid; secondly, if the party making the request was not properly informed about the arbitrator was not allowed to select or otherwise debate his or her position during the arbitration process; third, if discussed in the award a dispute that was not originally included or falls outside the terms of the arbitration agreement, or if it includes decisions on matters that were not part of the agreement. However, no mechanism allows national courts to assess the substance of the tribunals' rulings.

[12] UNCITRAL Model Law on ICA (1985), art. 5.
[13] UNCITRAL Model Law on ICA 1985), art. 11, 13, 14.
[14] UNCITRAL Model Law on ICA (1985), art. 34-36.
[15] *Ibid*
[16] Park, William W. "The Interface Between National Courts and International Arbitration: Trends and Challenges." 55 (2), Harvard International Law Journal, p. 321-345 (2014).
[17] Redfern, Alan, and Martin Hunter. "National Courts and International Arbitration: Striking the Right Balance." 3 (1), Journal of International Dispute Settlement, p. 87-108 (2012).
[18] UNCITRAL Model Law Arbitration (1985), art.36.

1.1 Interim measures under Indian laws

The Arbitration and Conciliation Act of 1996, aimed at aligning with the Model Law, seeks to create a pro-arbitration legal framework in India, moving away from the more interventionist Arbitration Act of 1940. However, despite this intention to minimize judicial intervention, court interpretations, particularly in International Commercial Arbitration, have shown otherwise. Section 9 of the Act grants court the authority to provide interim measures, distinct from Section 17, which empowers arbitral tribunals to issue orders. While Section 9 obligates courts to act, Section 17 highlights a lack of legislative mechanism for the execution of interim tribunal orders. Further, in case of **M/s. Sundaram Finance Ltd. v. M/s. N.E.P.C. India Limited**[19] emphasized that Section 9[20] should facilitate arbitration proceedings rather than prolonging them. Additionally, the evaluation of Section 9 applications must consider the provisions of the Code of Civil Procedure, 1908, as highlighted in the **ITI Ltd v. Siemens Public Communications Network Ltd**[21] case.

Majority of the arbitration laws today confines the role of the domestic courts to get involved in the matters of arbitration, in case where the proceeding is pending before the arbitrator and then to review the awards passed by the arbitrator or the tribunal, as the case maybe.[22] As a result, the international arbitration procedure may become unpredictable because of the subjective character of rulings issued by local courts. Parties use arbitration as a method to settle their conflicts only when they are confident in the fairness of the decision-makers and the advantages that come with it. The potential absence of coherence and heightened unpredictability on a global scale might have a significant influence on international commerce.

2. PHASES OF JUDICIAL INTERVENTION IN COMMERCIAL ARBITRATION

The courts in international arbitration are empowered to intervene at any phase. This means and include that courts can intervene even at the start, during and after the arbitral proceedings are conducted. Although, the limit and extent of such interference changes on the basis of different phases of the arbitral proceedings.

[19] *M/s. Sundaram Finance Ltd. v. M/s. N.E.P.C. India Limited*, (1999) 2 SCC 479.
[20] Arbitration and Conciliation Act, 1996, § 9.
[21] *ITI Ltd v. Siemens Public Communications Network Ltd* (2002) 5 SCC 510
[22] *Supra*, note 3.

2.1. Role of Judiciary at the Initiation of the Arbitration

In the initial phase of the arbitration proceeding, the courts can intervene mainly in three circumstances: to enforce the arbitration agreement, if a party challenges the jurisdiction of the arbitrator or with respect to the tribunal's establishment.[23]

The very first intervention of domestic courts initiates when there is determination of the validity of the agreement. The Model Law as well as the NYC provides that there should be a written arbitration agreement as per A. 2 of the NYC. This is a mandate that such agreement should bear the signatures of the parties.

Further, the Convention signifies that "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."[24] The broader aspect of what constitutes a 'written agreement' is laid down under the 2006 Model Law which states as follows:

> *"An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."*[25]

The Model Law stipulates that arbitration agreements must be in writing but defines "writing" broadly to include any recorded content, allowing agreements to be made orally or in any other form as long as the agreement's content is documented. [26] Additionally, contractual references to documents containing arbitration clauses are considered valid arbitration agreements in writing. Courts, upon request, are mandated to assess the validity and enforceability of such agreements, as demonstrated in cases like **Arab African Energy Corp. Ltd v. Olieprodukten Nederl and BV**[27]. Moreover, in Model Law jurisdictions, courts have the authority to review

[23] UNCITRAL Analytical Commentary on the Draft Model Law, at 4. (September 4, 2024, 9:30 AM), https://www.mcgill.ca/arbitration/files/arbitration/Commentaireanalytique-en.pdf
[24] UNCITRAL Model Law Arbitration (1985), art 2.
[25] The Model Law, Article 7/2/.
[26] The Model Law, Article 7/2/.
[27] *Arab African Energy Corp. Ltd. v. Olieprodukten Nederl and B.V* [1983] 2 Lloyd's rep. 419, Queen's Bench division (commercial court).

arbitral tribunals' jurisdictional decisions, a principle known as 'competence competence'. This enables tribunals to determine their own jurisdiction, including the validity of arbitration agreements, subject to court control upon party request. Courts may intervene if there is a failure to establish the arbitral tribunal or challenge its independence or impartiality, particularly in the absence of applicable institutional or procedural rules.

2.2. Role of Judiciary during the Arbitration

In a general understanding, the Courts shall have limited power when the matter is at the stage of arbitration as the main object of the arbitration is to resolve the disputes outside the court.[28] However, in few situations, the arbitrator or the tribunal might require the aid of the Court during the proceedings are going on. The interference of the Courts can involve the aid in taking up of evidences provided by the parties, or to pass an order in furtherance to protect the property and any other related measures. In case of taking up of evidence, there is limit on the power of the arbitrator since it originates from the agreement of the parties. Arbitrators are not empowered to make decisions wherein any third party is allowed to provide evidence. Therefore, in order to fill this gap, majority of the countries empowers the Courts to aid the arbitrators in the aspect of taking up of evidence.

Article 27 of the Model Law provides that *"The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.*"[29] A bare reading of this provision implies that the parties or the arbitral tribunal can apply to the Court for the purpose of evidence taking, provided that there is proper endorsement from the Tribunal. Therefore, this type of interference by the Courts in the arbitration proceedings is mainly not questioned and is to an extent desirable because when the Tribunal is not empowered to provide measures, and the Tribunal agrees to such interference, it is lawful.

[28] AymenMasadeh, "The Court's Supportive Role in Arbitration Under the Law of United Arab Emirates", 1, INTERNATIONAL JOURNAL OF HUMANITIES AND MANAGEMENT SCIENCES (IJHMS), p.130 (2013).
[29] UNCITRAL Model Law on International Commercial Arbitration, Article 27.

2.3. Role of Judiciary after the Arbitration

In the post arbitration phase, the domestic plays have a pivotal role to play. This mainly includes powers to set aside the awards, appeals from the arbitral award and enforcing such awards. The parties' involvement in the arbitration process does not conclude with the issuance of an arbitration award and the conclusion of the arbitration proceedings. Failure to comply by the party obligated to do so could potentially compromise the efficacy of the award, thereby requiring court intervention. During the post-arbitration phase, litigation generally unfolds in two separate jurisdictions: firstly, courts situated at the arbitration venue, where a party may appeal or contest the award in accordance with the applicable arbitration law; and second, the court located at the enforcement place, where the creditor of the award requests that the judgment be accepted and implemented.[30]

In accordance with the Model Law, parties have the option to petition the national courts located at the seat of arbitration to vacate an arbitral award under specific circumstances. These circumstances include the award resolving a dispute that was not initially agreed upon for arbitration, one of the parties being unable to present their case, or the award encompassing matters that were not included in the arbitration agreement.[31]

Moreover, in the event that the arbitral tribunal or procedure deviates from the terms agreed upon by the parties, or if the subject matter of the dispute infringes upon public policy, legal action may be pursued. Enforcement of award provisions is reliant on the participation of national courts; there is little distinction between recognition and enforcement in practice.[32] The Model Law does not require a distinct recognition procedure, in contrast to the NYC.

3. INDIAN PERSPECTIVE ON JUDICIAL INTERVENTION

The establishment of contemporary arbitration in British India was signified by the Bengal Regulations of 1772, which marked the beginning of the evolution of arbitration law in India. Amid this progression, the Arbitration and Conciliation Act of 1996 signifies a momentous achievement. When disagreements emerge regarding the nomination of arbitrators, the courts may intervene initially and continue to do so by granting interim protection or other measures

[30] *Ibid.*
[31] UNCITRAL Model Law on International Commercial Arbitration, Article 34.
[32] Bungenberg M., Reinisch A, Recognition and Enforcement of Decisions. In: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. European Yearbook of International Economic Law. Springer, Berlin, Heidelberg, 155. (2020).

during the proceedings. In order to enforce or resolve disputes arising from the arbitral award, judicial intervention is necessary subsequent to its announcement. The Model Law, which was established by UNCITRAL in 1985 with the intention of standardising national arbitration statutes, has been embraced by more than sixty nations[33]. Although the Model Law permits courts to intervene in specific affairs such as interim protection, arbitrator nominations, and the enforcement of arbitral decisions, contemporary arbitration statutes generally enforce stringent restrictions on the degree of judicial intervention during the entirety of the arbitration procedure.[34]

In an effort to harmonise with the Model Law, the Arbitration and Conciliation Act of 1996 endeavors to establish a legal framework in India that is more favorable to arbitration, thereby departing from the more interventionist Arbitration Act of 1940.[35] Notwithstanding this objective to reduce judicial intervention, court rulings have demonstrated otherwise, specifically in the context of international commercial arbitration. In contrast to Section 17, which confers the power to issue orders on arbitral tribunals, Section 9 of the Act confers upon courts the jurisdiction to grant interim measures. Section 17 exposes the absence of a legislative mechanism to enforce interim tribunal orders, whereas Section 9 imposes a legal obligation on courts to take action. This deficiency has prompted recommendations for amendments, as exemplified in the **Sri Krishan v. Anand case**[36]. Furthermore, it is imperative to take into account the stipulations of the Code of Civil Procedure, 1908 when assessing Section 9 applications, as emphasised in the case of **ITI Ltd v. Siemens Public Communications Network Ltd**[37].

3.1. Before the arbitration proceedings:

Section 5 of the 1996 Act[38] mentions the permissible extent of court intervention prior to arbitration proceedings. In the case of **Fair Air Engineers Pvt Ltd. v. NK Modi**[39], The Supreme Court upheld the recognition of organisations constituted under the Consumer Protection Act, 1986, such as the *State Commission and the National Commission, under the*

[33] United Nations Commission on International Trade Law, Status: UNCITRAL Model Law on International Commercial Arbitration.
[34] UNCITRAL Model Law on International Commercial Arbitration Articles 34-36.
[35] R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co., (1994) 4 SCC 541.
[36] Sri Krishan v. Anand, (2009) 3 Arb LR 447 (Del).
[37] ITI Ltd V. Siemens Public Communications Network Ltd, 2002 (5) SCC 510.
[38] Arbitration and Conciliation Act, 1996, s. 5.
[39] Fair Air Engineers Pvt Ltd. v. NK Modi, AIR 1997 SC 533

Consumer Protection Act as "Judicial Authority." Similarly, entities like commissions formed under the Monopolies and Restrictive Trade Practices Act of 1969 were recognized as possessing judicial authority. Furthermore, in **Canara Bank v. Nuclear Power Corporation of India Ltd**[40], according to the Supreme Court, the judicial body could be the Company Law Board.

3.2. After Arbitral Proceedings:

Section 34 of the Arbitration and Conciliation Act establishes the permissible grounds for contesting arbitral awards, thereby defining the restricted scope of judicial intervention[41]. Notably, the enforceability of the arbitral award is suspended pending the disposition of a petition filed under this section. The Supreme Court, in **National Aluminium Co. Ltd. v. Pressteel & Fabrications**[42], favoured amendments that would rectify preexisting deficiencies. Furthermore, the court emphasised the significance of judicial intervention in arbitration proceedings being kept to a minimum, highlighting the parties' intentional choice to bypass court jurisdiction by utilising Alternative Dispute Resolution mechanisms. Nevertheless, the definition of "Indian public policy" as it appears in section 34(2) is ambiguous, thereby requiring judicial review. In **ONGC Ltd. v. Saw Pipes Ltd. (2003)[43],** the Supreme Court broadened the definition of public policy to include matters that have a sustained positive impact on the public. In doing so, it introduced the concept of "patent illegality" as an additional basis for challenge.

4. COMPARATIVE ANALYSIS OF LAWS OF DIFFERENT JURISDICTIONS

In the matter of conflict between the international commercial arbitration and domestic arbitration, few counties assume that in case of international commercial arbitration, the disputes would be comparatively broader and therefore, the parties involved will take up the matter themselves. Hence, they have adopted their specific codes only for international arbitration such as countries like Switzerland, Singapore, France, Colombia.

4.1. Singapore

As Singapore has ratified the Model Law, there has been bifurcation of international arbitration and domestic arbitration by the Courts of Singapore.

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[40] *Canara Bank v. Nuclear Power Corporation of India* Ltd, AIR 1999 SC 1505
[41] *P.R. Shah, Shres and Stock Broker (P) Ltd., v. B.H.H. Securities (P) Ltd*, AIR 2012 SC 1866
[42] *National Aluminum Co. Ltd. v. Pressteel & Fabrications*, (2004) 1 SCC 540
[43] *O.N.G.C. v. Saw Pipes*, (2003) 5 S.C.C. 705

For instance, in the landmark case of **Swift-Fortune Ltd v. Magnifica Marine SA**[44], it was held that there is no power of Courts to pass orders to aid any international arbitration owing to the territorial limits laid down by the law, save for certain circumstances mention under the International Arbitration Act ("IAA").

Also, the Court in a latter ruling diverted from the Swift Case and ruled that as per IAA, the courts are empowered to aid the international arbitrations conducted inside the country and arbitration conducted outside the country as well with the help of interim measures.[45]

Justice Belinda Ang explained the specific requirements of Section 12(1)[46] of the IAA, which specify the temporary actions that arbitral tribunals may take to guarantee the equitable progress of arbitration. The High Court has the authority to impose these measures, which are designed to ensure the correct conduct of arbitration, with its authorization, as specified in Section 12(6)[47] of the Act. In addition, Section 12(7)[48] of the Act includes Article 9 of the UNCITRAL Model Law[49], which grants the High Court the authority to issue interim measures in accordance with its domestic legislation. Importantly, these remedies may be requested from a court in a different nation than where the arbitration is taking place, and they do not conflict with arbitration agreements. A recent judgement in the Singapore Court of Appeal has provided clarification on the application of § 12(7) of the IAA. It has been established that this provision applies only to international arbitrations with Singapore as the seat, but does not extend to foreign arbitrations.[50] Furthermore, the court highlighted that § 12(7) does not possess autonomous legislative competence to provide relief under § 12(1), since it derives its jurisdiction from the Civil Law Act. Therefore, in the Swift Fortune case, the court was unable to award interim remedies, such as Mareva injunctions, since the plaintiff did not have a valid legal claim in a Singapore court.[51]

In the case of **ALC v. ALF**[52], the arbitral tribunal in the first in stance rejected the application of a party that filed for subpoena to be issued in order to compel an individual to reveal some documents. The Tribunal rejected on the ground of abuse of procedure. Later, the superior courts held that the intervention of court will be correct with respect to the limit that such has been allowed by the Model Law.

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[44] *Swift-Fortune Ltd v. Magnifica Marine SA*, [2006] 2 SING. L. R. 323.
[45] *Front Carriers Ltd v. Atlantic & Orient Shipping Corporation*, [2006] 3 SING. L. R. 854.
[46] Singapore International Arbitration Act, Cap. 143A, § 12(1).
[47] Singapore International Arbitration Act, Cap. 143A, § 12(6).
[48] Singapore International Arbitration Act, Cap. 143A, § 12(7).
[49] UNCITRAL Model Law on International Commercial Arbitration, Article 9.
[50] *Mareva Compania Naviera SA v. International Bulkcarriers SA*, [1975] 2 LLOYD'S REP 509
[51] *Karaha Bodas Co LLC v. Pertamina Energy Trading Ltd*, [2006] 1 SING.L.R. 112
[52] *ALC v. ALF*, High Court, Singapore, [2010] SGHC 231.

4.2. United Kingdom

In spite of the fact that English courts are authorised by statute to issue anti-arbitration injunctions, they do so infrequently and only in extraordinary situations—typically when it is apparent that the arbitration proceedings were improperly instituted. This position is exemplified by a recent case in **Weissfisch v. Julius**[53], in which the English High Court denied an application to nullify an arbitration agreement regulated by Swiss law and having its seat in Switzerland. Notwithstanding the arbitrator's status as an English attorney within the court's jurisdiction, jurisdiction was declined, with the court placing emphasis on the parties' explicit intention to resolve the dispute in Switzerland in accordance with Swiss law. These ruling highlights the dedication of the English courts to upholding the arbitration agreement between the involved parties.

Likewise, the plaintiff in **Elektrim S.A. v. Vivendi Universal S.A**.[54] petitioned for an injunction to prevent the London Court of International Arbitration's (LCIA) arbitration proceedings. Nevertheless, the court denied the injunction, arguing that the Arbitration Act provides only limited authority for judicial intervention. Notwithstanding the claimant's ability to furnish evidence of a breach of rights or vexatiousness during the arbitration process, the court declined to intervene in order to uphold the agreement between the parties to submit disputes to LCIA arbitration. Furthermore, the court emphasised its limited jurisdiction to review or reverse procedural determinations rendered by arbitrators, as such action would contravene the tenets of the Arbitration Act. This particular case serves to emphasise the English courts' reverence for arbitral tribunals and their regard for their independence, thereby reasserting their hesitancy to intervene in arbitration proceedings.

4.3. Switzerland

The Swiss legal system demonstrates a notable hesitancy in issuing anti-arbitration injunctions, preferring to delegate the majority of interim relief powers to arbitration tribunals. Appellate Division **Canton of Geneva ruled in the Air (PTY) Ltd. v. International Air Transport Association**[55] case that anti-suit injunctions, which include those against arbitration, are in conflict with the legal framework of Switzerland. The foundation of this position is predominantly the 'Competence-Competence' principle, which is an essential tenet of Swiss

[53] *Weissfisch v. Julius*, [2006] EWCA (Civ) 218.
[54] *Elektrim S. A. v. Vivendi Universal S. A.*, [2007] EWHC 571 (Comm.)
[55] *Canton of Geneva ruled in the Air (PTY) Ltd. v. International Air Transport Association* May 2, 2005, Case No. C/ 1043/2005-15SP (Switz.), translated in 23 A.S.A. BULL. 739 (2005).

law.[56] This principle posits that arbitral tribunals possess the prerogative to establish their own jurisdiction; any encroachment upon this principle is considered detrimental in the context of Swiss law.

4.4. France

It is quite possible in France that the courts therein are empowered to stay the arbitral proceedings before a foreign court, however, the French Nouveau Code de Procédure Civile (NCPC)[57] provides no specific expression regarding the measures that can be taken by the court. Although, A. 1458 that is applicable to domestic as well as international arbitration, states that in case a dispute is pending before the arbitrator is now presented before a domestic court, it shall declare the party incompetent unless the arbitration agreement is clearly void; however, the party is required to raise this issue. In this instance as well, the court defers to the arbitral tribunal, with few exceptions, the authority to ascertain the legitimacy and scope of the arbitration. In addition to this, A. 1448 of the NCPC states that when a dispute in question that is specifically related to arbitration agreement is presented to court, that court must refuse jurisdiction.

Domestic courts hold substantial power in the French legal system over party autonomy by promoting the use of arbitration as the means of resolving disputes in cases where a valid arbitration agreement is present and the parties have not mutually relinquished it. After the initiation of arbitration proceedings, arbitrators possess the authority to enforce parties' submission of evidence and may enforce penalties for failure to comply.[58] Moreover, tribunals are granted the authority to impose interim or provisional measures throughout the arbitration procedure, as stated in Article 1468. In the aftermath of an arbitration, the enforcement of arbitral awards is particularly favoured under French arbitration law. France, as a signatory to the New York Convention (NYC), maintains rigorous enforcement standards. Specifically, Article 1520 of the French Code of Civil Procedure (FCCP) restricts challenges to arbitration awards to predetermined grounds.[59]

[56] PHILIPPE FOUCHARD et al., INTERNATIONAL COMMERCIAL ARBITRATION 397 (Emmanuel Gaillard and John Savage eds., 1999).
[57] Nouveau Code de Procedure Civile (NCPC) (Fr.) (1975).
[58] Nouveau Code de Procedure Civile (NCPC), art. 1467 (Fr.) (1975).
[59] Nouveau Code de Procedure Civile (NCPC), art. 1520 (Fr.) (1975).

