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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, IIS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. Indian Institute of Legal Studies 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 have 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



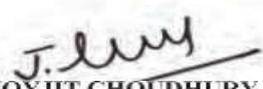
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**Founder & Chairman
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The contemporary legal landscape is undergoing significant transformation under the influence of globalization, technological advancement, and evolving socio-legal realities. These developments demand sustained intellectual engagement to ensure that the foundational principles of justice, legality, and ethical responsibility remain firmly preserved. Legal knowledge plays a critical role in responding to these changes by offering rigorous analysis, reflective critique, and normative guidance.

The *IILS Law Review* continues to uphold its commitment as an academic legal journal dedicated to the promotion of high-quality legal research and scholarly discourse. It provides a vital forum for critical engagement with legal theory, doctrine, and practice, thereby reinforcing the enduring values of justice, integrity, and the rule of law. The journal stands as a testament to the importance of thoughtful academic dialogue in shaping legal understanding and institutional development.

I offer my sincere gratitude to every contributor whose relentless efforts have shaped important ideas into well-researched works of scholarly merit. Through this collective endeavour, we proudly carry forward the rich tradition of legal research and publication, strengthening the broader legal community with shared knowledge and insight.



JOYJIT CHOUDHURY

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IILS Law Review

MESSAGE FROM EDITOR IN CHIEF**Dr. Trishna Gurung****Principal-in-Charge
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It gives me great satisfaction to place before you the newest issue of the *IILS Law Review*. The journal steadfastly continues its mission of promoting quality legal scholarship by providing a forum for in-depth analysis, critical reflection, and informed discussion on pressing legal concerns. As the law adapts to constant change, this volume reflects our enduring commitment to both established doctrines and developing branches of legal study.

This edition spans a broad spectrum—from constitutional and environmental thought to intricate contemporary matters such as digital evidence, surrogacy, and socio-economic regulation. Through such coverage, the *IILS Law Review* seeks to engage readers with research that is both relevant and intellectually stimulating. We are honoured to showcase insightful work from academicians, researchers, legal professionals, and students whose contributions deepen legal understanding and encourage meaningful debate that influences the trajectory of legal thought and practice.

I convey my sincere appreciation to the authors, peer reviewers, and members of the editorial board for their unwavering commitment to preserving the journal's academic excellence. I am confident that the range of viewpoints included in this issue will inform, motivate, and intellectually enrich

our readership.

Thank you for your continued encouragement and association with the *IILS Law Review*. We warmly welcome your feedback and look forward to your scholarly contributions in forthcoming issues.

Best Wishes



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

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NAVIGATING MODERN CHALLENGES: INNOVATING SOLUTIONS IN INTELLECTUAL PROPERTY LAW

Atheesha M. V¹

Abstract

With the unprecedented challenges and aspects modern digital landscapes pose to intellectual property laws, which were created to protect and aid innovators' rights, it is now under immense pressure. Traditional IP frameworks have proved ineffective as they often lag behind the new realities associated with rapid technological progress in terms of the internet and AI. It is contemporary circumstances that have thrown up several issues that call for consideration in IP law today, ranging from the lacuna of protection for digital content to the mushrooming of AI-generated works and the need for global harmonization of the norms of intellectual property law. There are also new forms of copyright infringement, like digital piracy and illegal streaming, that have cropped up with the new era of digitization, pointing out the limitations of today's laws. The emergence of AI technology raises critical questions about who owns the intellectual property when machines rather than humans create the content. It is bound to be even tougher for cross-border enforcement of national laws controlling IP across regions in a global economy dominated by multinational corporations.

This note encompasses the problems and suggests which of them shall be resorted to through an amendment of copyright and patent laws that bring in the rights of AI-generated works or via better international cooperation in the harmonization of IP law. It is further argued that protection and innovation must go hand in hand because inventions related to biotechnology, digital media, and many more are critical aspects to be catered for. As a system, IP law must address these modern challenges as it evolves along with the changing world.