4.5. United States of America

The United States adopts a judicial stance that is supportive of arbitration. Arbitration agreements are regarded as legally enforceable contracts under the US Federal Arbitration Act (FAA).[60] Courts possess the power to suspend judicial proceedings and enforce arbitration. Any ambiguity concerning the extent of arbitration must be resolved in favour of arbitration, as required by the FAA. Courts have the authority to enforce arbitration agreements and compel arbitration in accordance with this mandate. During the course of the arbitration proceedings, the involved parties may file petitions with the court seeking evidence-related orders. The United States integrates the New York Convention (NYC) into its FAA subsequent to arbitration, thereby guaranteeing that the enforcement and acknowledgment of awards conform to the stringent criteria established by the NYC.

4.6. Sweden

Courts generally abstain from intervening in arbitration proceedings in Sweden, mirroring the stance of Switzerland, in accordance with the fundamental tenets of arbitration: contractual autonomy, confidence in arbitrators, and the advantages of a privately administered mechanism for resolving disputes.[61] Nevertheless, a noteworthy deviation from this principle exists, similar to France, with respect to the enforceability of arbitration accords. In spite of recognising the 'Competence-Competence' principle, Swedish courts retain the authority to render decisions regarding the enforceability of arbitration agreements at the request of any of the parties involved.

4.7. Germany

Germany is relatively distinct from the other nations mentioned. It is clarified in Section 1033 of the ZPO[62] that arbitration agreements are not in contradiction with court orders for interim measures in disputes. This provision functions as a declaration in essence, and the courts' jurisdiction concerning interim relief can be inferred from Sections 914 to 945 of the ZPO, which address interim protective measures in a general sense. This is consonant with the

[60] The US Federal Arbitration Act (FAA), July 30, 1947, Pub.L. 68–401, 43 Stat.
[61] Julian D M Lew, *Does National Court Involvement Undermine the International Arbitration Processes?* 24 American University International Law Review 509 (2009). New Arbitration Regime in Sweden, 10 WORLD ARB. & MEDIATION REP. 154, 155 (1999).
[62] Zivilprozessordnung (ZPO), § 1033 (Ger.).

customary German position that only the courts have the authority to grant interim relief. Notably, German legislation does not require the principal proceedings to be conducted in Germany in order to petition for interim relief. Courts may grant interim relief even in the absence of arbitration commencement at the time of application, provided that the parties can establish that the final award would be enforceable in Germany and that an urgent need for relief exists.[63] As a result, the German judiciary has broad authority to intervene in arbitration proceedings and agreements. However, this authority does not extend to foreign arbitrators located outside Germany; their awards remain unenforceable exclusively within Germany.

A prevalent trend in numerous jurisdictions is for courts to adopt a supportive stance in international commercial arbitration. This is supported by the recognition that parties voluntarily choose arbitration due to its efficiency and finality. A number of nations, including Germany, Singapore, France, Switzerland, the United Kingdom, and the United States, place a high value on the independence of arbitration proceedings. They adhere to arbitration agreements and avoid any form of unwarranted interference. The aforementioned consensus highlights the global agreement regarding the effectiveness of arbitration as the favored approach to resolve commercial conflicts that transcend national borders. This consensus fosters trust in global trade and guarantees a rigorous and streamlined arbitration procedure.

5. CURRENT TRENDS IN JUDICIAL INTERVENTION

5.1. Bharat Aluminum Co v. Kaiser Aluminum Technical Services[64]

The Supreme Court of India referred the BALCO case to a larger bench on the grounds of concerns regarding prior decisions. The case was subject to careful consideration, which incorporated perspectives from prominent arbitral institutions in India. The court placed a high value on arbitral autonomy in an effort to ensure that its decisions adhered to international arbitration principles.

The dispute pertained to the delivery of equipment and the modernization of facilities; as a result, it was resolved through arbitration in England. In India, the appellant intended to contest the awards in accordance with Section 34 of the Act. The court deliberated on whether international arbitrations were governed by Section 9 of the Act.

[63] Eric Schwartz & Jurgen Mark, Provisional Measures in International Arbitration – Part II: Perspectives from the ICC and Germany, 6 WORLD ARB. & MEDIATION REP. 52, 56 (1995).
[64] *Bharat Aluminium Co v. Kaiser Aluminium Technical Services*, AIR 2016 SC 1285

The court underscored the exclusivity of Part I in governing arbitrations conducted in India, thereby elucidating the differentiation between domestic and international awards as stipulated in the Act. It overturned prior decisions such as Bhatia International and ruled that Indian courts lack jurisdiction over arbitrations conducted outside of India. With the intention of fostering arbitral independence and diminishing judicial interference, the court's ruling was consistent with the international standards under the international commercial arbitration regime.

The principles established by the judgement are applicable to agreements executed subsequent to September 7, 2012. The ruling represents a transition towards a position in favour of arbitration, addressing prior limitations. The 2015 Amendment Act expanded the scope of Section 9 to include arbitrations situated in foreign jurisdictions, thereby addressing additional concerns.

5.2. Amazon.com NV Investment Holdings LLC Vs. Future Retail Limited and Ors.[65]

One of the most considerable legal disputes in India's retail industry is the one between Amazon and Future Group. The dispute that was initiated under an agreement, has evolved into an intricate legal dispute that transcends numerous jurisdictions, involving tribunals in Singapore and India. This dispute serves as a symbol of the more extensive difficulties and rivalry that exist in the retail and e-commerce industries of India.

The dispute began in May 2020 when arbitration proceedings were conducted. Amazon approached the Singapore International Arbitration Centre (SIAC) for Emergency Interim Relief so that there can be temporary stay on the proposed commercial transaction between Future Group and Reliance Retail. In lieu of this action, Future Group challenged the jurisdiction of the Arbitral Tribunal and hence, legal proceedings began in order to ascertain the SIAC's interim order's validity.

The major issue in the case was regarding the enforceability and validity of the interim order that was passed by the SIAC's Emergency Arbitrator. This includes scrutinising the legal validity of such orders in the domestic Indian courts and the extent of such on the concerned parties. Also, this case gives rise to more questions related to the implementation and interpretation of arbitration regulations in India.

Decisions of Various Courts: At the outset, the Delhi High Court confirmed the SIAC's interim order and held that that Future Group has acted in violation of contractual duties and imposing substantial fines. Later, Delhi High Court issued a stay order which was further challenged before the Apex Court of India to intervene. Such recent intervening by the Supreme

[65] *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors*, AIR 2021 SC 3723

Court halted the proceedings of the Delhi High Court proceedings relating to the case and further halted the execution of the Emergency Arbitrator's ruling.

Issues Before the SC

1. Whether the A&C Act contemplates an emergency arbitrator's award and whether Section 17 of the A&C Act classifies an emergency arbitrator's award as an order.
2. Is it possible to maintain an appeal under Order 43, Rule 1(r) of the Code of Civil Procedure a Section 17(2) order enforcing the award of the emergency arbitrator?

Decision of SC

The issue is whether the specified emergency awards can be enforced and whether they are stipulated in Section 17 of the Arbitration and Conciliation Act (A&C Act) was subject to thorough examination by the Supreme Court. It commenced by reiterating the tenet of party autonomy, wherein it was underscored that the involved parties are free to opt for emergency arbitration in accordance with institutional regulations that they have chosen. In accordance with the contextual interpretation of Section 17(1), the Court determined that the incorporation of emergency arbitrators complies with the definition of "arbitral tribunal" as stated in Section 2(1)(d) of the A&C Act.

The court acknowledged its consideration of the procedural aspect of arbitration, specifying that it commences with the service of the notice of arbitration, which may be completed prior to the appointment of arbitrators. Thus, emergency arbitration is facilitated by this interpretation, which permits Section 17 remedies even in the pre-tribunal phase. The court reaffirmed its dedication to expeditious and efficient resolution of disputes in accordance with the A/C Act in this manner. Additionally, the court's acknowledgment of emergency awards in accordance with the statutory definition in Section 17.1 confirmed that immediate interim relief is still possible through emergency arbitration. Thus, it assisted in reducing the workload of courts while maintaining prompt dispute resolution as its primary objective.

6. CONCLUSION AND SUGGESTIONS

To begin, it is apparent that the current legal framework exhibits a deficiency in precision concerning the differentiation between arbitration awards rendered domestically and those rendered internationally. The judiciary's capacity to intervene effectively is impeded by the ambiguity, which ultimately results in inconsistent judicial decisions. It is imperative to implement comprehensive reforms that delineate explicit standards for various categories of

arbitration awards and grant courts the authority to intervene or abstain from doing so in accordance with said standards in order to effectively tackle this matter.

Furthermore, the efficiency of arbitral tribunals is substantially concerned with the possibility of addressing interim protection measures. However, it is somewhat feasible because the enforcement process is under-realized. Therefore, the most effective way to address the issue is to implement strategies that enhance the efficiency of granting and enforcing arbitral tribunals' powers to issue interim orders. Therefore, the action, if introduced, would make the burdens on states' judicial systems objectively easier while making the process of conflict-solving faster. Also, the vital step is to create the best-reached environment in the Indian judiciary, which would strengthen the public's trust in the arbitration process. The following can be obtained through policy decisions, implementation directives, special training programs Education and extensive public sensitization in the form of awareness campaigns to educate judges and legal practitioners involved in arbitration on the procedures and the principles of arbitration would also help. An analysis of arbitration-friendly jurisdictions such as Singapore shows that improving the arbitration-related legal framework in India would encourage more arbiters to come to the country. India has the potential, through proper strategy implementation and compliance with international standards, to become the preferred destination for dispute resolutions. This would lead to more investments, improved economic growth, and a more heightened position among countries that enjoy the status of the international arbitration community.

THE EVOLUTION OF MEDICAL NEGLIGENCE LAW: A GLOBAL PERSPECTIVE WITH A FOCUS ON INDIA, THE UK, AND THE USA

Dr. Sudhir Kumar[1]

Abstract: *This research paper examines the historical development and contemporary state of medical negligence law in India, the United Kingdom, and the United States. By comparing and contrasting the legal frameworks, case law, and societal attitudes in these countries, the paper aims to identify key trends and patterns in the evolution of patient rights and healthcare provider liability. The paper will delve into the historical context of medical negligence law in each country, tracing its origins and significant milestones. It will also explore the factors that have influenced the development of these legal systems, including societal values, technological advancements, and economic conditions. A comparative analysis will be conducted to highlight similarities and differences between the legal frameworks in India, the UK, and the USA. Key areas of comparison will include the elements of medical negligence, the standard of care required of healthcare providers, the burden of proof, and the remedies available to injured patients. Furthermore, the paper will discuss the impact of international conventions, treaties, and best practices on the evolution of medical negligence law in these countries. It will also examine the role of professional bodies, regulatory agencies, and courts in shaping and enforcing medical negligence standards. By providing a comprehensive overview of the evolution of medical negligence law in India, the UK, and the USA, this research paper seeks to contribute to a deeper understanding of the legal and ethical challenges faced by healthcare systems worldwide.*

Key Words**:** *medical negligence, historical context, legal frameworks, international conventions and treaties, best practices, legal and ethical challenges.*

1.1 INTRODUCTION

Medical negligence occurs when a healthcare professional, such as a doctor, nurse, surgeon, or pharmacist, provides substandard care that results in harm to a patient. This can include errors in diagnosis, treatment, medication administration, or surgical procedures.

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Negligence is often characterized by a failure to exercise reasonable care, skill, or judgment, leading to adverse outcomes. While mistakes can happen, negligence implies a degree of carelessness or disregard for patient safety.

The evolution of medical negligence law is a complex and multifaceted issue with significant implications for patient safety and healthcare delivery. As societies have progressed and the medical field has become increasingly sophisticated, the legal framework governing the relationship between healthcare providers and patients has evolved to address emerging challenges and protect the rights of individuals.

Throughout history, patients have sought legal recourse when they believe they have been harmed by the negligence of healthcare professionals. However, the specific legal standards, remedies, and procedures governing medical negligence cases have varied significantly across different jurisdictions.

These three countries represent diverse legal systems and cultural contexts, providing a rich comparative analysis. By examining the historical development of medical negligence law in each nation, we can identify key trends, similarities, and differences that have shaped the legal landscape today.

1.2 HISTORICAL DEVELOPMENT AND CONTEMPORARY STATE OF MEDICAL NEGLIGENCE[2]

1.2.1 The Historical Development and Contemporary State of Medical Negligence Law in India

1.2.1.1 Historical Development

The concept of medical negligence in India has undergone a substantial transformation over time, shaped by a confluence of legal and societal influences. While there were instances of medical malpractice and associated legal remedies in ancient Indian texts, the modern legal framework for medical negligence emerged relatively recently.

(i) Pre-Independence Era:

During the British colonial period, Indian courts adopted common law principles of tort law, including the concept of negligence. However, the application of these principles to medical practice was limited and often resulted in inconsistent outcomes.

[2] Alexander Muacevic and John R Adler, "A History of Medical Liability: From Ancient Times to Today", Also available on https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10408696/

(ii) Post-Independence Era:

After India gained independence in 1947, the legal system underwent significant reforms. The Indian Contract Act, 1872, and the Indian Penal Code, 1860, were amended to incorporate provisions related to medical negligence. The Consumer Protection Act, 1986, also played a crucial role in providing a consumer-friendly mechanism for redressal of medical negligence cases.

1.2.1.2 Contemporary State of Medical Negligence Law[3]

Today, medical negligence law in India is a complex and evolving area of law. It is governed by a combination of statutory provisions, common law principles, and judicial precedents. Key aspects of the contemporary state of medical negligence law include:

(i) Consumer Protection Act:

This Act provides a consumer-friendly forum for redressal of medical negligence cases. Consumers can file complaints against healthcare providers for deficiency in services, including medical negligence.

(ii) Indian Medical Council (IMC) Regulations:

The IMC, the regulatory body for medical professionals in India, has issued regulations governing the conduct of doctors. These regulations set standards of medical practice and provide guidelines for handling complaints of medical negligence.

(iii) Judicial Precedents:

Indian courts have played a significant role in developing the law of medical negligence. Several landmark judgments have clarified the legal principles applicable to such cases.

(iv) Emerging Trends:

In recent years, there has been a growing awareness of medical negligence issues in India. This has led to increased litigation and a demand for stricter accountability from healthcare providers. Additionally, there have been calls for reforms to the legal framework to ensure more effective protection of patient rights.

[3] Sujeet Katiyar, "Contemporary State of Medical Negligence Law", Also available on https://www.linkedin.com/pulse/medical-negligence-india-comprehensive-examination-sujeet-katiyar-kgkff#:~:text=4.,in%20cases%20of%20gross%20negligence.

1.2.2 The Historical Development and Contemporary State of Medical Negligence Law[4] in the United Kingdom

1.2.2.1 Historical Development

The historical development and contemporary state of medical negligence law in the United Kingdom are shaped by a complex interplay of legal principles, societal expectations, and medical advancements.

(i) Early Common Law:

The roots of medical negligence law in the UK can be traced back to the early common law principles of negligence. The concept of duty of care, breach of duty, and causation were central to these early cases.

(ii) The Bolam Test (1957):

A significant milestone in the development of medical negligence law was the landmark case of *Bolam v. Friern Hospital Management Committee*. This case established the 'Bolam test,' which held that a doctor would not be negligent if their actions were in accordance with the practice accepted by a responsible body of medical opinion.[5]

(iii) The Bolitho Test (1998):

In *Bolitho v. City and Hackney Health Authority*, the Bolam test was refined. The court held that the expert opinion must be logically sound and based on proper reasoning. This modification introduced a greater degree of judicial scrutiny into medical practices.[6]

1.2.2.2 Contemporary State of Medical Negligence Law[7]

(i) Duty of Care:

The duty of care owed by healthcare professionals to their patients is a fundamental principle of medical negligence law. This duty extends to all aspects of patient care, including diagnosis, treatment, and advice.

(ii) Breach of Duty:

A breach of duty occurs when a healthcare professional fails to meet the standard of care expected of a reasonable person in their position. This standard is often determined by reference to the practice of a responsible body of medical opinion.

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[4] Alexander Muacevic and John R Adler, "A History of Medical Liability: From Ancient Times to Today", Also available on https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10408696/

[5] [1957] 1 WLR 582.

[6] [1996] 4 All ER 771.

[7] Richard Goldberg, "Medical Malpractice and Compensation in the UK", Chicago-Kent Law Review, vol. 7, December 2011, also available on https://scholarship.kentlaw.iit.edu/cgi/ 3828&context=cklawreview.

(iii) Causation:

To establish medical negligence, the claimant must prove that the breach of duty caused their injury or loss. This involves showing a causal link between the healthcare professional's negligence and the harm suffered.

(iv) Consent:

Obtaining informed consent from patients is a crucial aspect of medical negligence law. Patients must be provided with sufficient information about the proposed treatment, including the risks, benefits, and alternatives, to make informed decisions.

(v) Damages:

If medical negligence is established, the claimant may be entitled to damages to compensate for their loss or injury. These damages can include pain and suffering, loss of earnings, and medical expenses.

1.2.3 The Historical Development and Contemporary State of Medical Negligence Law in the United States[8]

1.2.3.1 Historical Development

The evolution of medical negligence law in the United States has been a complex journey, shaped by societal, technological, and legal developments. This response will provide a brief overview of its historical development and the contemporary state of the law.

(i) Early Common Law:

Initially, medical negligence cases were treated under the general principles of negligence law. Doctors were held to a standard of ordinary care, meaning they were expected to exercise the skill and care of an average practitioner in the same community.

(ii) The Rise of Expert Testimony:

As medical knowledge and practices became more specialized, courts began to rely heavily on expert testimony to determine whether a doctor had breached the standard of care. This shift helped to ensure that medical negligence cases were decided by professionals with the necessary expertise.

[8] Alexander Muacevic and John R Adler, "A History of Medical Liability: From Ancient Times to Today", Also available on https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10408696/

(iii) The Tort of Medical Battery:

In addition to negligence, the tort of battery has also played a role in medical malpractice cases. Battery occurs when a doctor performs a medical procedure on a patient without their consent. This can happen when a doctor performs a procedure that is different from what the patient agreed to or when the patient is unable to give informed consent.

(iv) The Doctrine of Res Ipsa Loquitur:

This Latin phrase means '*the thing speaks for itself*.' It is a legal doctrine that allows a plaintiff to establish negligence without direct evidence of the defendant's fault. In medical malpractice cases, res ipsa loquitur can be applied when the injury is of a kind that ordinarily does not occur in the absence of negligence and the injury was caused by an agency or instrumentality within the exclusive control of the defendant.

1.2.3.2 Contemporary State of Medical Negligence Law[9]

(i) Standard of Care:

The standard of care in medical negligence cases continues to be based on the conduct of a reasonably prudent medical professional in the same or similar circumstances. However, the specific standard can vary depending on the specialty of the doctor, the location of the practice, and other factors.

(ii) Informed Consent:

Informed consent is a critical element of medical negligence law. Doctors have a duty to disclose to their patients the risks, benefits, and alternatives of proposed medical procedures. Failure to obtain informed consent can be a basis for a medical malpractice claim.

(iii) Damages:

If a plaintiff can prove medical negligence, they may be entitled to damages. These damages can include economic losses, such as medical expenses and lost wages, as well as non-economic losses, such as pain and suffering.

(iv) Contributory Negligence:

In some states, the doctrine of contributory negligence can bar a plaintiff from recovering damages if their own negligence contributed to their injury. However, many states have modified this doctrine to allow for comparative negligence, which apportions fault between the plaintiff and defendant and reduces the plaintiff's damages accordingly.

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[9] B. Sonny Bal, "An Introduction to Medical Malpractice in the United States", Also available on https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/#:~:text=In%20the%20United%20States%2C%20medical,litigation%20in%20the%20United%20States.

1.3 LEGAL FRAMEWORK

1.3.1 Legal Framework for Medical Negligence in India[10]

The legal framework for medical negligence in India is governed primarily by the Indian Contract Act, 1872, and the Consumer Protection Act, 1986. However, specific provisions related to medical negligence can also be found in other relevant laws, such as the Indian Penal Code, 1860.

1.3.1.1 Indian Contract Act, 1872:

Breach of Contract:

When a doctor agrees to provide medical treatment to a patient, a contractual relationship is formed. If the doctor fails to provide the agreed-upon level of care, it constitutes a breach of contract. The patient can then sue for damages.