Keywords: *Biotechnology Patents, Pharmaceutical Law, Fair Use Doctrine, Digital Copyright, Compulsory Licensing.*

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1. INTRODUCTION

Intellectual Property law contributes significantly to new economic development. It protects the innovations of the creators-inventors, authors, and designers and grants monopoly rights over inventions that stimulate competition and innovation. As such, however, the more technology develops rapidly, the more weaknesses show up in how IP law can effectively protect innovations. To start with there's digital piracy, an issue where copyright enforcement is lagging in the ability to keep up with unauthorized digital distribution usually across different borders where the laws are weak or deficient. The actual ownership of AI-generated works relates to new developments: for, so far, courts require human involvement to elicit IP protection. Another issue is the world's edging towards multinational corporations, and global harmonization of IP is an issue as that remains a serious challenge due to differing legal frameworks across jurisdictions. More importantly, such treaties as TRIPS did have some progress, although international cooperation in its enforcement is still wanting. As the new economy remains international and technology-driven, continuing in its headlong rush, IP laws have to find ways to adapt to these challenges and not be marginalized in fostering innovation.

1.1 The Digital Age and Intellectual Property

In any event, the intellectual property landscape of the digital era has changed dramatically. Rapid developments in terms of digital content distribution, online platforms, and software, and bring it much closer to its limits beyond which the traditional structures of IP law will confront a myriad of challenges. The rise of the internet, cloud computing, and AI has redefined how creative works, inventions, and other forms of IP are created, shared, and consumed. Such changes have brought opportunities and risks, mainly concerning, copyright infringement software patents and piracy, so pushing the entire legal system to adjust to this rapidly changing technological environment.

1.2 The Technology Impact on IP Law

It has changed the way many things have been done in terms of creating and disseminating content that relates to music, film, software, and literature. Before the digital revolution, these content works are encapsulated in physical forms, limiting their copying and redistribution by those without authorization. Digital technology has simplified and reduced the cost of distributing and sharing content. Such development has caused modifications in the way intellectual properties are managed, enforced, and infringed.

Copyright law is one of the areas most affected by the digital world. The internet has allowed for

access to creative works on an unprecedented level. Instant access to books, music, movies, and software becomes much easier for the consumer but at the same time escalates copyright infringement issues, where downloading or sharing without permission forms common practice. What is problematic about infringement in this sense is that digital works can be copied infinitely, without a loss in quality, something that was impossible in the pre-digital age. As a result of these new technologies, copyright holders-whether publishers or other content creators-have had to deal with global infrastructures of infringement. As if that were not enough, the development of legal frameworks such as the Digital Millennium Copyright Act in the United States equipped copyright holders with the authority to instruct websites to remove allegedly infringing content.² However, legal frameworks were still not adequate measures to substantially check and deter major copyright infringement, especially with P2P networks and the emergence of decentralized platforms.

Digital technology has hit, for instance, the area of patent law hard, especially on software patents. Innovations in software were explosive because of its rapid growth industry; firms seeking patents to protect their proprietary technologies and the market. However, the patent system was confronted with difficulties adapting to the peculiar nature of software, largely abstract and iterative. In a way, courts in different jurisdictions have solved this question inconsistently, holding whether software is patentable subject matter or not. For example, the ruling of *Alice Corp. v. CLS Bank International* has restricted the ambit of software patents to a huge extent and holds an opinion that abstract ideas that appear on a computer cannot get a patent.³ Such a judgment has put a lot of burden on the tech industry as this decision by the court has restrained companies from obtaining patents for their software innovations.

The new forms of IP, including data and algorithms, have finally gained significant inroads in the digital economy. In this respect, complex algorithms formed the backbone of Google, Facebook, and Amazon in rendering services for these virtual giants. The design of such algorithms is valuable proprietary information. Still, IP frameworks in place today are unable to afford any effective protection to these assets. This right offers very minimal protection for proprietary algorithms under trade secrets. Of high significance, cross-border issues make the enforcement of this right quite complicated. As algorithms play a more outstanding role in the digital economy, there is an ever-growing need for updating IP laws to adequately cover them.

² Digital Millennium Copyright Act, 17 U.S.C. S 512 (1998).

³ *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

1.3 Gaps in the Digital World

Technological progress has only encouraged weak responses from the IP laws, which could not match this revolution in new information. This led to a series of critical legal gaps in areas such as the enforcement of patents related to digital piracy, illegal streaming, and even legitimate measures against patent-infringing software. Such gaps devalue the IP but also place strains on creators, businesses, and legal systems throughout the world.

One of the most severe issues is digital piracy because it is significantly threatening copyright holders. The internet has affected the unauthorized dissemination of copyrighted content. Here are some samples of items passed on P2P networks, torrent sites, and file-sharing services: music, movies, e-books, and software. The internet has spread far and wide in this world, and hence copyright enforcement across jurisdictions is often found to be a challenge as it often tends to take shelter in countries that have minimal IP protections. Large-scale piracy continues unabated despite The Pirate Bay lawsuit in Sweden and technological measures like DRM. Many users can bypass DRM restrictions, and new torrent sites spring up even after old ones have been shut down.⁴ This constant cycle of enforcement and evasion best illustrates the challenges that will confront the regulation of IP in a borderless digital world.

Illegal streaming also poses a significant threat to the copyright holders. The fact that content is now being consumed in this new legally permissible form instead of other illegal forms has drastically changed the way people engage with content. Illegal streaming services enable people to access copyrighted content like films, TV series, and sports events without there being any pecuniary recourse for them. Most of these operations base themselves in countries where IP rights are weakly enforced and thus there is nearly no chance that copyright holders can fight back legally. Unlike download piracy where users download files, illegal streaming creates a scenario where users can view content in real-time without downloading it to a device, making enforcement even more complicated. For instance, live sports events are very frequently pirated and streamed on unauthorized channels leading to a loss of legitimate revenue streams for broadcasters and content creators. International efforts to combat illegal streaming have included enforcement actions, such as Interpol's Operation 404, which targeted illegal streaming websites. Yet the scope of the problem continues to prove challenging to address⁵.

A final gap in the law is about software patents. While software is essential to a vibrant digital economy, how to treat it in the patent system has not been clear. Due to the abstract nature of software as well as its iterative process of development, it becomes very inconvenient to apply

⁴ Sweden v. Neij, Svartholm, Warg & Lundström, Case No. B 13301-06 (Stockholm District Court 2009).

⁵ Interpol, Operation 404 Targets Pirated Content, <https://www.interpol.int/en/News-and-Events/News/2020/Operation-404-targets-pirated-content>.

traditional patent criteria. In the United States, the *Alice Corp. v. CLS Bank International* decision has limited the scope of patent protection for software. This in turn has opened Pandora's box of uncertainty regarding the patent protectability of innovative inventions of tech companies. Many argue that the existing legal structure is inadequate to protect software, whereas others suggest that the overly broad software patents unduly impede innovation because they impose monopolies over abstract ideas⁶. So, it is an endless debate raging on to date demonstrating how technology continues to make headway in shaping what needs to be said in clarity and consistency surrounding the patents of software.

Blockchain technology and cryptocurrencies brought another set of challenges to the table of IP law. Decentralization makes blockchain more challenging for enforcement, but the decentralized nature in which transactions and content are spread across a global network of computers has reverberations for the enforcement of IP rights, especially in copyright or trademark. For instance, one can spread copyrighted content using blockchain-based platforms without being authorized to do so, making it harder for copyright owners to act against it. With the spread of blockchain technology, there have also arisen challenges on the ownership and protection concerning digital assets. The rise in NFTs will mean a greater demand for IP laws regarding these and related challenges about unique contemporary applications.

2. ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY

Artificial intelligence has dramatically altered the creative innovation landscape, leaving in its wake a barrage of significant debates on intellectual property rights. Questions relating to who is considered the author and owner of independent, AI-generated art, music, inventions, or literature are complexly related to legal issues.

END. Traditional IP frameworks, in operation in reliance on the exclusive role of human creators of copyright or patents, are entering a paradigm shift. With AI-generated works becoming more widespread, an immediate question is who owns such creations and how they would be protected under current law.

2.1 A.I-Created Works: Who owns them? And how to protect them?

Authorship is the central controversy involved with AI-generated works. In most legal systems, IP laws, especially copyright and patent law, have the protection of human creators. For instance, copyright law protects the "author" of an original work as usually defined as a human being. Patent

⁶ *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

law, likewise, provides exclusive rights over inventions by an inventor when they satisfy qualifying requirements such as novelty and non-obviousness. However, these AI systems are now increasingly capable of producing creative works and innovations in the absence of direct human intervention. The question is: can such an AI system be treated as an author or inventor under current IP law?