1.3.1.2 Consumer Protection Act, 1986:

Defective Services:

Medical treatment is considered a service. If a doctor provides defective medical services, it can be considered a deficiency under the Consumer Protection Act. The patient can file a complaint with the Consumer Disputes Redressal Commission (CDRC) to seek redress.

1.3.1.3 Indian Penal Code, 1860:

Criminal Negligence:

In cases of gross negligence that results in death or serious injury, the doctor may be liable under criminal law. Section 304A the Indian Penal Code (*now BNC*) contains provisions for culpable homicide and causing grievous hurt due to negligence.[11]

1.3.1.4 Other Relevant Laws:

(i) State Medical Councils:

Each state in India has a Medical Council that regulates the conduct of medical professionals. These councils can investigate complaints of medical negligence and take disciplinary action against errant doctors.

(ii) Civil Liability:

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[10] Amit Agrawal, "Medical negligence: Indian legal perspective", National Library of Medicine, Also available on https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109761/

[11] Section 304A, IPC reads as, "304A. Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

In addition to the above, a doctor can also be held liable under civil law for negligence. This can include compensation for pain and suffering, loss of income, and medical expenses.

1.3.1.5 Key Considerations:

(i) Standard of Care:

The standard of care expected of a doctor in India is that of a reasonably prudent medical professional in the same or similar circumstances.

(ii) Informed Consent:

Doctors have a duty to obtain informed consent from patients before performing any medical procedure. Failure to do so can be a basis for a medical negligence claim.

(iii) Vicarious Liability:

Hospitals can be held vicariously liable for the negligence of doctors employed by them, under the doctrine of respondent superior.

1.3.1.6 Recent Developments:

(i) National Medical Commission (NMC):

The establishment of the NMC in 2019 has brought about significant changes in the regulation of medical education and practice in India. The NMC has the power to investigate complaints of medical negligence and take disciplinary action against errant doctors.

(ii) Medical Negligence Claims Tribunal:

Some states in India have established Medical Negligence Claims Tribunals to expedite the resolution of medical negligence cases.

1.3.2 The Legal Framework for Medical Negligence in the United Kingdom[12]

The legal framework for medical negligence in the United Kingdom is governed primarily by common law principles and supplemented by statutory provisions. The primary legal basis for medical negligence claims is the tort of negligence, which requires the plaintiff to prove three essential elements:

1.3.2.1 Duty of Care:

[12] Ali Yagan, "Understanding medical negligence in the UK: a brief overview" Also available on https://www.eyenews.uk.com/education/top-tips/post/understanding-medical-negligence-in-the-uk-a-brief-overview#:~:text=Legal%20framework&text=The%20breach%20of%20duty%20caused,healthcare%20professional's%20actions%20or%20omissions.&text=The%20patient%20suffered%20actual%20harm,a%20result%20of%20the%20negligence.

The defendant (healthcare provider) owed a duty of care to the plaintiff (patient). This duty arises from the special relationship between a healthcare provider and patient, where the provider has the necessary skill and expertise to provide medical treatment.

1.3.2.2 Breach of Duty:

The defendant breached their duty of care by failing to meet the standard of care expected of a reasonably competent healthcare professional in the same circumstances. This standard is typically determined by expert evidence.

1.3.2.3 Causation:

The defendant's breach of duty caused the plaintiff's injury or loss. This requires the plaintiff to prove that their injury or loss was a direct and foreseeable consequence of the defendant's negligence.

In addition to common law principles, several statutory provisions also impact medical negligence law in the UK. These include:

(i) The Health and Social Care Act 2008:

This Act sets out the general duties of healthcare providers, including a duty to provide safe and effective care.

(ii) The Human Rights Act 1998:

This Act incorporates the European Convention on Human Rights into UK law, which includes a right to respect for private life and health. This can be relevant in medical negligence cases where a patient's rights have been violated.

(iii) The Consumer Rights Act 2015:

This Act applies to contracts for goods and services, including medical services. It provides consumers with certain rights, such as the right to goods and services that are of satisfactory quality and fit for purpose. This can be relevant in cases where a healthcare provider has provided substandard treatment.

It is important to note that the legal framework for medical negligence in the UK is constantly evolving, and there may be additional statutory provisions or case law that apply to specific situations. If you have a medical negligence claim, it is advisable to seek legal advice from a specialist medical negligence lawyer who can provide tailored guidance and representation.

1.3.3 The Legal Framework for Medical Negligence in the United States[13]

The legal framework for medical negligence in the United States is complex and multifaceted, involving various laws, regulations, and court decisions. Here are some key aspects of this framework:

1.3.3.1 Tort Law:

(i) Negligence:

The most common legal theory used in medical negligence cases is negligence. This involves proving four elements: duty of care, breach of duty, causation, and damages.

Duty of care: Healthcare providers have a duty to exercise reasonable care in their treatment of patients.

Breach of duty: The plaintiff must show that the healthcare provider failed to meet the standard of care expected of a reasonably prudent professional in the same or similar circumstances.

Causation: The plaintiff must prove that the healthcare provider's negligence was the direct cause of their injuries.

Damages: The plaintiff must prove that they suffered actual damages as a result of the healthcare provider's negligence.

(ii) Battery:

In some cases, medical negligence may be based on battery, which occurs when a healthcare provider performs a medical procedure on a patient without their consent. This can happen if the patient is not fully informed about the procedure or if they are unable to give consent.

1.3.3.2 Statutory Law:

(i) Medical Malpractice Acts:

Many states have enacted medical malpractice acts that set forth specific rules and procedures for medical negligence cases. These acts may address issues such as the statute of limitations, expert witness requirements, and caps on damages.

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[13] B. Sonny Bal, "An Introduction to Medical Malpractice in the United States", Also available on https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/#:~:text=In%20the%20United%20States%2C%20medical,litigation%20in%20the%20United%20States.

(ii) Informed Consent Laws:

Informed consent laws require healthcare providers to obtain informed consent from patients before performing medical procedures. These laws typically require the healthcare provider to explain the risks, benefits, and alternatives of the procedure, as well as any potential complications.

1.3.3.3 Regulatory Agencies:

(i) State Medical Boards:

State medical boards have the power to license and discipline healthcare providers. They can investigate complaints of medical negligence and take disciplinary action against healthcare providers who violate medical practice standards.

(ii) Federal Agencies:

Federal agencies such as the Food and Drug Administration (FDA) and the Centers for Medicare & Medicaid Services (CMS) also play a role in regulating healthcare. They can impose sanctions on healthcare providers who violate federal laws and regulations.

1.3.3.4 Court Decisions:

(i) Common Law:

Court decisions have played a significant role in shaping the law of medical negligence in the United States. Courts have interpreted and applied existing laws and regulations to develop new legal principles.

(ii) Expert Testimony:

Expert testimony is often crucial in medical negligence cases. Expert witnesses can provide testimony about the standard of care, causation, and damages.

It is important to note that the specific laws and regulations governing medical negligence can vary from state to state. Patients who believe they have been the victim of medical negligence should consult with an attorney to learn more about their rights and options.

1.4 THE IMPACT OF INTERNATIONAL CONVENTIONS, TREATIES, AND BEST PRACTICES ON MEDICAL NEGLIGENCE LAW IN INDIA, THE UK, AND THE UNITED STATES[14]

The evolution of medical negligence law in India, the UK, and the United States has been significantly influenced by international conventions, treaties, and best practices. These global standards have played a crucial role in shaping domestic legal frameworks, promoting patient safety, and ensuring accountability within the healthcare sector.

1.4.1 International Instruments:

1.4.1.1 World Health Organization (WHO) Guidelines

The WHO has issued numerous guidelines and recommendations on patient safety, medical education, and healthcare quality. These guidelines have provided valuable insights to policymakers and healthcare providers in India, the UK, and the United States, helping to inform the development of domestic laws and regulations.

1.4.1.2 International Health Regulations (IHR)

The IHR are binding health regulations adopted by WHO member states. While primarily focused on public health emergencies, they also address issues related to patient safety and healthcare quality. Compliance with the IHR can have a significant impact on the domestic legal framework, ensuring that countries have adequate measures in place to prevent and respond to healthcare crises.

1.4.1.3 United Nations Convention on the Rights of Persons with Disabilities

This convention, ratified by India, the UK, and the United States, sets out the rights of persons with disabilities. It includes provisions related to access to healthcare, including the right to be treated without discrimination on the basis of disability. This convention has helped to shape domestic laws and policies, ensuring that persons with disabilities have equal access to healthcare services.

[14] http://14.139.185.167:8080/jspui/bitstream/123456789/454/1/LM0320003-PHL.pdf

1.4.2 Impact on Domestic Law

1.4.2.1 Harmonization of Standards:

International conventions and treaties can help to harmonize legal standards across different jurisdictions. This can facilitate cross-border healthcare, reduce legal uncertainties, and promote patient safety.

1.4.2.2 Raising Awareness:

International instruments can raise awareness of important issues related to medical negligence, such as patient safety and accountability. This can lead to increased public pressure for reforms and improvements in the healthcare system.

1.4.2.3 Providing a Framework

International conventions and treaties can provide a framework for domestic legislation, helping to ensure that laws and regulations are aligned with global best practices. This can help to strengthen the legal system and improve the quality of healthcare.

1.4.3 Best Practices

1.4.3.1 Evidence-Based Medicine:

Adherence to evidence-based medicine principles can help to reduce medical errors and improve patient outcomes. International organizations such as the Cochrane Collaboration and the National Institutes of Health (NIH) provide evidence-based guidelines and resources that can be used to inform the development of domestic laws and regulations.

1.4.3.2 Quality Improvement Initiatives:

Quality improvement initiatives, such as accreditation and certification programs, can help to ensure that healthcare providers meet high standards of care. International organizations such as the Joint Commission International (JCI) and the International Organization for Standardization (ISO) offer accreditation programs that can be adopted by countries to improve the quality of their healthcare systems.

1.5 DEEPER UNDERSTANDING OF THE LEGAL AND ETHICAL CHALLENGES FACED BY HEALTHCARE SYSTEMS: INDIA, THE UK, AND THE USA AND WORLDWIDE[15]

The legal and ethical challenges faced by healthcare systems worldwide are complex and multifaceted. This response will delve into some of the key issues confronting India, the UK, and the USA.

1.5.1 India

1.5.1.1 Inadequate infrastructure:

India's healthcare system is often characterized by inadequate infrastructure, particularly in rural areas. This can lead to delayed or inadequate treatment, which can contribute to medical negligence.

1.5.1.2 Lack of trained healthcare professionals:

A shortage of trained healthcare professionals, especially in specialized fields, can also contribute to medical negligence. This is particularly acute in rural areas.

1.5.1.3 Corruption and bribery:

Corruption and bribery within the healthcare system can lead to substandard care, as healthcare providers may prioritize personal gain over patient welfare.

1.5.1.4 Cultural and religious factors:

Cultural and religious factors can influence the delivery of healthcare, potentially leading to disparities in treatment and outcomes.

1.5.2 The UK

1.5.2.1 Rising healthcare costs:

The UK's National Health Service (NHS) faces increasing pressure due to rising healthcare costs and an aging population. This can lead to rationing of care, which can raise ethical concerns about the allocation of resources.

1.5.2.2 Waiting times:

Long waiting times for essential treatments can have serious consequences for patients, including deterioration of their condition.

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[15] Legal And Ethical Challenges In Healthcare: A Cross-Disciplinary Perspective, Volume 2, Issue III Year 2023, Also available on https://icrep.cusat.ac.in/journal/d/0ea64135-80e7-49f2-ae54-c196748c740f

1.5.2.3 Medical errors:

Despite the NHS's focus on quality improvement, medical errors continue to occur, leading to legal and ethical challenges.

1.5.2.4 Privatization of healthcare:

The increasing privatization of healthcare services in the UK has raised concerns about equity and access to care.

1.5.3 The USA

1.5.3.1 High healthcare costs:

The US healthcare system is renowned for its high costs, which can make it difficult for many people to afford essential medical care.

1.5.3.2 **Medical errors:**

Despite advancements in medical technology, medical errors remain a significant problem in the US healthcare system.

1.5.3.3 **Defective medical devices:**

The use of defective medical devices can lead to serious injuries and deaths.

1.5.3.4 **Malpractice lawsuits:**

The prevalence of medical malpractice lawsuits can have a chilling effect on healthcare providers, leading to defensive medicine practices and increased costs.

1.5.4 Common Challenges Across All Three Countries:

1.5.4.1 Balancing patient autonomy and paternalism:

Healthcare providers must balance the patient's right to make informed decisions about their treatment with the need to provide paternalistic care in certain situations.

1.5.4.2 **Allocating scarce resources:**

As healthcare resources are often limited, difficult decisions must be made about how to allocate them. This can raise ethical concerns about fairness and equity.

1.5.4.3 **Maintaining confidentiality:**

Protecting patient privacy is a fundamental ethical principle in healthcare. However, there are situations where confidentiality may need to be breached to protect public health or prevent harm.

1.5.4.4 Addressing healthcare disparities:

Addressing healthcare disparities based on factors such as race, ethnicity, socioeconomic status, and geographic location is a major challenge for healthcare systems worldwide.

These are just a few of the legal and ethical challenges faced by healthcare systems in India, the UK, and the USA. Addressing these challenges requires a multifaceted approach that involves policymakers, healthcare providers, patients, and the public.

1.6 CASES AND DEVELOPMENTS IN MEDICAL NEGLIGENCE LAW: INDIA, THE UK, AND THE USA

1.6.1 India

***Achuthan v. State of Kerala* (1990):**

This landmark case established the doctrine of informed consent in India. The court held that doctors have a duty to disclose material risks and alternatives to patients before obtaining their consent for a medical procedure.[16]

***Jacob Mathew v. State of Punjab* (2005):**

The Supreme Court clarified the standard of care for doctors. The court held that doctors should be judged by the standard of a reasonably prudent doctor in the same or similar circumstances, taking into account factors such as the doctor's qualifications, experience, and the prevailing medical practice at the time.[17]

***V. Gopalaswamy v. State of Tamil Nadu* (2018):**

The Supreme Court emphasized the importance of expert evidence in medical negligence cases. The court held that expert testimony is crucial to establish the standard of care and whether the doctor has breached that standard.[18]

1.6.2 The UK

***Bolam v. Friern Hospital Management Committee* (1957):**

This case established the Bolam test, which states that a doctor is not negligent if their actions or omissions are in accordance with a practice accepted as proper by a responsible body of medical opinion.[19]

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[16] 959 AIR 490, 1959 SCR SUPL. (1) 787, AIR 1959 SUPREME COURT 490, 1960 KER LJ 62, 1959 KER LJ 103, 1959 SCJ 465, ILR (1960) KER 150
[17] 2005 AIR SCW 3685
[18] (2018) 3 SCC 398
[19] (1957) 1 WLR 582

***Bolitho v. City and Hackney Health Authority* (1998):**

The House of Lords modified the Bolam test, holding that the practice must be reasonable, as well as accepted by a responsible body of medical opinion.[20]

***Montgomery v. Lanarkshire Health Board* (2015):**

The Supreme Court further refined the law of informed consent, holding that doctors have a duty to take reasonable steps to ensure that patients are aware of the material risks of a proposed treatment and any reasonable alternatives.[21]

1.6.3 The USA

***Darling v. Charleston Community Memorial Hospital* (1965):**

This case established the doctrine of corporate negligence, holding hospitals liable for the negligence of their employees, even if the hospital itself did not directly cause the harm.[22]

***Roe v. Wade* (1973):**

While not directly a medical negligence case, Roe v. Wade had a significant impact on medical malpractice law by establishing a woman's right to abortion. This decision led to increased litigation involving medical procedures related to reproductive health.[23]

***Cruzan v. Director, Missouri Department of Health* (1990):**

The Supreme Court recognized a patient's right to refuse life-sustaining medical treatment. This decision has implications for cases involving end-of-life decisions and the scope of a doctor's duty of care.[24]

These are just a few examples of cases and developments in medical negligence law in India, the UK, and the USA. The law in each country is constantly evolving, and it is important to consult with a legal professional for the most up-to-date information.

1.7 CONCLUSION AND SUGGESTIONS

The evolution of medical negligence law in India, the UK, and the USA reflects a complex interplay of societal, technological, and legal developments. While each country has its unique legal framework, there are common themes that emerge from the global perspective. The trend across all three countries is towards increased accountability of healthcare providers.

[20] [1998] AC 232
[21] [2015] UKSC 11
[22] 33 Ill. 2d 326, 211 N.E.2d 253 (1965)
[23] 410 U.S. 113 (1973)
[24] 497 U.S. 261 (1990)

This is evident in the development of stricter legal standards, the expansion of patient rights, and the growing role of regulatory bodies. A significant shift has occurred from a narrow focus on individual liability to a broader emphasis on patient safety and quality of care. This has led to the development of new legal concepts, such as corporate negligence and informed consent, which aim to improve the overall healthcare system. International conventions, treaties, and best practices have played a crucial role in shaping medical negligence law in India, the UK, and the USA. These global standards have helped to harmonize legal frameworks, promote patient safety, and ensure accountability within the healthcare sector. Technological advancements have both positive and negative implications for medical negligence law. While new technologies can improve patient care, they can also create new risks and challenges. This has led to the need for ongoing legal developments to address the evolving landscape of healthcare.

As healthcare systems continue to evolve, so too will the legal frameworks that govern them. By understanding the key trends and developments in this area, policymakers, healthcare providers, and patients can work together to ensure that the law effectively protects patient rights, promotes patient safety, and fosters accountability within the healthcare sector. A more in-depth analysis of specific high-profile medical negligence cases in each country could provide valuable insights into the application and interpretation of the law. The rapid advancements in medical technology have implications for medical negligence law. Future research could explore how technology has influenced the standard of care, the definition of negligence, and the available remedies. A comparative analysis of medical negligence law in other countries, particularly those with different legal systems and cultural values, could provide a broader understanding of global trends and best practices. The availability and affordability of medical malpractice insurance can significantly impact the behavior of healthcare providers and the availability of care. Research could examine the relationship between insurance and medical negligence law. An analysis of patient safety initiatives implemented in each country could assess their effectiveness in reducing medical errors and improving patient outcomes.

A PERSPECTIVE ON NON-CONVENTIONAL TRADEMARK IN INDIA: EUROPEAN UNION AND UNITES STATES JURISDICTION

Tushar Tanwar[1]

Abstract**:** *In India, the concept of non-conventional marks continues to evolve as courts and regulators struggle with defining and protecting such innovative forms of trade mark. Unlike conventional marks which cover words, logos and symbols, the non-conventional mark includes sounds, scents, colors, shapes or even holograms. In spite of some difficulties in terms of distinctiveness and consumer perception, India's legal system is willing to recognise and safeguard these unconventional marks. Over the years, India's trademark market has evolved considerably and broadened beyond conventional symbols and words to include a wide range of non-conventional elements. Domestic law, foreign treaties and legal interpretations have influenced the recognition and protection of non-conventional marks in India. The rules governing the registration and enforcement of trade marks, which include non-conventional ones, are laid down in the Trade Marks Act 1999, accompanied by amendments and appropriate case law. In addition, the harmonization of trade mark standards has been facilitated by India's accession to international agreements such as the TRIPS Agreement, which has encouraged the recognition of non-conventional marks. On the other hand, the EU has taken a more progressive approach to the protection of non-conventional marks, offering a wider scope of protection. The EU Intellectual Property Office (EUIPO) recognizes a diverse range of unconventional marks, providing clearer guidelines for registration and enforcement. Likewise, the US, with its well-established legal framework, offers robust protection for non-conventional trademarks through the United States Patent and Trademark Office (USPTO), leveraging case law and statutory provisions. Therefore, this paper is primarily aimed at examining the regulatory situation of unconventional marks in advanced countries like the European Union and the U.S. as well as analysing India's position with regard to these marks so that appropriate suggestions and recommendations can be drawn up for further improvement.*

Keywords**:** *Non-conventional Trademark, India, European Union, Unites States, Intellectual Property, Comparative Analysis.*

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I. INTRODUCTION:

The practice of offering products and services to the public in exchange for profit has been a longstanding aspect of human society, dating back to ancient times. Over the years, the business landscape has become increasingly complex and competitive, with individuals and organizations striving to secure dominant positions within it. This drive for success has sometimes led to unethical tactics, including the infringement of trademarks. Consequently, trademark violations are prevalent globally.