In many jurisdictions around the world, in the United States and the European Union, the reply is a straightforward "no." Courts and lawmakers have usually maintained that only human beings may be granted IP rights. The United States Copyright Office, for example, has unequivocally declared that it would grant copyright protection only in respect of such works that can be said to possess a stamp of human authorship⁷. In *Thaler v. Hirshfeld*, a federal district court has recently reaffirmed that inventions developed by AI cannot be patented because patents are reserved exclusively for human inventors⁸. Under the Copyright Act in the United Kingdom, no room is available for AI to claim authorship as the author of a work must be identified as a human individual⁹.

Despite such rulings, the use of AI in creative processes is on the rise. AI-generated artworks, music, and literature are becoming increasingly sophisticated; some of these works even achieved commercial success. For instance, AI-generated music has been used in a particular game and film, while AI-generated works of art have gained massive sums in auctions. Since it is unable to recognize AI as an author or an inventor, it possibly creates legal voids. Hence, AI-generated works are likely to enter the public domain without IP protection, effectively depriving creators or companies that develop and use AI systems of suitable financial benefits they would otherwise have obtained. This deters investment in AI technologies that add to creativity and innovation.

Ownership of AI-generated content can be attributed to human developers or AI system users. Others, arguing purely on legalistic grounds, count as authors or inventors the person or entity who designs the AI, inputs the relevant data, or instructs the system to create a particular work. This approach is analogous to the "work-for-hire" doctrine in copyright law, where it is considered that the employer or client who ordered a work retains the copyright even though the work is created by another person such as an employee or a contractor.¹⁰ This provides some potential resolution but then raises further questions about how much human involvement is required for a claim of ownership. For example, consider the case where an AI system has wholly autonomously produced a work with minimal human input: can the developer be considered the author?

⁷ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* S 313.2 (3d ed. 2017).

⁸ *Thaler v. Hirshfeld*, No. 1:20-cv-00903 (D.D.C. Sept. 7, 2021).

⁹ Copyright, Designs and Patents Act 1988, c. 48, § 9 (UK).

¹⁰ 17 U.S.C. S 101 (defining "work made for hire").

2.2 A. I and Copyright Law: Existing Lacunae

Copyright law is today, then, deeply challenged in accounting for reality regarding AI-generated content. The Berne Convention for the Protection of Literary and Artistic Works-the seminal international treaty on copyright law- doesn't offer protection to any work unless considered an original expression of the author's mind. Traditionally, this has been interpreted as bestowing copyright in things involving human authorship. Yet AI-generated works challenge this understanding of originality since they often are based on vast datasets of pre-existing works. Such content generation by AI systems-Open AI's GPT-4 and DeepMind's AlphaFold, for example-is, in itself, a computation of represented information redistributed in different patterns. The merit of "genuine" "originality" in the content generated by AI is thus called into question.¹¹ Moreover, infringement anxiety: by relying on huge datasets composed of protected information, AI may, literally, inadvertently create similarities to copyrighted works.

This brings AI generations of work into a grey area of the current legal regime. Without clear guidelines, creators, developers, and businesses remain uncertain about the potential for protecting AI-generated content. The international implications of such legal ambiguity lie in the fact that countries with more lenient approaches to IP would stand to gain an advantage vis-a-vis competitors in the global AI innovation space by setting clearer protections for AI-generated works. Conversely, jurisdictions continuing strict requirements for human authorship will attract insufficient investment in AI technologies.

Policy Recommendations: Reform of IP Law concerning AI With AI now fast becoming part and parcel of creative and innovative processes, the existing IP frameworks should be reformed to account for creations born out of AI. There should be a clear balance in this matter nipping at innovation at one end nor losing focus on producers and developers of AI technology, who should be adequately compensated for their efforts. Various policy recommendations may be put in place. The first step would be a modification of copyright and patent laws to account for rights in AI-generated works. A potential remedy is the provision for copyright or patent protection over works created by AI systems, provided the rights are granted to the developer, user, or company owning the AI. This is in line with the incentive principle: persons who commit resources to developing AI technologies should be rewarded. For example, the European Union could just rewrite its Directive on the Legal Protection of Computer Programs to include, explicitly, AI-generated software or software written by AI systems as copyrightable, with ownership in the developer or

¹¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended on Sept. 28, 1979.

company producing that AI system.¹²

Another way to go may be to create a new, independent category of IP rights for AI-generated works. This new category can be allowed protection for a certain period and can be applied to inventions or content that has been primarily generated by AI and with a minimum contribution from humans. Thus, AI-generated works, created by an autonomous AI system without any human interference, would not fall through the crack, but their developers and users could monetarily benefit from their AI-generated creations. It would distinguish human-traditional content from AI-generating content, hence creating a clearer legal landscape for both.

International guidelines in the protection of AI-generated works are therefore needed to ensure international uniformity. With AI advancement across the globe, national IP laws would vary, and therefore, protection and enforcement could be fragmented, hence confusing developers and businesses. WIPO should take the lead in establishing international standards for works created by AI, basing it on past frameworks, such as the TRIPS Agreement, to establish the minimum accepted levels of IP protection within its member states¹³. Such minimum standards could outline principles for ownership, originality, and scope of protection applicable to AI-generate works to secure worldwide consistency in matters of IP rights in the digital world.

Fourth, the right balance between innovation and protection must be achieved. This, of course, doesn't mean that policymakers must give IP protection for the works produced by AI; instead, they should guarantee it will not stifle innovation. If there were overly broad or restrictive rights of IP over the content generated with the aid of AI, this would lead to possible monopolization of some types of AI technology or algorithms, checking competition and gradually retarding technological development. Policymakers should tread the middle ground between making it easy for innovation in AI and exerting their imperative to preclude potential misuse of IP rights that might inhibit development in the field further. For one, perhaps shorter duration protection of AI-generated works might strike a better balance.

2.3 Harmonization at the Global Level and Cross-Border Issues

Indeed, the world is very small, for intellectual property rights cut across borders. Multinational companies, global trade, and business activities now exist in a globalized marketplace. It also marks a big challenge for creators, businesses, and governments with varied national IP laws and inconsistent enforcement across jurisdictions. The international nature of trade, technology, and a

¹² Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

digital economy underscores the urgent need for cross-border harmonization and enforcement of IP rights while intellectual property law remains dominantly territorial. Challenges in Global IP Protection Section three explores such challenges, reviews issues in enforcing IP rights in countries with weak or inconsistent IP laws, and suggests possible steps toward harmonization.

2.4 Global IP Protection: Challenges by Differing National Laws

The main challenge of global IP protection lies instead in the vast differences between national IP laws. Each country has its intellectual property law framework regarding the acknowledgement and protection of intellectual property rights, and this may stem from its prevailing legal traditions, economic interests, or cultural aspects. For example, the patent law in the United States formerly featured a system of first-to-file. India and South Africa have historically supported the inclusion of additional more stringent patentability requirements designed to avoid evergreening and ensure the affordability of medicines.¹⁴ These differences cause friction for companies that seek IP protection in more than one jurisdiction, particularly for multinationals operating in a global marketplace.

For example, copyright protection term differs significantly from country to country. The Berne Convention for the Protection of Literary and Artistic Works gives most countries a minimum protection period of 50 years after the death of the author. But the European Union and the United States have stretched the period to 70 years post-mortem, bringing inconsistency in the length of protection across borders.¹⁵ Furthermore, the apprehension of "originality" or "fair use" varies from country to country, thereby bringing inconsistency as to what could be copyrighted and how copyrighted material could be used in other countries.

These legal inconsistencies bring great hurdles to the transnational corporation and its creators. For instance, application developers, filmmakers, and artists have to navigate a complex web of diverse legal standards to safeguard their products within various countries. To this end, the stakeholders pay more legal and bureaucratic costs when they seek to register and enforce rights across multiple jurisdictions. In addition to this, there will not be one approach under one legal umbrella but forum shopping as parties look to exploit differences between legal systems to achieve favorable outcomes further complicating the protection of IP across global borders.

The other major challenge has been trademark law, particularly in the digital era. With the growth of e-commerce and the branding that happens in the digital space, trademarks must be protected in a myriad of jurisdictions by businesses. On the other hand, trademark registration is typically

¹⁴ United States Patent Act, 35 U.S.C. SS 101 et seq.