In the age of globalization, trademarks stand out as a crucial form of intellectual property. They serve as identifiers that distinguish a company's products from those of its competitors, communicating to consumers the source and characteristics of these goods. This fosters brand recognition and reputation within the market, establishing a business's unique identity. A strong trademark not only promotes sales but also represents the goodwill and quality associated with the products. By indicating the origin of goods, trademarks protect the interests of both consumers and traders.[1]

Trademark law is a captivating field within intellectual property law, with recent changes adding to its intrigue.[2] Essentially, Trademarks serve as trade-marks that facilitate the identification of a particular brand, service or product on the market by consumers.[3] It shields manufacturers or proprietors from unauthorized replication of their products and ensures consumers' interests are safeguarded while preventing confusion. Traditionally, trademarks protect symbols, logos, names, and other conventional marks.[4] However, intensified competition in the physical goods sector necessitates brands to stand out, leading to the adoption of innovative non-traditional trademarks for product identification.

Non-traditional or unconventional trademarks encompass marks that deviate from the typical categories and include sensory elements such as touch, scent, color, configuration, quality,

[1] D.P. Mittal, Trademark: Passing-off & Geographical Indication of goods law & Procedure, (Taxman Publication, 2015).
[2] Rachna R. Kurup & Nimita Aksa Pradeep, Non-Conventional Trademarks in India: The What, the Why, & the How, 1 E-JAIRIPA 131, 133-134(2020).
[3] Vatsala Sahay, Conventionalising Trademarks of Sounds and Scents: A Cross: Jurisdictional Study, 6 NALSAR SLR 128, 128-141 (2011), https://www.nalsar.ac.in/images/NSLR%20Vol%206%202011.pdf
[4] Sanya Kapoor & Riya Gupta, The Five Senses and Non- Traditional Trademarks, 8 JCIL 121, 124-126 (2018).

sound, and taste.[5] While trademarks protection typically extends to marks that can be visually depicted, non-traditional trademarks are registered and safeguarded due to their capability to uniquely identify products in consumers' minds. The TRIPS Agreement governs the registration and safeguards the trade marks, which does not mandate that a trademark be tangible or visually perceptible.[6] As a result, non-traditional trademarks, particularly sound marks, have become increasingly prevalent in the US and the EU.

II. TRADE MARKS LAW IN INDIA:

Prior to 1940, India did not have any formal legislation concerning trademarks, and instead, the legal framework governing trademarks was rooted in common law principles.[7] This framework closely resembled the laws observed in England before the enactment of the First Registration Act in 1875.

The Trade Marks Act of 1940 established procedures for registering and legally protecting trademarks in India. This Act was later replaced by the Trade and Merchandise Act of 1958, which in turn was repealed by the Trade Marks Act of 1999, effective from 2003. The Trade Marks Act of 1999 brought significant revisions to trademark law. While certain aspects concerning unregistered trademarks are now codified, others remain based on common law, requiring reference to court rulings for clarification.

The decision to amend the current laws of the nation was prompted by the growing demands of trade and industry, as well as the forces of globalization, aiming to foster harmonious trading practices. A significant driving force behind this revision was the necessity to align with the regulations outlined in the (TRIPS), following India's accession to the (WTO) in 1995. India was obligated to ensure its trade laws conformed to the stipulations of the TRIPS Agreement. As a result, the Trade Marks Act, 1999 was enacted on December 30 of that year and was enforced starting from September 15, 2003. In the case of **Gujarat Bottling Co Ltd.**[8], the Supreme Court affirmed that the initial legislation that introduced mechanisms for registering

[5] Mohit Joshi, Smell Mark: A New Era, 3 IJLMH 607, 608(2020), https://www.ijlmh.com/wp-content/uploads/Smell-Mark-A-New-Era.pdf
[6] Dr. Mwirigi, K. Charles & T. Sowmya Krishna, Registrability of Non-Conventional Trademark: A Critical Analysis, 6 IJRAR 914, 916-923 (2019).
[7] Siddhartha Mohanty, Trademark Law in India, Legal Service India (March 21, 2024, 11.45 AM), https://www.legalserviceindia.com/legal/article-8611-trademark-law-in-india.html
[8] *M/S Gujarat Bottling Co. Ltd. & Ors. v. The Coca Cola Co. & Ors*, AIR 1995 SC 2372.

and legally safeguarding trademarks in India was the Trade Marks Act of 1940. Prior to 1940, India's trademark law was grounded in common law principles resembling those in England before the enactment of the Trademarks Registration Act in 1875. The Trade Marks Act of 1999 seeks to amend and unify the legislation governing trademarks, aiming to enhance trademark registration, protection for goods and services, and the prevention of fraudulent mark usage.[9]

III. KINDS OF UNCONVENTIONAL TRADEMARK:

1. Smell Marks:

Smell, being a potent sense, holds the capacity to evoke past memories effortlessly. The registration and protection of scents as trademarks is recognised by a number of countries, but the process remains difficult because smells cannot be visually represented or they require considerable effort in order to demonstrate their distinctive character.[10] Some attempts have involved depicting the scent through chemical formulas. Nevertheless, certain companies have managed to navigate these obstacles successfully and registered smells as their trademarks. Examples include a UK tire company trademarking the scent of roses and a London-based company trademarking the smell of beer in their dart flights.

2. Taste Marks:

Depicting a taste mark is widely regarded as particularly demanding and complex compared to other non-traditional marks. Nonetheless, certain nation have allowed the registration of flavours as trademarks for product identification in the commercial sphere.[11] Typically, taste marks are described through written explanations. Similar to smell marks, it's essential for taste marks to be distinguishable from the product's inherent function. However, there is ongoing debate and discourse surrounding the registration of taste as trademarks, especially for services.

3. Movement Marks:

Some nations permit the trademark registration of dynamic media such as moving pictures, videos, cinematography, and film excerpts. Notable examples of motion trademarks include those associated with major film studios like 20th Century Fox Movies and Columbia Pictures,

[9] *M/S Meghraj Biscuits Industries Ltd v. Commissioner of Central Excise*, (2007) 3 SSC 780.
[10] WIPO, https://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html, (last visited March 22, 2024).
[11] Lisa P. Lukose, Non-Traditional Trademark: A Crtique, 57 JILI 197, 210 (2015).

as well as the animated logo that appears upon opening a Windows desktop, representing Microsoft Windows etc.[12] In India, the registration of motion marks is gaining traction, particularly due to the presence of numerous prominent movie companies in the country.

4. **Touch Marks:**

Touch marks, also referred to as texture marks, are less commonly employed compared to other types of trademarks, making them the least sought-after form of non-conventional trademark. When seeking registration for a touch mark, it's crucial for it to convey significance rather than merely serving as decorative packaging for products or services.[13] Examples of Touch marks include the velvet texture of Khvanchkara wine bottles and the leather-like material used in the packaging of brandy or grappa.

5. **Color Marks:**

Color is ubiquitous and its distinctiveness poses an ongoing challenge. While combinations of colors are accepted as trademarks, registering a single color mark remains ambiguous. Single color marks lack inherent distinctiveness and may cause confusion among consumers due to the multitude of shades available for any given color.[14]

6. **Shape Marks:**

Similar to colors, textures, and other unconventional trademarks, the shape of a product can also receive protection if consumers associate that specific shape with the product. Both the Trade Marks Act of 1999 and the UK Trade Mark Act of 1994 include shapes within their definitions of a trademark.[15] However, like other non- conventional trademarks, registering shape marks presents numerous challenges due to difficulties in graphical representation and demonstrating distinctiveness. Nevertheless, several companies have successfully protected the shape of their products, such as the distinctive triangular shape of Toblerone chocolate, the design of Zippo lighters, and the iconic contour shape of Coca-Cola bottles, etc.[16]

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[12] Archi Bhatia, Registration of Motion Mark as Trademark, blog.iPleaders (March 23, 2024, 10:30 PM).
[13] Tanisha Aggarwal & Vanshaj Mehta, Hear Me, Touch Me, Taste Me, Smell Me: Conventionalizing Non-Conventional Trademark in India, 3 JCIL 1, 1-22 (2017).
[14] M M S Kharki, Non- Traditional Areas of Intellectual Property Protection: Colour, Sound, Taste, Smell, Shape, Slogan and Trade Dress, 10 JIPR 499, 502-506 (2015).
[15] Lisa P. Lukose, Non-Traditional Trademark: A Crtique, 57 JILI 197, 210 (2015).
[16] Dr. Mohan Dewan, Registering shape marks in India: guidelines and processes, Lexology (March 23, 2024, 12:30 PM), https://www.lexology.com/library/detail.aspx?g=94e581ac-5333-4a72-8dfc-111d746af82d.

7. **Sound Marks:**

Sound marks, also known as auditory marks, encompass any auditory elements. Among non-conventional trademarks, sound marks are the most frequently registered and protected, experiencing significant popularity, particularly in the United States. They serve the crucial role of aiding consumers in distinguishing a specific product in the marketplace without inducing confusion. Unlike other non-conventional trademarks, sound marks can be graphically represented using musical notation, with or without accompanying words. Some of the earliest and most renowned examples of registered sound trademarks include the Harley Davidson sound, the Nokia tune, and the Tarzan Yell, etc.[17]

IV. COMPARATIVE ANALYSIS OF UNCONVENTIONAL TRADEMARK IN VARIOUS JURISDICTION:

A. European Union (EU):

The registration of trade marks in the UK and its dependent territory, the Isle of Mann,[18] is managed and supervised by the Trade Marks Act 1994, which has been implemented to comply with EU Directive 89/104/EEC. In 1994,[19] sought trademark status for the scent of its perfume Chanel No. 5, marking the first attempt at an olfactory trademark under the Act. However, this request was denied because the fragrance was considered inseparable from the product itself.[20] Concurrently, Sumitomo Rubber Co. successfully obtained trademark approval for the scent of roses used in their tires, and Unicorn products secured trademark status for the aroma of beer in their darts.

In determining whether or not a trademark application is accepted or rejected within the European Union, graphical representation has always been a decisive factor. Mr. Sieckmann submitted an application for trademark protection of a particular scent on behalf of his company in the important case **Raf Sieckmann.**[21] The application included various details such as the scent's chemical composition, formula, written description, and a sample. Despite this

[17] Dev Gangjee, Non-Conventional Trade Marks in India, 22 NLSIR 67, 82 (2010).
[18] Paul Leo Carl Torremans, Trademark Law: Is Europe Moving Towards an Unduly Wide Approach for anyone to follow the example? 10 JIPR 127, 127-132 (2005).
[19] Rachna R. Kurup & Nimita Aksa Pradeep, Non-Conventional Trademarks in India: The What, the Why, & the How, 1 E-JAIRIPA 131, 133-134(2020).
[20] Nathan K.G Lau, Registration of Olfactory Marks as Trademarks: Insurmountable Problems? ,16 SALJ 264, 265 (2024).
[21] Raf Sieckmann v. Deutsches Patent und Markenamt, Case C-273/00, European Court of Justice.

comprehensive submission, the trademark status was denied due to insufficient graphical representation. Article 2 of European Union Directive 89/104/EEC was referred to by the European Court of Justice and stressed that the samples did not meet the criteria for graphical representation. They further noted that while verbal descriptions could serve as a form of graphical representation, they were inadequate for capturing the essence of a scent. Additionally, the ECJ ruled that chemical compositions and formulas only represented the ingredients rather than the scent itself. Consequently, the court stressed the importance of clear, precise, accessible, understandable, durable, and objective graphical representation for trademark applications.

On the basis of European Union Directive 89/104/EEC and precedents such as the Seickmann case, the European Court of Justice held that the sound could be trademarked if it was unique and could be visually represented in the case of **Shield Mark BV v. Kist**.[22] They clarified that mere verbal descriptions or onomatopoeia were insufficient for graphical representation, emphasizing the use of musical notations or similar methods. This case set a precedent for trademark protection of sounds. However, subsequent changes in EU trademark directives and regulations, such as Directive 2015/2436 and Regulation 2015/2424, have removed the requirement for graphical representation. This alteration has facilitated the registration of unconventional trademarks, including those related to smell, taste, motion, feel, color, structure, and sound.

B. United States (US):

In the United States, the approach to unconventional trademarks differs from that of other regions like the EU and India. The regulations governing trademark registration and protection are outlined in the Lanham Act. According to this act, trademarks can be protected if they are utilized to differentiate products or resources from one business to others, without the necessity of visual depiction.[23] The aim of requiring graphical representation is to inform other businesses about the registered trademarks.[24] Section 10 of the Lanham Act outlines trademarks negatively and specifies the conditions for their registry. In accordance with this provision, trademarks are required to comply with criteria such as malfunctioning, diversity or external

[22] *Shield Mark BV v. Kist*, Case C-283/01, European Court of Justice.
[23] Linda B. Samuels & Jeffry M. Samuels, Color Trademarks: Protection under U.S Law, 15 JPPM 303, 303-307 (1996).
[24] Kuruvila M Jacob & Nidhi Kulkarni, Non- Conventional Trademark: Has India Secured and Equal Footing, 47 IJIPL 47, 47-72 (2018).

characteristics which assist consumers in distinguishing a particular product from other products.

The deliberate decision by the 1988 Congress to retain terms such as "symbols and devices" in the trademark definition u/s 15 of the Act was aimed at encompassing non-traditional trademarks like smells, sounds, and shapes for registration. Therefore, the registration and safety of sounds and scents are not hindered by US trademark law. In **Qualitex Co. v. Jacobson Products and Co**., the accommodating attitude of the Supreme Court in relation to registration of Non-Traditional marks is also highlighted.[25] Here, the Court emphasized that the key requirement for trademark registration and protection is distinctiveness, rather than the ability to be graphically represented.[26]

There are two main types of functionalities defences against trademark infringement claims: 'traditional functionality' and 'aesthetic functionality'. Traditional functionality defense is applicable if a feature is crucial to the product's use or significantly impacts its cost or quality, in which case trademark protection is not granted. It's often deemed more appropriate to seek patent protection, given its renewable nature. Even if a product doesn't possess traditional functionality, it must pass the aesthetic functionality test to gain competitive advantages. In general, the United States of America appears to have a high flexibility and adaptability when it comes to registration and protection of intangible marks such as smells, sounds or visual irremovable marks.

Among the earliest and widely recognized non-traditional trademarks is the NBC Jingle, registered in 1970 within the category of sensational. Subsequently, several companies achieved success in registering their distinctive mark, including MGM with its lion roar and 20th Century movies. The US maintains a liberal approach towards unconventional marks and remains receptive to emerging developments in this area.

V. UNCONVENTIONAL TRADEMARK IN INDIA:

The statutory definition of the mark is very comprehensive within India's trademark law. According to Section 2(1)(zb) of the Trade Marks Act, 1999, "A trademark is described as a

[25] *Qualitex Co. v. Jacobson Products Co.,* 514 US 159 (1995).
[26] Brinks Hofer Gilson & Lione, The Sound of Non- Conventional Marks in the United States, WTR 94, 94-95 (2007).

mark that can be visually represented and serves to distinguish the goods or services of one entity from those of others". This definition encompasses various elements such as the shape of product, cover, & combinations of colors. Additionally, Section 2(1)(m) defines "*a mark as including devices, brands, labels, names, signatures, words, numerals, and combinations thereof".* Consequently, unconventional trademarks are gradually gaining recognition within Indian legal discourse.

A. Sound Mark

Two notable examples of sound marks in India are Yahoo Inc.'s[27] and ICICI Bank's corporate jingle, which Was given trademark status in 2008 and 2011 separately. In each case, the grant of a sound mark to an Indian entity is regarded as the earliest instance in which such a mark has been issued in India. Additional instances of sound marks in India encompass Britannia Industries' four-note bell sound, the default ringtone of Nokia mobile phones, the iconic roar of the Metro-Goldwyn-Mayer (MGM) lion, the melodious sequence associated with Raymond: The Complete Man, the distinctive Tarzan yell from Edgar Rice Burroughs' works, and the theme track of the National Stock Exchange (NSE).[28]

In accordance with Section 26(5) of the Trade Marks Rules, 2017, the Office of the Registrar of Trade Marks shall be required to submit an MP3 recording of the sound, not exceeding 30 seconds in duration, for registration of the sound as a trade mark in India. In addition, there must also be a visual representation of the sound's note structure. Moreover, as per the Draft Manual of Trade Marks career and policy, the exercise must be explicitly state that the trademark being look for a sound. If this is not the case, it shall be presumed to be for a word and shall be processed accordingly in the course of the examination.

B. Color Mark

There are two types of category mark: first, those representing single colors and second, those representing combinations of colors.[29] The Trade Marks Act, 1999, specifically mentions the

[27] P.Manoj, Yahoo awarded India ’ s first sound mark; Nokia in queue, Livemint (August 22, 2008, 1:01 AM), https://www.livemint.com/Home-Page/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-first-sound-mark-Nokia-in-queue.html.
[28] Lubna Kably, Jingles and chimes can make trademark noise, Times of India (March 27, 2017, 2:39 AM), https://timesofindia.indiatimes.com/business/india-business/jingles-and-chimes-can-make-trademark-noise/articleshow/57845491.cms.
[29] Althaaf Marsoof, The Registrability of Unconventional in India & Srilanka: A comparative analysis, 12 JIPR 497, 497-506 (2007).

mixture of colors in Sections 2(1) (m), 2(1) (zb), and 10(1). According to Section 26(2) of the Trade Marks Rules, 2017, the practice for trademarks involving combinations of colors must include a reproduction of the mark. However, the Act does not address single color trademarks. In addition, according to Section 9(1)(a) of the Act it is prohibited to register a trademark which does not contain any distinguishing features, which raises concerns regarding the registration of single color marks in India, as they are commonly used and may not inherently distinguish one product from another. Additionally, the theory of color depletion, which suggests the limited availability of distinct colors, complicates the issue further.[30] Consequently, the legal framework surrounding the trademarking of colors in India appears ambiguous, leaving considerable discretion to the judiciary in such matters.

The position of color trademarks in India remains uncertain due to inconsistent judgments delivered by the courts over the years. In the 2003 case of **Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd**.[31], the Delhi High Court prohibited the defendant from using the red and white color combination of the plaintiff in their product packaging, stating that mimicking another product's color amounted to passing off. However, in the 2007 case of **Cipla Ltd. v. M.K. Pharmaceuticals**[32], where the plaintiff sought an interim injunction against the defendant's use of orange color similar to their own, the court ruled that monopolizing colours was not permissible. Consequently, the court determined that replicating the color of another product did not constitute passing off.

C. Shape Mark

The Trade Marks Act, 1999 acknowledges the recognition of the shape of goods as a trademark under Sections 2(1)(m) and 2(1) (zb), similar to the combination of colours, provided that the shape is distinctive and can be visually represented. Section 9(3) of the Act outlines criteria for registering shape marks, stating that the shape must be distinct from the product or service and not merely due to its nature. It also prohibits shape trademarks that serve a functional purpose or add substantial value to the product, potentially disadvantaging other manufacturers of similar goods or services. The Draft Manual of Trade Marks Practice and Procedure provides further clarification on the registration process for shape marks in India.

[30] Dev Gangjee, Non- Conventional Trademarks in India, 22 NLSIR 67, 67-95 (2010).
[31] *Colgate Palmolive Co. & Anr. v. Anchor Health and Beauty care Pvt. Ltd.*, 108(2003)DLT 51.
[32] *Cipla Ltd. v. M.K. Pharmaceuticals*, 2008 (36) PTC 166 (DEL).

Indian courts have generally maintained consistency in their rulings regarding the use of shape as a trademark. In the case of **Lilly ICOS LLC and Anr. v. Maiden Pharmaceuticals Ltd.**[33], the Delhi High Court ruled in favor of the plaintiff, who alleged that the defendant had copied the almond shape of their product. The court issued an injunction against the defendants, concluding that they had adopted the shape with deceptive intent. Similarly, in the case of **Gorbatschow Wodka KG v. John Distilleries Ltd**.[34], the Bombay High Court recognized the shape of the plaintiff's vodka bottles as a trademark. The court granted an injunction in their favor, agreeing that the distinctive shape contributed to the goodwill of their product.

The use of shape as a trade mark has already been recognised by the Indian judicial system before the current law was enacted. In the 1990 case of **MRF Ltd. v. Metro Tyres Ltd**.,[35] the applicant applied for an injunction to stop the accused from producing and vending tires with trade design similar to applicant design. The High Court of Delhi has ruled in favor of the plaintiffs, stating that similar patterns would cause confusion among consumers regarding the product's origin.