¹⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended on Sept. 28, 1979.

national or regional. A company can enjoy trademark protection in one country but not in another. This led to the sparring between Apple Inc. and Proview Technology, which owned rights to the term "iPad" in China but the latter enjoys trademark rights in all other jurisdictions. The company was ultimately sued to shell out \$60 million to bring the trademark infringement case to an end in China. Notably, such cases remain a major trouble in defending trademarks globally.¹⁶

2.5 Enforcement of IP Rights in Global Markets: Weak IP Laws and Lax Enforcement

Even if multiple jurisdictions grant IP rights, enforcement still turns out to be the biggest headache, especially in weak or non-uniform IP laws countries. While countries find themselves party to an ever-growing number of international agreements, like that of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides for minimum standards of protection, mechanisms of enforcement can vary dramatically between nations. Due to strong legal frameworks, for example in the United States, the European Union, or Japan, rights holders can generally rely on a predictable system of courts and law enforcement agencies to deal with violations of their IP rights. Rights holders may face a less than effective enforcement of their IP rights in countries with weaker legal systems or less political will to enforce IP laws.

Although countries such as China have made significant strides in IP protection over the last couple of years, they are also known for the extensive infringement of IP rights coupled with the lack of effective enforcement over the years. Counterfeiting goods, piracy, and trademark infringement were rife in certain industries due to companies' difficult times enforcing their IP rights abroad. For example, foreign film studios face a tough time cracking the scourge of online piracy of their films in China, even with the government's escalation of IP-related legislation lately.¹⁷ In addition, the rapid growth of counterfeit products—from luxury products to pharmaceuticals continues to pose challenges for proper enforcement. Although China has been becoming more aggressive in enforcing its IP rights, especially since its entry into the WTO, the enforcement of rights holders' rights remains difficult due to the inefficiency of the administration and local protectionism in some cases.¹⁸

India also has been a concerning destination for companies that seek to enforce their IP rights, particularly in the areas of pharmaceuticals and technology. India's patent laws are drafted in such a way that access to affordable medicine remains available, usually at the cost of foreign

¹⁶ Proview Tech. v. Apple, No. 2010 Huaji 5335, Guangzhou Intermediate People's Court.

¹⁷ Michael D. Pendleton & Douglas Clark, *China Intellectual Property Law Guide*, 3rd ed. (LexisNexis, 2016).

¹⁸ Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, 14 *AIPLA Q.J.* 13 (2011).

pharmaceutical companies hoping to receive patent protection. Recently, it was rejected by the Supreme Court of India in 2013 a patent application for its cancer drug Glivec by Novartis. It reasoned that the country has strict standards for innovation since the drug does not meet those standards¹⁹. As such, it was based on Section 3(d) of the Indian Patent Act, which is aimed at preventing "evergreening," or the practice of extending patent protection by making minor modifications to an existing drug. While the policy from India is well-prepared to protect accessibility in medicines, it leaves quite a lot to be concerned with when it relates to global-plane protection on pharmaceutical innovations.

Consistency can also be said to not abound well in the Southeast Asia setting, where countries like Indonesia and Vietnam are known to have major cases of IP infringement and counterfeit goods. Although countries are signatories to international agreements such as TRIPS, the local enforcement mechanism of IP rights is weak in most jurisdictions, meaning that existing IP rights holders are generally subject to bureaucratic delays and are inadequately rewarded against the infringers. These woes are compounded by the issue of jurisdictions where national authorities lack the necessary resources or will to implement successful IP infringement cases.

The problem of the weakness of IP enforcement is not solely at the domestic level. In the digital era, cross-border piracy and infringement have become much easier and more prevalent, especially with the advent of the internet. The success of various web platforms, streaming services, and digital marketplaces has made it easy to circulate pirated content and fake products from jurisdictions in which IP enforcement is relatively weak. For example, some sources offering pirated movies or songs may be based in jurisdictions with either weak mechanisms of enforcement or are uncooperative with abroad's IP enforcement agencies. In that regard, this presents a tremendous hurdle for rights holders in trying cross-border legal actions to effectively address infringement; sometimes at a great cost.

2.6 Harmonization Recommendations: Steps Toward Greater International Harmonization

The above challenges posed by differences in national laws on IP and inconsistent enforcement also call for global harmonization of the protection of IP. Harmonization requires that there be more uniform and harmonized rules about matters of IP protection and enforcement across jurisdictions. While this is difficult to achieve fully because of the difference in economic, cultural, and political priorities, several measures can still be taken toward greater consistency.