D. Other Unconventional Trademarks

In India, besides sound, color, and shape marks, there are various other non-conventional trademarks Such as scent, taste, touch or motion marks. In India, such marks are in fact not explicitly covered by trade mark laws like the Trade Marks Act of 1999 or Trademarks Rules of 2017 and a draft manual on trading mark law. While terms like "shape of goods" and "combination of colors" are specified in the illustration of "trademark" in the Trade Marks Act, 1999. It is therefore hard to determine the lawful status of those marks in India due to this lack of specific legislation. Moreover, the registration of such marks is further complicated and difficult due to requirements such as Section 26 (1) of the Trade Marks Rules, which require a visual representation of the mark's status.[36]

VI. CONCLUSION:

Trademarks plays an important part in helping consumers identify the origin of products, contributing to the development of goodwill, brand image, and reputation. They also foster

[33] *Lilly ICOS LLC and Anr. v. Maiden Pharmaceuticals Ltd*., 2009 (39) PTC 666 (Del).
[34] *Gorbatschow Wodka KG v. John Distilleries Ltd*., 2011 (47) PTC 100 (Bom).
[35] *MRF Ltd. v. Metro Tyres Ltd*., 1990 PTC 101.
[36] Neha Mishra, Registration of Non- Traditional Trademark, 13 JIPR 43, 43-50 (2008).

brand loyalty among consumers. Nowadays, businesses invest their significant resources into build their goods and services distinctive to set them apart from competitors. However, traditional trademarks are no longer the sole means of product differentiation. Modern businesses target all senses of consumers, including smell, sound, taste, and touch. This shift increases the risk of trademark infringement and passing off, posing challenges for businesses. Unconventional trademarks offer a solution in this evolving landscape. However, in India, there's a lack of comprehensive legal understanding and acceptance of unconventional marks. The registration of unconventional marks in India is relatively low compared to other countries, such as the EU and the US. It's essential for India to learn from the trademark laws of progressive countries and introduce mandatory proviso in its statutes to address this gap.

Recommendations & Suggestions:

Several recommendations & Suggestions can be put forward to overcome these challenges and support the recognition of no conventional trade mark in India:

i. Legislative Amendments: In order to explicitly recognise and provide guidelines for the registry and protection of non-traditional Trademarks, it is recommended that the Trade Marks Act 1999 be amended. This action will bring clarity and assurance to businesses and law practitioners.

ii. Legal Jurisprudence Development: Initiatives to improve case law and precedent in the field of novelty Trademarks should be pursued. It can be done by strengthening the judiciary's scrutiny and interpretation of current legislation.

iii. Stakeholder Awareness: To inform businesses, legal professionals and the public about the importance and potential of trademarks that do not follow traditional patterns it is essential to organise awareness campaigns and educational initiatives.

iv. International Best Practices: In order to integrate effective practices into its legal framework, India should study the trademark laws of developed countries. It also includes the establishment of procedures for registration and protection of nonconventional marks, as well as dispute resolution mechanisms related to those marks.

PRESERVING FREEDOM: RIGHT TO LIBERTY VIS-À-VIS DOCTRINE OF BAIL RULE JAIL EXCEPTION REFINED: AN APPRAISAL OF PMLA/UAPA

Dr. Poonamdeep Kaur[1]

Abstract**:** *The right to bail, a crucial statutory right, is constitutionally protected under Article 21 of the Constitution of India. The nature of a statute dictates the conditions of bail for an accused. If the offence falls under ordinary penal law, the bail conditions are less stringent. However, if it falls under stringent laws like the Prevention of Money Laundering Act, 2002, or the Unlawful Activities (Prevention) Act, 2019, the bail conditions are more rigorous. Since the enactment of these stringent laws, the Supreme Court has made it challenging for the accused to secure bail. The High Courts and the Supreme Court have consistently interpreted the bail provisions to uphold that bail is an exception and jail is the norm in most of the cases under the PMLA and UAPA until 2022. However, in the fall of 2022, the Supreme Court took a proactive role, providing reassurance to both the accused and the legal community that every statute, regardless of its nature, should ensure compliance with constitutional provisions. The judiciary started interpreting the rigorous bail provisions in line with Article 21 and other provisions of the Constitution, instilling confidence in the legal system. The Apex Court reiterated that even when a statute provides more strict conditions for bail, the right to bail to the accused would not be submerged just because the statute is stringent. Thus, the Article explores the complex legal framework regulating bail and detention in cases involving Money Laundering and Unlawful Activities in India. It focuses on the controversial aspects of the Prevention of Money Laundering Act of 2002 (PMLA) and the Unlawful Activities (Prevention) Act of 2019 (UAPA), shedding light on the constitutional challenges and debates that have emerged in this domain. It also delves into the extensive powers held by the Enforcement Directorate under the PMLA and the contentious provisions of the UAPA, offering an in-depth analysis of the intricate legal discussions surrounding these laws.*

Key Words: *Enforcement Director, PMLA, UAPA, Article 21, Constitution, Bail.*

I. INTRODUCTION

Article 21 of the Constitution is the repository of the right to life and personal liberty of all persons within the territory of India. The Article states that no person shall be deprived of the Right to life and personal liberty except according to the procedure established by the law. The

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right to bail is intrinsically intervened in Article 21 as it ensures the release of undertrials from the prisons waiting for the commencement of trial. The Article does not distinguish between the ordinary and stringent penal statutes to safeguard the liberty of an undertrial prisoner. It fundamentally applies to every kind of statute in India. In the case of **State of Rajasthan v. Balchand @ Balaiay**[2], Justice Krishna Iyer, while granting bail in 1977 to an accused, famously stated, "*The basic rule is bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court* ". This principle has been reaffirmed numerous times and has laid the foundation of bail jurisprudence in India. Despite this, the legislature has enacted stricter laws contradicting this fundamental principle of bail. These laws include the Prevention of Money Laundering Act of 2002 (PMLA) and the Unlawful Activities (Prevention) Act of 2019 (UAPA). The Prevention of Money Laundering Act (PMLA) grants extensive powers to the Enforcement Directorate (in short ED), sparking intense debate. The ED is established under the Department of Revenue, Ministry of Finance, Government of India, to investigate crimes relating to Foreign Exchange and Economic Laws such as The Prevention of Money Laundering Act, 2002, The Foreign Exchange Management Act, 1999, etc. It is a multi-disciplinary organisation initially established as an 'Economic Unit' in 1956 under the Department of Economic Affairs for handling the volition of the FERA Act.[3] The Enforcement Directorate has prosecuted money launderers, strengthening the legal system but at the same time invited controversy for its potential misuse of power. The ED wields extensive power under PMLA, including tracing the assets acquired by the accused through the proceeds of crime, provisional attachment of the accused's property, and ensuring the prosecution of the offenders and confiscation of their property.[4] On the other hand, The Unlawful Activities (Prevention) Act of 2019 is another such legislation at the center of controversy for allowing extended detention without trials for detainees. This legislation has also sparked debates regarding human rights violations and rigorous bail provisions.

[2] *State of Rajasthan v. Balchand @ Balaiay*,1977 AIR 2447.
[3] Directorate of Enforcement.
[4] Ibid.

II. THE JUDICIAL SCRUTINY OF THE PRINCIPLE OF BAIL UNDER THE PMLA AND UAPA POST-2022:

(1) Vijay Madanlal Choudhary v. Union of India[5]- In this case, a significant and thought-provoking constitutional challenge was mounted against various provisions of the Act, most importantly, sections 45[6] and 50[7] of the PML Act. Though Vijay Madanlal's case upheld the validity of all these sections, it is currently referred to a three-judge bench for review, which is

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[5] *Vijay Madanlal Choudhary v. Union of India*, 2022 SCC Online 2024.

[6] The Prevention of Money Laundering Act, 2002, S.45, "(1)[Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless]
(i)the Public Prosecutor has been given an opportunity to oppose the application for such release; and
(ii)where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:
Provided that a person, who is under the age of sixteen years or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees], may be released on bail, if the Special Court so directs:
Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by
(i) the Director; or
(ii)any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.
[(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.
(2)The limitation on granting of bail specified in of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

[7] The Prevention of Money Laundering Act, 2002, S.50, " (1) The Director shall, for the purposes of section 12, have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:
(a)discovery and inspection;
(b)enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;
(c)compelling the production of records;
(d)receiving evidence on affidavits;
(e)issuing commissions for examination of witnesses and documents; and
(f)any other matter which may be prescribed.
(2)The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.
(3)All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.
(4)Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).
(5)Subject to any rules made in this behalf by the Central Government, any officer referred to in sub-section (2) may impound and retain in his custody for such period, as he thinks fit, any records produced before him in any proceedings under this Act:
Provided that an Assistant Director or a Deputy Director shall not
(a)impound any records without recording his reasons for so doing; or
(b)retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the Joint Director.

still pending. Section 45 of the PML Act deals with bail conditions and is controversial. The section states that an under trail would only be granted bail if he satisfies the twin conditions, namely (1) there should be reasonable ground before the court that the accused is not guilty of the offence for which he is charged. This condition puts reverse the burden of proof on the accused to prove that he is not guilty of the offence, which is against the basic principle of criminal law jurisprudence, and (2) that there is no likelihood on the part of the accused to commit any offence while he is on bail. These two conditions, commonly known as the 'twin conditions' for bail under the PML Act, are often regarded as onerous by the accused, and their constitutionality is challenged before the Supreme Court through various writ petitions. In this case, the main contention surrounding section 45 of the PML Act was that it violated Article 20 (3) of the constitution as it did not provide safeguards akin to those offered to a person detained under preventive detention law. The said section is also violative of Article 21 of the Constitution, for it does not entitle the accused to apply for bail, which, under ordinary criminal law, would be entitled to when the offence is of a punishment of less than seven years. However, the court upheld the validity of the section on the ground that the section is classified based on intelligible differentia well founded under Article 14 of the constitution. According to the Apex Court, the object of the PML Act is to create a deterrent effect on people who commit economic offences. Therefore, the bail conditions laid down by section 45 of the Act have reasonable nexus with the object of the PML Act. Moreover, the PML Act is at par with the recommendations of International Conventions on Money Laundering, and India is committed to fulfilling its international commitment globally. Since the money laundering offense is committed by influential people with the help of advanced technology, it is difficult for investigating agencies to trace the transactions of the money laundering act. For these reasons, the bail conditions for the accused are also stringent. The Supreme Court has also upheld the constitutional validity of section 50 of the PMLA, which provides vast powers to the ED to summon any person for investigation and record their statements. The court held that the section is not violative of Article 20 (3) of the constitution because signed statements of the accused under the PMLA do not become compelled testimony, even if they are incriminatory. After all, the proceedings of the ED are only investigative to determine whether the proceeds of the crime money were in the way fall under section 3 of the PMLA. The protection of Article 20 (3) would be available after the registration of a formal FIR and not merely at the summoning stage. Secondly, under Article 20 (3), protection would be available only if the person is "accused" of an offence. Since when the ED summons a person, the person is not necessarily provided with the information on the reasons for his summoning, it cannot be

assumed that, there is a transformation of that person's status to that of an accused.[8] However, from the constitutional point of view, the right of the accused against self-incrimination is a fundamental right provided under Article 20 (3) of the Constitution. The Constitution is the ground norm, and all the other laws are to abide by the constitutional provisions in India. The case of **Nandani Satpathy V. Dani (P.L.)[9]** is an encyclopaedia on the rights of the accused against self-incrimination. At page 442, "*And Art. 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness".*

However, post-Vijay Madanlal, there seems to be a slight trend reversal in the Supreme Court's decisions regarding the accused 's right to personal liberty in money laundering cases.

(2) **Pankaj Bansal v. Union of India[10]** In this case, the petitioners did not assail to challenge section 19 of the PMLA act. Still, they requested to read into section 19 of PMLA the principles laid down in **Vijay Madanlal's case**, which provides for furnishing the accused with grounds for arrest. After analyzing some of the earlier judgments of the SC, especially **V. Senthil Balaji v. The State[11]** On section 19 of the PMLA, the Supreme Court concluded that as per constitutional mandate, the person arrested should be informed in writing about the grounds of his arrest so that he can prepare for his release. The PLMA, being a stringent law, has harsh conditions for bail. Mere reading the grounds to the accused will not serve the purpose in light of Article 22 (1) of the constitution and would make it difficult for the accused to secure his release. Therefore, the accused was released for noncompliance with section 19 PMLA and Article 22 (1) of the Constitution.

(3) Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office[12]:- In this case, the Supreme Court discouraged the practice of the Special Court in permitting the custody of the accused to the ED when they appear before such courts in adherence to their summons. The Supreme Court made it clear that this practice violates the scope of Article 21 of the Constitution, as it restricts the personal liberty of an individual committed to custody. In such cases, the proper procedure for the Special Courts is to allow custody only when the

[8] Shraddha Chaudhary & Shreedhar Kale, Vijay Madanlal Choudhary v. Union of India: A systematic breakdown of protections against testimonial compulsion during criminal investigations, 15 OP. Jindal Global L.R, 1, 2024, , (Aug.08, 2024, 10:30 AM), https://www.researchgate.net/.
[9] *Nandani Satpathy v. Dani* (P.L.), (1978) 2 SCC.
[10] *Pankaj Bansal v. Union of India*, 2022 SCC OnLine SC 1244.
[11] *V. Senthil Balaji v. The State*,2023 SCC OnLine SC 934.
[12] *Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office*, 2024 LiveLaw (SC) 383.

Enforcement Directorate has applied for it, and the court formally grants it. If the Special Court denies custody of an accused to the ED, it must provide brief reasons for its decision

(4) Arvind Kejriwal v. Directorate of Enforcement[13]- In this case, the Delhi Chief Minister, Mr. Arvind Kejriwal, was arrested on the charges of scamming a liquor policy to benefit some leaders of his party, Deputy Chief Minister Mr. Manish Sisodia, and himself. He challenged his arrest before the Delhi High under Article 226, but the Delhi High Court dismissed it. So Mr. Kejriwal approached the Supreme Court against the decision of the Delhi Court. He did not press for bail before the Supreme Court as he was aware that he had to satisfy the twin conditions laid down in section 45 of the PMLA, which seemed challenging at that time. Rather than applying for bail, Mr. Kejriwal challenged his arrest under section 19 of the PMLA. The ED contended that the PML Act allows the ED to arrest a person without a prosecution complaint being filed against the arrestee. Also, it need not conduct a mini-trial to establish a 'reason to believe' before making an arrest. If there are incriminating statements against the accused, the Enforcement Directorate (ED) has the full power to make an arrest, and the court cannot interfere with the ED's examination of the legality of the arrest. Rejecting all the contentions of the ED, the Supreme Court, while granting interim bail to Mr. Kejriwal, held that:

(1) Section 19 of PMLA is subject to judicial review. The Supreme Court has the power to ascertain the legality of arrest by the ED under section 19 of the Act. It is the mandatory duty of the court to protect the life and liberty of individuals as envisaged by Article 21 of the Constitution against arbitrariness. Section 19 of the Act contains mandatory inbound safeguards for the ED, and the court's power to judicially review the arrest adds extra protections to section 19 of the Act.

(2) If there is any material in the possession of the ED that can acquit the accused, the ED should weigh the material equally with the incriminating ones. The ED cannot exercise the powers under the Act at their whims and fancies.

(3) The 'need and necessity to arrest' is another critical parameter that, though not found in section 19 of the Act, has been given judicial recognition in the past. However, the two judges' bench referred the question on the 'need and necessity of the arrest' and the question of the Doctrine of Proportionality to be applied in ED cases to a larger bench, the decision of which is still pending.

[13] *Arvind Kejriwal v. Directorate of Enforcement*, 2024 LiveLaw (SC) 463.

(4) The ED cannot arrest any person solely because he/she is required for an investigation. There should be a "reason to believe," based on sound material in the possession of the ED officer, that the arrest of a person is required under the Act.

(5) The ED should frame a uniform policy on the grounds of arrest for the persons accused under the Act.

(5) Sheikh Javad Iqbal @ Ashfaq Ansari @Javed Ansari v. State of Uttar Pradesh[14]- The appeal arises from the Allahabad High Court's order refusing to grant bail to the appellant, a foreign national of Nepal accused of offences under various sections of UAPA law and IPC concerning fake currency notes. In the present case, the court emphasized the enduring principle of criminal jurisprudence regarding the presumption of innocence. It articulates that the accused should be deemed innocent unless proven otherwise. The same rule holds true even in stringent penal laws. The court emphasized that the right under Article 21 of the constitution is sacrosanct and overarching. The constitutional courts cannot deny the right to bail to an under-trial prisoner just because the statute under which his offense falls is penal. Upholding of constitutionalism is the prerogative of every constitutional court, which necessitates interpreting Personal Liberty as an intrinsic part of every individual. A constitutional court has the authority to deny bail in certain situations. Asserting that bail cannot be granted under any specific law is incorrect, as it contradicts the core principles of our constitutional system. Thus, the court granted bail to the appellant because of his long incarnation in jail.

(6) Parvinder Singh Khurana V. Directorate of Enforcement[15]- The case raised an important question about whether the Sessions Court or the High Court, under section 439(2) of the CrPC or 483(3) of BNSS, has the power to issue interim Ex-Parte stay on bail granted by the Special Court to the appellant until the High Court disposes of the application to cancel the bail in the Money Laundering Case. In this case, the High Court had casually stayed the order of bail granted by the Special Court to the appellant. Thus, the appellant filed the appeal before the Supreme Court, challenging the High Court's power to stay. Taking serious note of the High Court's order, the Supreme Court held that such an order of stay on the bail already granted should unhurriedly be made in exceptional circumstances. The stay order should clearly outline the prima facie reasons supporting the cancellation of the bail order, along with a brief explanation. When the stay order is passed Ex-Parte, the accused seeking relief against such order should be heard immediately, for it is a drastic order that will affect the right to

[14] *Sheikh Javad Iqbal @ Ashfaq Ansari @Javed Ansari v. State of Uttar Pradesh*, 2024 LiveLaw (SC) 486.
[15] *Parvinder Singh Khurana V. Directorate of Enforcement*, 2024 LiveLaw (SC) 502.

personal liberty of a person guaranteed under Article 21 of the Constitution. Once an undertrial is enlarged on bail by a competent court, he is granted liberty that cannot be easily revoked by any court later on. There can be other ways to monitor an undertrial, including imposing additional conditions on them. If the court allows the cancellation of a bail application, the accused will ultimately be put behind bars. For these reasons, courts should exercise caution before granting an ex-parte order to stay the bail granted to the accused.

(7) Manish Sisodia v. Directorate of Enforcement[16]- In this case, the appellant was arrested based on the letter addressed by the Lieutenant Governor of Delhi to the Enforcement Directorate alleging various irregularities in the Delhi Excise Policy of 2021-22 by the Delhi government. The appellant was arrested for violating multiple sections of the PML Act, the Indian Penal Code, and the Prevention of Corruption Act. Both his bail applications before the Trial Court and High Court were rejected, and this was his third attempt to secure bail before the Hon'ble Supreme Court. The Hon'ble Court, after going through a catena of decisions made on the Right to Life and Personal Liberty, declared that where the accused is lodged in prison for a long incarnation, he is entitled to Bail irrespective of the nature of the offense he has committed. In this case, the appellant was in prison for 17 long months and there were 495 lists of witnesses with thousands of documents to be examined. The courts and state agencies are obligated to provide the accused with a system that ensures the right to a speedy trial as guaranteed by Article 21 of the Constitution. The Court observed that the ED had assured that the prosecution of all the accused involved in the scam would commence within 6-8 months, which in no case seemed to be a reality given the number of witnesses, documents, and accused involved. Referring to the case of Manish Sisodia, the court held that a stringent provision of bail under the PML Act could not bar the accused the right to expeditious trial under Article 21 of the Constitution. Allowing bail to the accused, the court summed that no statute could override the cardinal principle that bail is a norm and jail an exception.

(8) Jalaluddin Khan v. Union of India[17]:- The case of the appellant was that he was charged with sedition under various sections of the Indian Penal Code (Now BNS) and the Unlawful Activities (Prevention Act), 2019. He and the co-accused applied for the bail before the Special Court, which was denied, but the High Court granted the bail to the co-accused. Hence, he filed the present appeal before the Supreme Court. Before the Apex Court was the question relating

[16] *Manish Sisodia v. Directorate of Enforcement*, 2024 Livelaw (SC) 563.
[17] *Jalaluddin Khan v. Union of India*, Criminal Appeal No. 3173 of 2024.

to the interpretation of section 43-D (5) of the UAPA[18] law, which contained provisions relating to bail under the said Act. The court considered the decisions of the two previously decided cases in section 43-D (5) of the Act, namely the **Gurwinder Singh v. State of Punjab[19]** and **, National Investigation Agency v. Zahoor Ahmad Shah Watali[20].** In **Gurwinder Singh's** case, the court had to consider and analyze the bail provisions as laid in section 45 (D) 5 of the UAP Act. The Appellant was charged based on the disclosure statement made by the co-accused that the accused was involved in furthering terrorist Acts and receiving money through Hawala for carrying out the activities associated with such activities. In this case it is pertinent to mention that only 19 witnesses out of 106 were examined so far. The general rule that bail is the norm and jail is the exception under penal laws does not apply in cases under special statutes like the UAPA, according to the court. The principles governing bail are applied more strictly in UAPA cases. The legislative intent of such restriction can be found by the use of the word "shall" in section 45(D) 5 instead of "may," pointing towards more stringent rules for the release of the accused on bail. The standard of satisfaction the courts apply while deciding bail under the UAP Act is quite low compared to the standards applied under the Criminal Procedure Code. In this case, the Apex Court laid down a twin-prong test to grant the accused's bail. Under the first prong, the court might grant bail to the accused if the public prosecutor does not oppose the bail of the accused and the case dairy and the submissions made in the final report of the investigating agency do not point towards the involvement of the accused in the crime. When the court concludes that the condition mentioned above is satisfied, it will proceed toward applying the second prong, which deals with the satisfaction of the tripod test for the bail grant. The tripod test of bail includes an inquiry as to whether the accused-

(1) Is a flight risk, which means there are any chances on the part of the accused to leave the country given the criminal charges against him.
(2) Whether there are any chances of tampering with evidence on his behalf.
(3) Whether there is any probability that the accused would influence the witness.

[18] The Unlawful Activities (Prevention) Act, 1967, S. 43D (5), " Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true".
[19] *Gurwinder Singh v. State of Punjab*, (2024) 5 SCC403.
[20] *National Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1.

If the conditions in the first prong are satisfied, the court would not normally do further inquiry, but that would not mean the accused is entitled to bail. The accused might be asked to satisfy the tripod test to secure bail. Applying the above conditions, the Apex Court rejected the petitioner's bail application. The Apex Court did not consider the trial delay as grounds for the grant of bail to the accused.

Unfollowing the **Gurwinder Singh's case**, the court extensively considered the propositions laid down in **Zahoor Ahmad's case** on the interpretation of section 43-D (5) and gave the following observations: -

(1) while interpreting the phrase 'Prima Facie True,' the court held that the evidence collected against the accused must show his involvement in committing the offense.

(2) Once the court frames the charges against the accused or even at the bail stage, it becomes arduous for the accused to make the court believe that he has not committed the crime.

(3) The court must record reasoned decisions for granting or denying bail to the accused. At that stage, the court should desist from delving deep into appreciating the pieces of evidence.

(4) when the court has to decide upon the involvement of the accused in an offense, its decision should be based on the broad prospect of probabilities of his involvement rather than seeking proof beyond reasonable doubt of his involvement.

(5) Section 45 D of the 1967 Act lays down special procedures concerning the trial and investigation of offence under chapters IV and VI. The section ensures that a thorough legal process is followed in cases involving anti-terrorism from the beginning of the registration of FIR until the conclusion of the trial. The section aims to maintain judicial sightedness over the stringent provisions of the Act.

(6) The material collected by the investigating agencies against the accused must be considered in toto rather than in pieces.

(7) Whether evidence or document would be admissible or not is to be decided during the trial till that the contents of the document should be taken into account by the court as it is.

(8) The evidence and the materials gathered by the Investigation Agency cannot be questioned until it is disapproved or contradicted by some other evidence. In short, the prosecution's evidence earns full faith and credit.

These were some critical observations extracted from **Zahoon Ahmed's** case by the Hon'ble Supreme Court. The Court considered the applicability of these observations in **Jalaluddin Khan's case** while disregarding the law established in **Gurwinder Singh's case**.

Allowing the bail, in the above case, the Supreme Court held that when, in a case, owing to the facts and circumstances, the accused has filled out his case in its entirety, then the courts should

not hesitate to grant bail to the accused, even where the allegations against the accused are grave. The courts are duty-bound to proceed and act according to the law. It is an accepted principle of criminal law that 'bail is the rule and jail is an exception.' Some statutes like UAPA, AMLA, etc, lay down very stringent conditions regarding bail. In such cases, the courts should desist from denying bail to the accused when the accused has successfully established their case for securing freedom. Otherwise, it will be a sheer violation of Article 21 of the Constitution.

(9) Prem Prakash v. Union of India through the Director of Enforcement[21]- In this case, the High Court of Jharkhand denied the accused bail concerning the offences under 3 and 4 of PML Act. Section 45 of the Act was challenged once again in this case. In the case of **Vijay Madanlal**, the court upheld the validity of section 45 of the Prevention of Money Laundering Act (PMLA). The court emphasized that "Bail is the rule and Jail is the exception," regardless of the nature of the statute. This principle essentially paraphrases Article 21 of the Constitution. It is often breached, particularly in PMLA cases. The court observed that the trial court's refusal to grant bail in open and shut cases has contributed to the piling up of cases leading to colossal pendency. The other main contention before the Hon'ble Supreme Court was whether the statements of the accused while in custody incriminating himself in some other case under the same PML Act could be used as evidence against him in that other case. Answering the negative, the court held that it would violate the salutary provision of Article 21 of the Constitution, which says that the procedure established by law has to be reasonable and valid. Secondly, the statement of a co-accused cannot be used against the main accused, for such statements are not substantive pieces of evidence.

(10) Vijay Nair v. Directorate of Enforcement[22]- The Case involves the bail application of Mr Vijay Nair, a co-accused in the Delhi Excise Policy Scam for acting as a middleman and irregularly implementing the Excise Policy. He has been accused of violating many provisions of the PML Act and has been in jail for the past 23 months. Taking note of **Manish Sisodia's case**, the Supreme Court held that the right to speedy trial is a fundamental right guaranteed by Article 21 of the Constitution, a statutory provision that cannot be subjugated. A person's liberty is sacrosanct and must be respected even under stringent laws.

(11) Girish Gandhi v. The State of U.P and Ors.[23]- In this judgment, an important question arose before the Hon'ble Court SC was: whether the personal bonds and one set of surety

[21] *Prem Prakash v. Union of India through the Director of Enforcement*, SLP (Crl.) No. 5416/2024.
[22] *Vijay Nair v. Directorate of Enforcement*, Special Leave Petition (Criminal) Diary No(s). 22137/2024.
[23] *Girish Gandhi v. The State of U.P and Ors.*,Writ Petition (Criminal) No. 149 of 2024.

furnished by the petitioner in one case could be considered sufficient surety in other bail orders of different courts in India. In this case, multiple FIRs were filed against the accused in various states of India, such as Rajasthan, Kerala, Punjab, Haryana, etc. The accused was granted bail in the state of Haryana, where he furnished personal bail bonds of Rupees 50,000 and a surety. He contended that since he was the only bread earner of his family, he could not provide surety and personal bond in all cases. The states, through affidavits, contended that surety and bond given in one bail order cannot be used against the other bail orders. There should be separate surety and bond for each bail order. The Supreme Court, after reviewing various authorities on the concept and purpose of bail, has held that Article 21 of the Constitution envisions the essential idea of life and personal liberty. This would be compromised if a person is unable to secure their freedom due to their inability to arrange for surety and bonds for various bail orders. The Supreme Court held that the incapacitation of the accused should be balanced with Article 21 of the Constitution.

III. SUMMARY OF THE ABOVE-STATED CASE LAWS

Sr. No.	Name of the case	Observations of the Hon'ble Supreme Court
1.	**Pankaj Bansal v. Union of India**	Accused to be furnished the grounds of Arrest meaningfully as per Article 22 (1) of the Constitution.
2.	**Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office**	Allowing the custody of the accused when they appear before the special courts in pursuit of the summon violates Article 21 of the Constitution.
3.	**Arvind Kejriwal v. Directorate of Enforcement**	It is the mandatory duty of the court to protect the life and liberty of individuals as envisaged by Article 21 of the Constitution against arbitrariness.
4.	**Sheikh Javad Iqbal @ Ashfaq Ansari @Javed Ansari v. State of Uttar Pradesh**	A constitutional Court can grant bail to the accused even when the statute is penal, where the right of the under-trial prisoner under Article 21 of the Constitution is being violated.

5.	**Parvinder Singh Khurana v. Directorate of Enforcement**	An Ex-parte order of stay on bail already granted infringes the right to life and personal liberty under Article 21
6.	**Manish Sisodia v. Directorate of Enforcement**	An under-trial has the Right to Speedy Trial by virtue of Article 21 of the Constitution.
7.	**Jalaluddin Khan v. Union of India**	The denial of Bail in Deserving cases violates Article 21 of the Constitution.
	Prem Prakash v. Union of India through the Director of Enforcement	Incriminating Statements made in one case cannot be used in other instances of the same Act, being violative of Article 21 of the constitution.
8.	**Vijay Nair v. Directorate of Enforcement**	Under Article 21, a person's liberty is sacrosanct and must be respected even under stringent laws.
9.	**Girish Gandhi v. The State of U.P and Ors.**	Article 21 will be violated if a person cannot procure his freedom due to his inability to arrange for surety and bonds for different bail orders.

IV. SUMMING UP

The Apex Court has played a pivotal role in navigating these particular laws, effectively balancing an individual's right to personal liberty with the stringent provisions of these laws. This has instilled confidence in the legal system’s commitment to fairness and justice. Overall, the legal landscape surrounding bail and detention in cases involving Money Laundering and Unlawful Activities in India presents a complex interplay of constitutional principles, statutory provisions, and enforcement practices. The controversial aspects of the Prevention of Money Laundering Act of 2002 and the Unlawful Activities (Prevention) Act of 2019 continue to be subjects of intense debate and legal scrutiny. The extensive powers wielded by the Enforcement Directorate under the PMLA and the contentious provisions of the UAPA have given rise to significant constitutional challenges that necessitate continued engagement and critical reflection. As the legal discourse on these laws evolves, it remains crucial to balance the imperatives of combating financial crimes and safeguarding individual rights, ensuring that

any restrictions on personal liberty are consonant with constitutional principles and the fundamental tenets of criminal law jurisprudence.

TOWARDS JUSTICE: ENSURING ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN UN PEACEKEEPING MISSIONS

Alisha Syali[1]

Abstract: *This paper examines the intricate issue of human rights violations committed by United Nations (UN) peacekeepers, focusing on the legal and institutional hurdles related to accountability. Although the UN's core mission is to foster peace, security, and the safeguarding of human rights, peacekeepers have been implicated in serious offenses, such as sexual abuse, exploitation, and negligence. The paper contends that the existing framework governing peacekeepers enables considerable impunity, which in turn undermines the UN's credibility and objectives. The research critically evaluates the current accountability mechanisms within the UN, including the Office of Internal Oversight Services (OIOS), the General Assembly, and the UN Security Council. Additionally, it investigates how the UN's immunity from national legal systems worsens the situation by leaving victims without a path to justice. The study also emphasizes the responsibility of troop-contributing countries (TCCs), which frequently neglect to prosecute their peacekeepers, urging for increased transparency and accountability from them. It further explores the limitations of international judicial bodies like the International Criminal Court (ICC) and the International Court of Justice (ICJ) in holding peacekeepers accountable. To fill these gaps, the paper suggests several reforms. It calls for strengthening the investigative and disciplinary authority of the OIOS and creating a specialized international tribunal to address cases of peacekeeper misconduct, especially human rights violations. Moreover, it recommends the establishment of standing claims commissions to offer victims a structured means of seeking compensation. In conclusion, the research asserts that implementing substantial reforms to both the legal and institutional frameworks governing peacekeeping operations is crucial for the UN to uphold its role as a credible advocate for global peace and security.*

***Key-words**: UN Peacekeeping Accountability, Human Rights Violations, Sexual Exploitation and Abuse, Troop-Contributing Countries (TCCs), International Legal Reforms*

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I. INTRODUCTION:

From its inception to the present day, this has been believed that the central mission of the United Nations (UN) is to guarantee universal peace and security under an institutional umbrella composed of partner organizations.[2] An international intergovernmental organization, the United Nations acts as a framework for states to collaborate and address challenges such as interstate conflicts or in post-war peace keeping.[3] Dag Hammarskjöld's conviction in and appreciation of preventive diplomacy had a significant impact on the decision to aggressively pursue the peacekeeping mission as a means of achieving peace.[4]

The UN Peacekeeping Operations are coordinated, implemented, and sustained through four principal organs of the UN; the Security Council, the General Assembly, the Secretariat, and the Department of Peacekeeping Operations. The UN's special account means specific operations; while the regular program budget pays for the central concept of the UN as a promoter of peace.[5] The UN has often made efforts to prevent conflicts from escalating to a war, to pressurize adversaries to resolve conflicts peacefully not through arms but through Negotiation and Dialogue and to help in the peace-making process where conflicts do not necessarily translate into warfare. Cooperation is one of the Organization's main tools to guarantee a peaceful resolution of disputes in post-conflict scenarios and is titled peacekeeping.[6]

However, the UN created peace keeping which is crucial in maintaining of the UN's peace and security agenda. It has nevertheless also elicited criticism with several parties perceiving peace keeping as a bridge for other invading forces. Both the events in Rwanda and Srebrenica that happened in mid 1990s could not be prevented despite having UN soldiers stationed in the region.[7]

While on missions, UN peacekeepers are actually responsible for gross violation of human rights despite the fact that they are under the duty of protecting human rights. As much as the

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[2] Athambawa Sarjoon & Mohammed Agus Yusoff, *The United Nations Peacekeeping Operations and Challenges*, 8 Acad. J. Interdiscip. Stud. 202 (2019).
[3] Stephen Mathias, *UN Peacekeeping Today: Legal Challenges and Uncertainties*, 18 Melb. J. Int'l L. 1 (2017).
[4] Id.
[5] Muggi Tuvdendarjaa, *Challenges of the United Nations Peacekeeping Operations*, DKI APCSS (2022), https://dkiapcss.edu/wp-content/uploads/2022/10/Challenges-of-the-United-Nations-Peacekeeping-Operations.pdf.
[6] Id.
[7] Teresa Haller, *The Role of the United Nations in the Prevention of Genocide* (2020), https://digitalcommons.assumption.edu/cgi/viewcontent.cgi?article=1075&context=honorstheses.

preservation of peace and adherence to human rights are a part of the agenda of such missions, it has serious implications when the protectors, who are supposed to defend civilians especially women and children, among them, violate human rights.[8] The peacekeepers get to become active players in the country they operate and live in during the course of these operations. For this reason, peacekeepers can appropriately fight for and promote the rights of individuals. On the other hand, they also bear a great extent of the responsibility for human rights abuses.[9]

UN peacekeeping forces have also at times been a direct threat to the very people to whom they offer protection. The involvement of UN staff members in sexual exploitation and human rights violations and acts of abuse in relation to the delivery of assistance has also dented its image in recent years and no measures have succeeded in fully addressing the issue to this date.[10]

One blatant example of how peacekeeping missions may act to the detriment of the most vulnerable populations of a nation is the cholera outbreak that occurred in Haiti. It is believed that the Haiti cholera breakout in 2010 was due to UN peacekeepers. The implicated peacekeepers are said to be those from Nepal, serving with the United Nations Stabilization Mission in Haiti (MINUSTAH). These troops are said to have been camped near the Artibonite River, whose water supply the region depends on. Poor camping sanitation polluted this river due to such practices. Tests revealed the strain of cholera that was seen in Haiti was almost identical to a strain already circulating in Nepal.[11] That could explain where it came from. Cholera spread rapidly in Haiti because of its unsanitary infrastructure and inefficient structures, infecting more than 600,000 people and killing over 10,000. The UN was criticized initially for not assuming responsibility, but later took responsibility, however, the organization was able to avoid liability in court due to the fact that international law grants immunity protections.[12]

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[8] Nigel D. White, *Protecting Human Rights in UN Peacekeeping: Operationalising Due Diligence and Accountability*, 34 King's L.J. 463, 464 (2023).
[9] Id.
[10] Amin R. Yacoub & Becky Briggs, *(UN)Accountable: Who Shall Hold the United Nations Accountable for Its Human Rights Breaches? International Arbitration and Insurance Coverage as Two Viable Solutions to the UN Accountability Dilemma*, 28 U.C. Davis J. Int'l L. & Pol'y 139 (2022).
[11] Jonathan M. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (Palgrave Macmillan 2013).
[12] "UN Admits Role in Haiti Cholera Outbreak That Has Killed Thousands," The Guardian, Dec. 1, 2016, https://www.theguardian.com/world/2016/dec/01/united-nations-admits-role-haiti-cholera-outbreak.

Therefore, arguments that UN PK operations should be done more responsibly; by offering compensation to victims, and setting up robust measures to protect individuals against harm by peacekeepers.[13]

The Peacekeeping Operations has a significant impact in the preservation and restoration of the global peace and security. A component of the same is 'but' since it is the most influential actor in the system of systems, it is also the most geared towards and tasked with promoting and implementing human rights in peacekeeping. This is because, unfortunately, very often, peacekeepers themselves are involved in gross violations of human rights that negatively impact the entire United Nations system. Hence, it is imperative that IHL be adopted and practiced in the UN PK mission so that civilians are shielded against acts of violence, torture, or any other violation of their human rights and that the culprit peacekeeping personnel are brought to book and let those that have been wronged to get justice.[14]

Furthermore, it has been often found that UN missions are accompanied by severe allegations of sexual misconduct, especially sexual abuse, and exploitation.[15] While the UN and the Secretary General have time and again assured the world that the organization has zero tolerance for any form of sexual misconduct during peacekeeping missions,[16] incidents like these appear to be on the rise.[17]

A recent example of the same is the allegations raised against the deployed UN peacekeepers in Democratic Republic Congo (DRC), where 8 South African peacekeepers were levied with allegations of being involved with brothels set up in vicinity of the South African camp.[18] Other such cases were visible in the past in the Congo, Haiti, and Central African Republic.[19] First, 243 allegations of sexual exploitation and abuse, in and of itself, in 2022 formally reported against the United Nations and related staff members 291 allegations were reported

[13] *Supra* note 9.
[14] *Supra* note 7.
[15] Valorie K. Vojdik, *Beyond Repatriation: Combating Peacekeeper Sexual Abuse and Exploitation*, Georgetown J. Int'l Affairs, https://gjia.georgetown.edu/2022/05/02/beyond-repatriation-combating-peacekeeper-sexual-abuse-and-exploitation/ (last visited Feb. 28, 2024).
[16] The United Nations, Zero Tolerance Policy Against Sexual Exploitation and Sexual Abuse (SEA), https://unficyp.unmissions.org/sites/default/files/sea_information_sheet_for_unficyp_website_-_2018_1.pdf (last visited Sep.19, 2024).
[17] Guterres Vows to Improve UN's Handling of Sexual Exploitation and Abuse, UN News (Mar. 15, 2022), https://news.un.org/en/story/2022/03/1114012 (last visited Sep. 19, 2024).
[18] South Africa Recalls UN Peacekeepers Accused of Sexual Misconduct in DR Congo, BBC, https://www.bbc.com/news/world-africa-67115883 (last visited Sep.19, 2024).
[19] Skye Wheeler, UN Peacekeeping Has a Sexual Abuse Problem, https://www.hrw.org/news/2020/01/11/un-peacekeeping-has-sexual-abuse-problem (last visited Sep.19, 2024).

and implementing partners that were not directly under the United Nations' direction or supervision.[20]

Presently in the legal context the U. N. can probe the criminal activities; demote or repatriate the accused peacekeepers; or detain them till the investigation is over but the U. N. does not have the authority to prosecute.[21] However, it cannot be denied that in order to preserve the essence and honor of the institution of peacekeeping, the issues regarding the accountability remain rather problematic. However, there are various challenges faced while trying to realise accountability of individual peacekeepers, UN and even the TCCs.[22]

This research will examine the measures to be taken in order to ensure accountability of UN peacekeepers in relation to the human rights violations including sexual abuse they perpetrate on the civilians in countries where peacekeeping operations are conducted such as DR Congo, Mali, and South Sudan among others.[23]

In addition, considering that the status and the powers of the contributing nations over the troops contributed by them shall also be examined. It shall also investigate on the laws concerning the liability of the peacekeepers and the challenges within the same and give recommendation on this in order to ensure that proper prosecutions are done in so far as the state responsibility is concerned. This research therefore differs from a study of passive human rights violations by the UN because of lack of intervention insofar as the UN peacekeepers are involved since it only studies cases of wrong doings that led to serious human rights breaches that provoked criminal and civil accountability.

Also, it is stated that, The UN can equally easily escape responsibility for its misconduct because of the identified accountability framework, even though it is increasingly turning into the quasi-state actor which shapes individuals' lives. To a sound of reason, higher privileges must be associated with higher responsibilities; however, in the case of the UN, it seems to be the only organization that seems to be an exception to this rule.[24]

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[20] *United Nations, Report of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Abuse* (A/77/748), https://conduct.unmissions.org/reports-secretary-general-special-measures-protection-sexual-exploitation-and-sexual-abuse (last visited Sep. 20, 2024).
[21] *Supra* note 16.
[22] Agathe Sarfati, *Accountability for Crimes Against Peacekeepers*, https://www.ipinst.org/wp-content/uploads/2023/03/2303_Accountability-for-Crimes-Against-Peacekeepers.pdf (last visited Sep.. 20, 2024).
[23] *Supra* note 16.
[24] *Supra* note 9 at 141.

II. BACKGROUND:

UN peacekeeping missions are of different kinds. These have functions such as handling conflict resolution, supervising emergencies, and non- military functions such as offering humanitarian assistance, including political resurrection like assisting in reconstructing the representative democracy, the protection and promotion of human rights, and the enforcement of rule of law. The peacekeeping organs of the UN have played a vital role to restore the order after the world wars by preventing number of conflicts from escalating to state and civil wars.[25]

However, it has also been observed that despite some landmark successes in the past, the UN peacekeeping missions have faced numerous challenges due to various issues concerning diverse aspects of peacekeeping, especially in the domain of civilian protection.[26] The commitment to human rights contained in the UN Charter is not in doubt. Namely, the UN must promote and protect human rights based on the provisions of Article 1 (3), as well as chapters VI and VIII of the Charter of the United Nations.[27] Moreover, as the UN is a legal person, it is bound by CIL but this allows only protection of human rights.[28] Moreover, despite the fact that UNSC resolutions are highly political, peacekeeping operations often help to foster progress of peace in their host countries.[29]

There, however, situations in which some of the peacekeepers who have been dispatched in many of the UN peacekeeping missions have been proved to have committed heinous acts which are violations of human rights of the civilians including cases of sexual abuse and exploitation.[30]

Examples of complaints of sexual abuse and exploitation by peace keeping forces include the Democratic Republic of Congo, Mozambique, Cambodia and among others. The constant problem is impunity, which has been a problem in the UN for a long time. But instead of improving the situation with the prevention and the pursuit of sexual criminals and offenders,

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[25] *Supra* note 1 at 203.
[26] Victoria Holt & Glyn Taylor with Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations*, https://www.globalprotectioncluster.org/sites/default/files/2022-12/un_poc_peackeeping_operations_2009_en.pdf (last visited Sep.20, 2024).
[27] THE UNITED NATIONS, Icelandic Human Rights Centre, https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-fora/the-united-nations (last visited Sep.20, 2024).
[28] *Supra* note 9 at 146.
[29] Id.
[30] Kelly Askin, *Global: Ending Impunity for Crimes Committed by UN Peacekeeper*s, https://www.ibanet.org/article/CEBC5F69-A238-49BB-B85A-5E8D878FE485 (last visited Sep.21, 2024).

the situation worsened in recent years.[31] That is rather worrisome given the so called Zeid report released in March 2005 detailing the organization's 'framework for response to prevent future sexual exploitation and abuse in UN peacekeeping'. This report post which the organisation attempted several big changes several the problem but it is clear that they have not proven to be much successful.[32]

Such instances of human rights violations and instances of sexual misconduct, if go unpunished, subsequently are not punishable to the responsible stakeholders for their misdeeds. They consequently leave the local populace demoralized when it comes to such international interferences and without which the mandate issued in promotion of the mission is unlikely to be effectively implemented[33], hence, a shift on the existing legal and policy regime currently in place in this respect is called for. It is thus critical that the stakeholders who perpetrate such heinous incidences are prosecuted for misconduct and take actions that are beyond sending them back or reassigning them.[34]

In order to properly analyze the structure and measure the UN's responsibility for violations of human rights we must distinguish between two types of acts. There are two types of actions in peacekeeping missions, first, those which can be attributed to definite personnel, some of the offenders being members of the United Nations peacekeeping forces, and, second, the collective acts which though committed by the United Nations peacekeeping forces cannot be attributed to definite individuals.[35]

Further, because the events in question occurred as a result of collective misconduct, the UN should be held collectively responsible for acts of MINUSTAH, including the cholera outbreaks. Whereas the composite wrongful act, which is a combined violation of the international law, is under article 13 of the DARIO. Thus, the UN cannot escape civil liability for the unlawful conduct of the entire operation of peacekeeping in Haiti under the international law. Where restitution cannot be effected, Article 36 of DARIO provides compensation as the remedy for the aforementioned breaches. It also states that the aforesaid International Organisation is bound by "an obligation" to comply with these remedies.[36] Now,

[31] Elizabeth F. Defeis, *U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity*, 7 Wash. U. Global Stud. L. Rev. 187 (2008).
[32] *Supra* note 9 at 146.
[33] Shayna Ann Giles, *Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict Through Their Own Misconduct*, 33 Am. U. Int'l L. Rev. 157 (2017).
[34] Id.
[35] *Supra* note 9 at 143.
[36] *Supra* note 9 at 144.

on the matter of the UN's accountability for its operations on the ground, an attribution issue arises. The issue in question is whether misbehavior in international peace keeping operations can be associated with the UN or the soldier's home state. Similarly, soldiers in peace support operations are not deemed state actors where they conduct operations as organs of the UN but the parties in question come within the ILC articles on state responsibility particularly articles 4, 5, 7, and 8.[37]

The following analysis is in a contention that the UN or contributing member states are accorded different roles depending on which of them is had the effective control or the operational mandate over the UN peacekeeping forces. If decisions regarding operations were left to the commanders of the UN force with the consent of the higher authority, the UN will be blamed for all the wrong in this regard.[38] On the other hand, if national force commander had more say in the force management under their command, then state member would be held responsible for any misconduct instead of the UN.[39]

III. ANALYSIS OF EXISTING MECHANISMS FOR ACCOUNTABILITY UNDER THE UN SYSTEM:

Some of the potential mechanisms under the UN system which might come to the forefront to ensure accountability with respect to any act of misconduct during a peacekeeping mission shall be studied below:

1. The UN Office of Internal Oversight Services:

It is crucial to take note of the fact that UN's current attitude to the wrongdoing and crimes perpetrated by the peacekeeping forces is woefully inadequate. The national government of the staff member is primarily delegated by the UN in investigating and seeking appropriate legal proceedings against the UN peacekeeper's misconduct. The UN Office of Internal Oversight Services ("OIOS") only gets to investigate again if the accused staff member's respective government refuses to. Apprehended perpetrators of misconduct in a mission may be subject to demotion, dismissal or be repatriated besides facing a bar on

[37] Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), arts. 4–5, 7–8 (2001).
[38] Kjetil Mujezinović Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 Eur. J. Int'l L. 514 (2008).
[39] Id.

future missions. Still, the staff member's national jurisdiction is the only avenue to obtain information on criminal and civil penalties for his /her actions.[40]

The only framework for charging soldiers or staff members for offences they commit, while performing a peacekeeping mission, are their domestic laws. Moreover, the OIOS is a self-correcting mechanism, that is not authorized to take disciplinary action; instead, it points to strengthen UN supply chain such as the peacekeeping missions of the organization rather than punishing the accused peacekeepers.[41] From the point of view of criminal justice, many soldiers escape responsibility when accused staff members or soldiers are sent to their state to investigate and punish. These actions have forced the national court of the offender to lack evidence, witnesses, and ways of accessing victims in the host states the mission was deployed even if the states wanted justice.[42]

Since the formation of the OIOS, it has investigated alleged cases of corruption, financial misconduct and unbecoming conduct by UN employees and personnel. In some of these cases, investigations have led to the removal of the UN staff members in question. In fact, some of investigations of the OIOS have resulted in changes in the UN such as the formation of the International Criminal Tribunal for Rwanda.[43] Therefore, in terms both of sanctions and of the behavior of the organisation in the future,[44] the OIOS is effective as an accountability mechanism. But one ought to tread carefully regarding the OIOS's performance because it often fails in offering the victims recourse. In other words, the extent to which it is accountability oriented is far more about seeking to address UN misconduct than it is about offering victims' rights-based compensation.[45]

2. The UN General Assembly:

The GA is one of the other internal accountability systems The other internal accountability systems include the General Assembly ("GA"). Thus, the GA can rightfully be said to be best tailored for exercising control and supervision over states and all of its organs, including the UNSC, in as much as the organization is arguably theorized to as a

[40] *Investigations*, United Nations: Conduct in UN Field Missions, https://conduct.unmissions.org/enforcement-investigations (last visited Sep.21, 2024).
[41] Id.
[42] *Supra* note 9 at 153.
[43] Guglielmo Verdirame, The UN and Human Rights: Who Guards the Guardians? 331 (1st ed. 2011).
[44] Id.
[45] *Supra* note 9 at 154.

global parliament of states.[46] However, due to the influence of powerful countries, most secretary generals, if not all, have never had this kind of supervision. In any case, all the branches of the UN, including the peacekeeping missions, are obliged to report to the General Assembly. Also, within the GA, the UN has power over the budget, whereby it can freeze funds; if peacekeeping missions violate international law or agreements on human rights. However, GA's control in this regard is taken to be rather weak and most of the reports offered are seen to be bureaucratic in nature.[47]

3. The UN Security Council:

The UNSC has the responsibility to monitor UN activities from within. It can assign a delegation to conduct fact-finding missions. These missions are sometimes carried out by senior UN officials, civil society members, and local NGOs.[48] Historically, the focus of these missions has been on ensuring accountability for UN peacekeeping forces. For example, the Security Council Mission to Central Africa examined the measures taken regarding sexual abuse cases involving personnel from the UN Mission in the Democratic Republic of the Congo. These missions are capable of investigating both individual and institutional accountability.[49] While the UNSC mechanism has yielded results in the past, it is often perceived as being highly political and more focused on investigation rather than on corrective actions.[50]

4. The International Court of Justice:

Article 34 of the current International Court of Justice (ICJ) statute specifies that only disputes between states are under the Court's jurisdiction.[51] However, the ICJ can request information from foreign organizations that is relevant to the case. Additionally, international organizations can seek guidance from the ICJ, especially when drafting the foundational documents of a public international organization.[52] The historic reparations case at the ICJ illustrates that, although advisory opinions are non-binding, they can

[46] United Nations, *Functions and Powers of the General Assembly*, https://www.un.org/en/ga/about/background.shtml (last visited Feb. 24, 2024).
[47] *Supra* note 9 at 154.
[48] *Supra* note 9 at 155.
[49] *Supra* note 41 at 326-327.
[50] *Supra* note 9 at 156.
[51] *Statute of the International Court of Justice*, https://www.icj-cij.org/statute (last visited Sep.21, 2024).
[52] Id.

significantly contribute to the development of international law regarding the responsibilities of international organizations.[53] Another option would be to revise Articles 69 and 70 of the ICJ statute to include conflict resolution between victim groups and international organizations within the Court's scope. Yet, amending the ICJ statute requires a two-thirds majority vote from member states, as outlined in Article 108 of the UN Charter. While achieving a two-thirds majority is technically feasible, it may be challenging due to the competing interests of member states and the prevailing global atmosphere of distrust.[54]

5. The International Criminal Court:

The International Criminal Court (ICC) was established in 2002 through the Rome Statute, which grants the court jurisdiction over four main types of crimes: crimes against humanity, war crimes, crimes of aggression, and genocide.[55] In 2002, sixty states ratified the Rome Statute, and nearly 140 states signed it.[56] The ICC has jurisdiction over these crimes if they were committed by a national of a state party within its territory on or after July 1, 2002, or in a country that recognizes the ICC's authority. Additionally, if the United Nations Security Council (UNSC) refers such crimes to the ICC, the court may also have jurisdiction based on the ICC prosecutor's actions in accordance with Chapter VII of the UN Charter.[57]

It is important to note, however, that most crimes committed by UN peacekeepers do not fall under the categories of crimes against humanity, war crimes, genocide, or aggression. Many of these offenses are actually torts or acts of negligence.[58] Moreover, the ICC does not have the power to hold the UN accountable for the actions of blue-helmet officers, who operate under its command. The ICC cannot mandate the UN to compensate victims, which means it does not serve as an effective accountability mechanism for the UN.[59] Therefore, it can be argued that there is no accountability mechanism within the UN system that is subject to thorough scrutiny, whether proposed or existing. There is a pressing need for a

[53] *Supra* note 9 at 156.
[54] Id.
[55] *The Role of the International Criminal Court*, Council on Foreign Relations, https://www.cfr.org/backgrounder/role-international-criminal-court (last visited Feb. 25, 2024).
[56] Id.
[57] E. de Wet, *Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials*, 112 Am. J. Int'l L. 33 (2018).
[58] Melanie O'Brien, *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold*, 10 J. Int'l Crim. Just. 525, 535–36 (2012).
[59] Id.

judicial system that can hold the UN and other international organizations accountable for human rights violations.

IV. ANALYSIS:

In furtherance of the above discussed mechanisms, the analysis of the current accountability mechanisms within the UN system for peacekeepers highlights several notable weaknesses in addressing human rights violations, particularly regarding sexual misconduct. While there are various mechanisms in place, such as internal oversight bodies and international courts, they often lack the necessary enforcement power to ensure that peacekeepers are held fully accountable for their actions during missions.

Further, the UN Office of Internal Oversight Services (OIOS) is tasked with investigating allegations within the system, but it faces significant limitations.[60] Typically, the responsibility for investigations falls to the national government of the accused peacekeeper, and the OIOS only steps in if the national government does not act, resulting in few prosecutions. The OIOS does not have the authority to impose disciplinary measures on peacekeepers beyond administrative actions, and matters of criminal justice, including punishment or victim compensation, are outside its jurisdiction. Although the OIOS has been successful in uncovering misconduct and corruption, its emphasis on maintaining institutional integrity rather than prioritizing victim justice hampers its effectiveness in dealing with peacekeeper misconduct.[61]

Further, the UN General Assembly (GA) theoretically oversees UN activities, including peacekeeping, and has the power to freeze funds or demand accountability when peacekeeping missions breach international law. However, the political dynamics within the GA, especially the influence of powerful member states, undermine its ability to provide meaningful oversight. The bureaucratic processes of the GA further limit its control over accountability, often resulting in minimal changes in how peacekeeper misconduct is handled.[62] The UN Security Council (UNSC), which is responsible for overseeing peacekeeping missions, plays a vital role in accountability through fact-finding missions, such as those conducted in the Democratic Republic of Congo. Nevertheless, political

[60] Protection of Civilians: Accountability System, Int'l Peace Inst., https://www.ipinst.org/wp-content/uploads/2020/12/POC-Accountability-System-Final.pdf (last visited Sep.21, 2024).
[61] Id.
[62] Id.

considerations frequently restrict its ability to hold peacekeepers accountable, and the UNSC tends to prioritize investigations over enforcing actual consequences.[63]

Additionally, the International Court of Justice (ICJ) has a limited scope, as it primarily resolves disputes between states. Although the ICJ can provide non-binding advisory opinions, it does not have the power to hold individual peacekeepers or UN actions accountable.[64] To broaden the ICJ's role would necessitate substantial changes to its statute, which is challenging given the current global political landscape. Likewise, the International Criminal Court (ICC), created to prosecute serious international crimes, is unable to hold the UN accountable for most peacekeeper misconduct, as these actions typically fall outside the ICC's jurisdiction, which is often perceived to be the best possible solution in the quest to ensure accountability in regard to peacekeepers' misconduct.[65]

Thus, it can be observed that several gaps and weaknesses obstruct accountability. Jurisdictional issues arise from the dependence on troop-contributing countries (TCCs) to prosecute peacekeepers, many of which do not investigate or penalize misconduct. Political pressures undermine the effectiveness of the General Assembly (GA) and the United Nations Security Council (UNSC), while the limited reach of international courts leaves a void in addressing offenses such as sexual exploitation. Victims frequently find it difficult to seek redress due to the emphasis on institutional reform rather than justice.

To bridge these gaps, reforms are essential. The Office of Internal Oversight Services (OIOS) should be granted enhanced authority to investigate and discipline peacekeepers, with a shift towards victim-centered justice. Creating a specialized international tribunal for peacekeeper misconduct, especially regarding human rights violations, would ensure unbiased investigations. Expanding the jurisdiction of the ICJ or ICC to encompass peacekeeper offenses could enhance accountability, and increasing transparency and oversight within the UN system would further bolster these mechanisms.[66] Without significant reforms, peacekeepers will continue to act with impunity, jeopardizing the

[63] Id.
[64] Frequently Asked Questions, Int'l Court of Just., https://www.icj-cij.org/frequently-asked-questions (last visited Sep. 22, 2024).
[65] Criminal Accountability of United Nations Peacekeepers, 31 Am. U. Int'l L. Rev. 103 (2016), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1946&context=auilr (last visited Sep.22, 2024).
[66] *Supra* note 59.

credibility of UN peacekeeping operations. Tackling these issues is vital for justice and for upholding the legitimacy of the UN's peacekeeping mission worldwide.

V. EFFECT OF UN'S IMMUNITY ON HOLDING UN AND ITS PEACEKEEPERS ACCOUNTABLE:

The immense difficulty victims encounter in seeking accountability from the UN has resulted in very few historical cases against UN peacekeepers for human rights violations. This highlights the importance of this research. The UN possesses legal personality, allowing it to both assume and fulfill obligations as an international organization. However, it often seems to prioritize its rights over its obligations and liabilities. While some national courts have recently begun to differentiate between absolute and limited immunity for states and international organizations, most remain reluctant to waive the UN's complete immunity.[67]

Consequently, numerous cases involving human rights violations by UN peacekeepers have not resulted in compensation for victims or their ability to pursue justice in domestic courts.[68] The UN's framework for addressing human rights violations committed by peacekeepers during their missions, as mandated by the Security Council, is poorly defined and largely relies on the discretion of individual states. Prosecution falls under the jurisdiction of the troop-contributing country, which is often uncooperative, allowing violators to evade accountability.[69] If immunity from prosecution is maintained for these offenses and states are hesitant to take legal action, the incidence of human rights abuses by peacekeepers may increase. It is crucial to investigate the issue of impunity in UN operations, and to enhance accountability for peacekeepers, a standardized investigative process for human rights violations in the field is essential.[70]

A major challenge to establishing legal accountability is the UN's immunity from the jurisdiction of national courts in its member states. The United Nations invokes this immunity whenever a claim is brought against it in a domestic court, as it seeks to prevent

[67] Rosa Freedman, *UN Immunity, or Impunity? A Human Rights Based Challenge*, 25 Eur. J. Int'l L. 241 (2014).
[68] Id.
[69] Daphna Shraga, *The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect, in Securing Human Rights? Achievements and Challenges of the UN Security Council*, Collected Courses of the Academy of European Law (Bardo Fassbender ed., Oxford 2011; online edn, Oxford Academic, Jan. 19, 2012), https://academic.oup.com/book/4096/chapter-abstract/145807352?redirectedFrom=fulltext&login=true (last visited Sep. 22, 2024).
[70] *Supra* note 29.

domestic courts from interfering with its operations.[71] This is especially concerning regarding claims related to peacekeeping missions, as the UN often does not provide an alternative legal remedy at the UN level for such claims.[72] UN immunity was designed to allow the organization to fulfill its international obligations and to prevent state interference, but this should be its only purpose. It is possible to hold sovereign states accountable for the actions of private individuals by enforcing restrictive immunity.[73] However, this immunity is typically limited to actions taken in a sovereign capacity.[74]

Unfortunately, it appears that the UN and other international organizations overlook this limited immunity, asserting total immunity in national courts regardless of the circumstances that originally justified the immunity. The UN stubbornly wields the shield of absolute immunity to evade accountability instead of relinquishing it to uphold its principles.[75] In the past, UN peacekeepers have also claimed both internal and external immunity from victims' private law claims while engaging in intentional and negligent acts around the globe, including in Haiti and Kosovo.[76] The UN, which is responsible for safeguarding human rights, criticizes developing nations for violating these rights, even as it refrains from applying international law to itself.[77] It can be argued that the UN's absolute immunity from liability in national courts should not be a barrier to accountability in international courts, as it does not fulfill that function, even though it still prevents victims of UN peacekeepers from pursuing private law claims in national courts.

It can be argued that the UN's absolute immunity from liability in national courts does not protect the organization from accountability in international courts, as this immunity does not fulfill that role. While it does prevent victims of UN peacekeepers from pursuing private law claims in national courts[78], the immunity was not designed to shield the UN from international legal bodies. Instead, its primary purpose is to prevent political interference from member states. Additionally, this immunity is granted to the UN for operational reasons, so it should not apply when the UN acts beyond its intended purposes, such as in cases of human rights violations.

[71] Id.
[72] Id.
[73] *Supra* note 66.
[74] Id.
[75] *Supra* note 29.
[76] *Supra* note 9 at 142.
[77] Id.
[78] Id.

VI. PROPOSED SOLUTIONS AND RECOMMENDATIONS TO ENFORCE ACCOUNTABILITY IN UN PEACEKEEPING MISSIONS:

The rapid, intense pace, breadth, and ambition of U.N. peacekeeping missions have exposed a number of grave issues, worries, and challenges that need to be resolved. One of the major concerns raised in this regard is the lack of measures put in force to ensure that the stakeholders concerned with acts of misconduct against civilians are duly held accountable. Some of the measures which can be put in place to solve the legal and policy dilemma in this regard are as follows:

1. Seek clarification from the U.N. about the procedures and conditions required for the organization to waive employee immunities to facilitate grievance processes and address serious misconduct. Many actions taken by the U.N. and its affiliated organizations can lead to fatalities, property damage, or other negative consequences. Lifting U.N. immunities could likely result in fewer field operations, potentially leading to even greater suffering. However, this concern should not overshadow the necessity for victims of sexual abuse, criminal acts, or neglect to hold perpetrators accountable for their pain. While U.N. privileges and immunities are important, they should not unjustifiably hinder accountability.
2. It is essential to hold the nations that provide troops accountable. According to the standard memorandum of understanding between the United Nations and troop-contributing countries, jurisdiction over troops and police involved in U.N. peacekeeping operations is granted to those countries. Until recently, there was little action taken in these nations to investigate or punish individuals who commit such crimes. In fact, the U.N. often refrained from disclosing the nationalities of those who were detained or sent back. The United Nations has made efforts to improve the situation by identifying the nationalities of those involved, repatriating units with a history of misconduct, and indicating that compensation could be withheld. However, instead of merely reacting to these issues, more proactive measures are necessary to prevent them.
3. The Secretary-General has urged countries that contribute troops to establish mechanisms for monitoring how they investigate, prosecute, and discipline their personnel in cases of misconduct. While the Security Council acknowledged this report, it did not mandate that all troop-contributing nations implement these measures. To promote participation in U.N. peacekeeping, it should be essential for these nations to take such steps. Countries that do not hold their troops accountable to the agreed-upon standards should either forfeit their

right to provide troops for peace operations or face a significant cut in peacekeeper reimbursements; the monthly pay of peacekeepers directly involved in misconduct should be substantially withheld. Additionally, if it is determined that compensation is warranted for crimes committed by peacekeepers or for losses due to governmental negligence, penalties should be deducted from the peacekeeping funds allocated to the troop-contributing nation.

4. Under U.N. peacekeeping status of forces agreements with host nations, the U.N. currently seems to provide ways to address damages caused by its actions or lack thereof through claims in a standing claims commission. However, the U.N.'s failure to establish these commissions indicates that there are issues within the system. This is likely due to the fact that governments in countries where the United Nations has a peacekeeping presence are often heavily dependent on the organization for political, material, and security assistance. As a result, these administrations may be reluctant to challenge the U.N. by suggesting the formation of a standing claims commission. Ideally, a standing claims commission should be automatically established when a mission is launched to avoid this problem; however, it would be prudent to clearly outline the types of claims that can be considered to prevent frivolous requests. If compensation is found to be warranted in situations where damages do not result from lawful peacekeeping operations or are due to negligence, then the responsibility for that compensation should fall on the individual or the nation supplying the troops.
5. Establishing an independent body, similar to the now-disbanded Procurement Task Force (PTF), could enhance oversight, or alternatively, we could work towards making the Office of Internal Oversight Services (OIOS) genuinely independent. Additionally, the disdain shown towards U.N. whistleblowers worsens the already insufficient internal oversight within the organization. Given that U.N. agencies and their staff benefit from significant protections and immunities, whistleblowers serve a crucial function in the system. They should essentially function as a safety valve, alerting the organization to any misconduct.

VII. CONCLUSION:

The challenges surrounding accountability in United Nations (UN) peacekeeping operations, especially in relation to human rights violations and sexual misconduct, significantly threaten the integrity of these missions. Although UN peacekeeping efforts have been crucial in promoting global peace and security, the involvement of peacekeepers in serious human rights

abuses, including sexual exploitation and abuse, directly contradicts the principles these missions are designed to uphold. Current mechanisms within the UN framework, such as the Office of Internal Oversight Services (OIOS), the General Assembly, and the Security Council, provide limited options for addressing misconduct by peacekeepers.

While these mechanisms are established with good intentions, they are often obstructed by political pressures, jurisdictional constraints, and the UN's immunity from national legal systems. Consequently, this has led to a significant lack of accountability for peacekeepers and troop-contributing countries (TCCs), allowing many offenders to escape justice. Moreover, the UN's complete immunity from domestic courts, coupled with the insufficient enforcement of international legal remedies, has left victims of human rights violations with inadequate avenues to pursue justice. Although the International Criminal Court (ICC) and the International Court of Justice (ICJ) can tackle certain crimes, they do not have jurisdiction over the types of misconduct most frequently associated with peacekeeping forces, such as sexual exploitation and negligence. To tackle these issues, several reforms are essential. First, the UN should reassess its extensive claims of immunity and facilitate more transparent legal processes that enable victims to access justice. Second, TCCs need to be held responsible for their troops' actions, with enhanced monitoring and stricter penalties for non-compliance. Lastly, the creation of independent oversight bodies, like a revived Procurement Task Force or a more autonomous OIOS, could enhance accountability and oversight within the system.

Establishing standing claims commissions could create a structured way to handle claims of harm caused by peacekeepers, making sure that victims are compensated when warranted. In the end, holding UN peacekeeping operations accountable is not only a legal duty but also a moral responsibility. This accountability is crucial for preserving the credibility and effectiveness of UN missions and for upholding the core human rights principles outlined in international law. If significant reforms are not implemented, the UN risks further harm to its reputation and a loss of trust from the very communities it aims to safeguard.

SEBI BEYOND BORDERS: ANALYZING THE EXTRATERRITORIAL REACH OF INDIAN SECURITIES LAW

Tanmay Roy[1]

***Abstract*:** *The globalization of financial markets has amplified cross-border transactions, creating significant challenges for regulatory authorities in maintaining market integrity and investor protection. The Securities and Exchange Board of India (SEBI), as India's apex securities market regulator, has increasingly encountered the need to assert its jurisdiction over activities beyond national boundaries that impact Indian securities markets. This paper examines the extraterritorial application of SEBI's regulatory powers, focusing on its legal basis, practical implementation, and challenges in addressing transnational securities issues. The study analyzes the statutory framework and judicial interpretations that empower SEBI to regulate foreign entities and transactions affecting Indian markets. It explores the mechanisms used by SEBI to address securities fraud, market manipulation, and other illicit activities originating outside India but bearing consequences for its financial ecosystem. Additionally, the paper highlights the difficulties faced in enforcement actions, including jurisdictional conflicts, lack of cooperation from foreign regulators, and the complexities of tracing activities across borders. Through an evaluation of landmark cases, the paper assesses SEBI's effectiveness in asserting its extraterritorial reach and the implications for market participants. The analysis emphasizes the need for enhanced regulatory strategies, including international cooperation, to address the challenges posed by the interconnected nature of modern financial markets. The paper concludes by proposing actionable recommendations to strengthen SEBI s capacity to oversee cross-border securities activities while aligning its efforts with global best practices in securities regulation.*

Keywords: E*xtraterritorial Jurisdiction, Cross-Border Transactions, Indian Markets, Regulatory Enforcement, Investor Protection, Global Financial Markets, International Cooperation.*

I. INTRODUCTION

The birth of Securities and Exchange Board of India took place on 12th April, 1988 through a resolution of the Finance Ministry to operate as an arm of the Government of India. With its

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main purpose to regulate the market based on public securities. Ever since its birth SEBI has been very active in regulating the market and has played a very eminent role in the promotion of the transparent and investor protection system which is existing under the securities market in India. While having a very broad sweep and control over the securities market its powers not only are limited to that of the listed and about to be listed companies but it has got several other powers outside its umbrella. The jurisdiction of SEBI regulations is not only extended to India but they also operate outside India. The extra territorial jurisdiction of SEBI is one of the key features that the SEBI regulatory framework has which is very helpful for SEBI to regulate and monitor those transactions and activities which are having an impact over the securities market in India even though these transactions are taking place outside the Indian territory. While in most of the countries one can see that there is enactment of certain laws which have extra territorial application in order to protect their country from the threat which can emanate from the neighboring countries. FEMA, 1999 clearly provides under its provision contained in Section 1(3) for extra territorial operation of the provision, but the SEBI Act does not have any such provision which explicitly mentions about the same. In order to frame certain new regulations which are having extra territorial operation the SEBI uses its powers under Section 30 of the Act.[2] The researcher in this paper would be looking into and analyzing the extra territorial jurisdiction of SEBI, the legal frameworks behind those regulations and the limitations that have been put forth by the Supreme Court on their enactment.

II. EXTRA- TERRITORIAL JURISDICTION: WHAT DOES IT MEAN?

Extra territorial operation is such a concept which has been embodied under the Constitution of many countries around the world. Under the Indian pretext Clause (2) of Article 245 of the Indian Constitution contains and approves such laws which are having extra- territorial operation and it restrains the courts and judiciary from declaring such laws as ultra vires. The interpretation of the term was given by Justice Venkata Iyer in the case of *Bengal Immunity Co. Ltd. v. State of Bihar*[3] and it was stated that the notion is used for two different connotations, firstly it refers to the laws of the acts or the events which have their origin or take place outside the territories of the state. Secondly, laws which have reference to the nationals of a state with

[2] Bharat Vasani Team Varun Kannan, CAM Corporate, *Extra-territorial application of India's securities law – Has SEBI cast its net too wide?*, INDIA CORPORATE LAW (2021), https://corporate.cyrilamarchandblogs.com/2021/07/extra-territorial-application-of-indias-securities-law-has-sebi-cast-its-net-too-wide/ (last visited May 13, 2023).
[3] *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR1955 SC 661.

relation to their acts which have been committed outside it. The court in this case stated that the term extra territorial operation under Article 245(2) should be construed under the second connotation with a strict sense as placing reference to the laws of the state with respect to their nationals in purview of the acts which have been committed outside the territory of a state.[4] In layman's term the notion refers to the authority of a regulating body to regulate and oversee the activities taking place outside the boundaries of its territory and in SEBI's case these activities should be within the scope of Indian securities market even if they take place outside India.

One of the most important principles with regards to the extra territorial jurisdiction were laid down in the landmark case of *G.K Industries v. Income Tax Officer*[5] where the Apex Court pursuant to Article 245 of the Indian Constitution went on to check whether the Parliament is having power to legislate upon legislative competence with regards to the events that arise or take place outside the Indian territory. The Court held that the Parliament can exercise such a power only when such extra- territorial events are having or expected to have some impact on, or consequences for either the Indian territory or interests or welfare or wellbeing or security of the Indian citizens and those inhabiting Indian subcontinent.

III. EXTRA- TERRITORIAL JURISDICTION OF SEBI THROUGH CASES AND PROVISIONS

The case of *SEBI v. Pan Asia Advisors*[6] is a very important judgement where the usage of the principles that were laid down in the case of GVK Industries have been applied extensively for making a reference to the extra territorial jurisdiction of SEBI. The Supreme Court in this present case analyzed whether the powers give under the SEBI Act give SEBI the power for taking up actions against the respondents who were alleged to be fraudulently trading on the Global Depository Receipts (GDR) that were not only issued outside India but they were also having their market and investor bank outside the Indian territory. The contentions raised by the respondents in the present case were that the jurisdiction of SEBI under Section 1(2) of the act would onlu extend to the whole of India and there were no statutes which conferred it with such a power to regulate the activities which were taking place outside the India. Secondly, in the present case RBI is empowered for the formulation of regulations which were with relation

[4] Girish R, *Constitutional Governance of Extra-territorial Operation of Indian Law*, 7 GJLDP (October 2017).
[5] *G.K Industries v. Income Tax Officer*, (2011) 4 SCC 36.
[6] *SEBI v. Pan Asia Advisors*, AIR 2015 SC 2782.

to transfer of or issuing of a foreign security *as* the GDRs would fall under the definition of "foreign security" under Section 2(o) of FEMA and so SEBI will not have any form of application in the present case. The Supreme Court in the present case held that the GDRs would be falling under the definition of "security" under Section 2(h) of the SCRA Act of 1956 and the main purpose for their creation is for the issuing company ro earn foreign investments and SEBI is vested with a statutory duty of protecting the Indian investor's interests. The court held that just because GDRs were created and traded outside India in the global markets it cannot be stated that it doesn't have power to exercise its jurisdiction.[7] The Apex court while making this decision referred to Section 11(3) of the SEBI Act[8] wherein SEBI has been provided with the powers for calling for information which is relevant for any investigation for the matters concerning transaction in securities which is notwithstanding anyting that has been laid down or contained in any other provisions of law. The court also stated that FEMA and even the RBI Act of 1934 does not bar or retrict SEBI from exercising its jurisdiction and even if there is violation of FEMA or RBI Act SEBI can apply. The SC held that SEBI is having the statutory mandate for proceeding against individuals who are not present within Indian territory if the commission of their acts are affecting the legitimate interests of Indian market and India and SEBI to protect these interests can even initiate proceedings even though the transactions have taken place outside India.[9]

In another landmark case of *Sahara India Real Estate Corporation Ltd. v. SEBI*[10] the Supreme Court held that Section 11(1) casts and obligation over SEBI for protecting the interest of investors of India for the promotion of development in the securities market and for regulating the market through such measures it deems fit. The SC stated that the measures adopted by SEBI for carrying out the obligations are very much open ended and they do not have any prearranged limits and no other provision has been given an overriding effect over Section 11(1) of the SEBI Act. The court stated that SEBI which is a quasi legislative body shich is having the power of enforcing its law if it is affecting the interest of the securities market under the Indian subcontinent.[11]

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[7] FINSEC LAW ADVISORS, https://www.finseclaw.com/article/sebi-powers-regulate-gdrs (last visited May 13, 2023).
[8] https://www.sebi.gov.in/acts/act15ac.html (last visited May 13, 2023).
[9] Team, *supra* note 1.
[10] *Sahara India Real Estate Corpn. Ltd. v. SEBI*, (2012) 12 SCC 610.
[11] Shubham Gupta, *Extraterritorial Compliance with Corporate Governance Norms*, INDIACORPLAW (2020), https://indiacorplaw.in/2020/03/extraterritorial-compliance-with-corporate-governance-norms.html (last visited May 12, 2023).

Although SEBI derives its extraterritorial jurisdiction through several provisions of the SEBI Act as well as through several other rules and regulations issued by SEBI from time to time some of the key provisions for the same are:

- Section 11 of the SEBI Act[12]: This section empowers SEBI to take up measures for protecting the interests of the investors in securities and for developing the market related to securities in India which also goes on to include the regulating of events and transactions which have an impact on the securities market in India even though they take place outside India.

- SEBI (Foreign Portfolio Investors) Regulations, 2014: This regulation provides for the regulatory framework of SEBI concerning the Foreign Portfolio Investors (FPI) including their registration, limits for investment and disclosure requirements. This regulation provides for and gives power to the SEBI to impose penalties on the FPI for its voting regulations even if they are located outside.[13]

IV. SCOPE AND LIMITATION OF SEBI'S EXTRATERRITORIAL JURISDICTION

Some of the key areas where SEBI's extra territorial jurisdiction has been exercised are enlisted below:

1. Foreign Portfolio Investments (FPIs)- SEBI regulates the requirements under FPI and can even impose penalties on FPIs for the violation of the regulations even if they are situated outside India.[14]

2. Insider Trading: The extraterritorial jurisdiction of SEBI also extends to the practise of insider trading, which is defined as the purchasing or selling of securities based on information that is not readily available to the general public. Even if the insider or the person dealing in the securities is situated outside of India, SEBI has the authority to investigate and prosecute cases of insider trading involving Indian stocks.

3. Manipulation of the Market: The extraterritorial jurisdiction of SEBI extends to encompass the practise of market manipulation, which is defined as the intentional

[12] *supra* note 7.
[13] PricewaterhouseCoopers, *Tax Alert : Review of SEBI (Foreign Portfolio Investors) Regulations*, PwC, https://www.pwc.com/mu/en/services/tax/Taxtimes/tax-alert-india-desk.html (last visited May 14, 2023).
[14] *Id.*

attempt to artificially influence either the price or volume of securities traded on a market. Even if the individual or company implicated in market manipulation involving Indian securities is based outside of India, SEBI has the authority to investigate and prosecute cases of market manipulation involving Indian securities.

4. Cross-Border Listings: SEBI's extraterritorial jurisdiction extends to cross-border listings, which refers to the listing of securities of an Indian firm on a foreign stock exchange or the listing of securities of a foreign company on an Indian stock exchange. In other words, cross-border listings can take place either in India or abroad. Even if a company is based outside of India but still violates SEBI's laws, the organisation may be subject to disciplinary action. SEBI is in charge of regulating the disclosure and reporting requirements of such listings.[15]

5. Offshore Derivatives Instruments (ODIs): SEBI's extraterritorial jurisdiction also encompasses offshore derivative instruments (ODIs), which are financial instrument values of which are derived from an underlying asset such as stocks, bonds, or currencies. ODIs fall under the category of "financial instruments values of which is derived from an underlying asset." SEBI has the authority to take legal action against investors who breach its laws even if they are based outside of India. This is because SEBI controls the issue and trading of ODIs by overseas investors in Indian securities.[16]

Despite its wide-ranging extraterritorial jurisdiction, SEBI's regulatory authority is not absolute and has several limitations. Some of the key limitations of SEBI's extraterritorial jurisdiction are as follows:

1. Jurisdictional Conflicts: SEBI's extraterritorial jurisdiction can sometimes lead to jurisdictional conflicts with other regulatory bodies that have jurisdiction over the same activity or transaction. In such cases, SEBI may have to rely on cooperation and coordination with other regulatory bodies to regulate the activity or transaction effectively.

[15] Principal listing and maintenance requirements and procedures | Indian Stock Exchanges | Cross-Border Listings Guide | Baker McKenzie Resource Hub, https://resourcehub.bakermckenzie.com/en/resources/cross-border-listings-handbook/asia-pacific/indian-stock-exchanges/topics/principal-listing-and-maintenance-requirements-and-procedures (last visited May 13, 2023).
[16] Conventus Law, *India - SEBI Prohibits Issuance Of Offshore Derivative Instruments By FPI's With Derivatives As Underlying.*, CONVENTUS LAW (2017), https://conventuslaw.com/report/india-sebi-prohibits-issuance-of-offshore/ (last visited May 14, 2023).

2. Limited Enforcement Capabilities: SEBI's extraterritorial jurisdiction is limited by its enforcement capabilities, particularly when it comes to prosecuting entities located outside India. SEBI may have to rely on cooperation and coordination with foreign regulatory bodies to enforce its regulations effectively.

3. International Law: SEBI's extraterritorial jurisdiction is also limited by international law, particularly when it comes to regulating activities and transactions that take place outside India. SEBI may have to rely on international treaties and conventions to regulate such activities and transactions effectively.

V. CONCLUSION

SEBI's extraterritorial jurisdiction is a crucial tool for regulating the Indian securities market and protecting the interests of Indian investors. Its jurisdiction covers a wide range of activities and transactions that have an impact on the Indian securities market, even if they take place outside India. However, SEBI's extraterritorial jurisdiction also has several limitations, including jurisdictional conflicts, limited enforcement capabilities, and limitations imposed by international law. Despite these limitations, SEBI's extraterritorial jurisdiction has several benefits, including protecting Indian investors, promoting transparency, and enhancing India's image as a responsible regulator of the securities market. To overcome the challenges of its extraterritorial jurisdiction, SEBI must continue to collaborate and cooperate with other regulatory bodies, both within and outside India. Just like the IOSCO principles certain other principles of International platform should be made which shall provide for the protection of investors amongst the participant or member countriesIt must also continue to enhance its enforcement capabilities and invest in technologies that enable it to monitor and regulate activities and transactions more effectively. Additionally, SEBI must balance the need for regulatory oversight with the need to promote innovation and growth in the Indian securities market, particularly in the context of emerging technologies such as blockchain and cryptocurrencies.