International treaties and agreements have become probably one of the most effective tools for the harmonization of rights as both cover high minimum standards for the protection of IP under

¹⁹ Novartis AG v. Union of India, AIR 2013 SC 1311 (India).

international enforcement among WTO member countries. TRIPS has been very instrumental in raising global standards. TRIPS, however, comes with limitations, particularly in its mechanisms of enforcement, and there is a need for additional international agreements that would go beyond the standards set by TRIPS. For example, ACTA is expected to combat counterfeiting and piracy more effectively by enlisting better mechanisms to enforce. Although many countries have ratified the ACTA, opposition from several others has made it rigid in its advancement process, including the European Union; it was rejected by the European Parliament after it continued raising its issues about freedom of the internet.²⁰ Any other international accord must reconcile stronger enforcement methods with the cultural and legal differences of various sovereigns.

Specialized IP courts or tribunals with cross-border jurisdiction are the other crucial stride toward harmonization. Specialized courts could resolve cross-border disputes involving IP rights, which would gradually lead to the development of an efficient and predictable mechanism for enforcement purposes. International IP courts established on similar lines as arbitral tribunals in international commercial disputes may provide a neutral forum for cases involving multinational companies and cross-border IP infringement.

For instance, capacity building is very crucial in the enforcement of IP in developing countries. A country with weak IPs would be able to fortify its capacity to enforce protection if equipped with education and resources for local law enforcers, customs authorities, and judicial systems. WIPO, through collaboration with other international organizations, can also play a very big role in education and capacity-building programs in countries with weak IP enforcement frameworks.

Finally, enhanced cooperation among national IP offices and law enforcement authorities will help to enhance the enforcement of global IP rights. Companies, like governments, should push for greater information exchange and cooperation between national authorities to combat cross-border infringements more effectively. This might include international enforcement networks through which national authorities cooperate in joint operations and strategies against counterfeiting goods, and online piracy, among other forms of IP infringement.

3. EVOLVING CONCEPTS IN PATENT AND COPYRIGHT LAW

Biotechnology and the digital world have catapulted the domain of patents and copyrights to the fullest. Applications of biotechnology, pharmaceuticals, as well as content generation in the digital world push to the extreme traditional precedents that exist under patent and copyright laws. Issues related to the patentability of life forms and drugs challenge patent law in the fields of

²⁰ Anti-Counterfeiting Trade Agreement (ACTA), 2011.

biotechnology and pharmaceuticals. The increasingly elusive fair use doctrine is also challenging copyright law, especially about educational materials and digital applications. The chapter discusses current issues related to patents in biotechnology and pharmaceuticals, as well as how the frontier of this area keeps flying.

3.1 Contemporary Issues in Biotechnology and Pharmaceuticals

New medical sciences have been produced with biotechnology and pharmaceutical research, but they also lay down complex legal and ethical questions about protection through patents. The most debated aspects include the patentability of life forms and genetic material. A landmark case is *Diamond v. Chakrabarty* (1980), in which the U.S. Supreme Court ruled that a genetically modified microorganism capable of breaking down oil qualified as man-made inventiveness and was therefore patentable²¹. This precedent continues to drive patentability decisions regarding genetically engineered organisms, plants, animals, and so on. The changes have set off alarm bells in the accusations of biopiracy, privatization of life forms, and commodification of nature.

Another controversial case is *Association for Molecular Pathology v. Myriad Genetics* (2013), in which the Supreme Court of the United States ruled that "naturally occurring human genes cannot be patented," while synthetic DNA (cDNA), which was created in the lab, can be patented²². This has been intended to balance the need for innovation in genetic research with the need to make basic biological discoveries available to the public.

Another dubious practice of the pharmaceutical industry is evergreening. This allows a company to make only slight alterations to an existing drug to extend patents. The tactic has been reported to draw attention, especially in developing countries where low-priced medication might make a difference. Section 3(d) of India's Patent Act prohibits patents for new formulations of known drugs that do not demonstrate higher efficacy.²³ In *Novartis AG v. Union of India* (2013), the Indian Supreme Court confirmed the denial of a patent on the cancer drug Glivec when the new formulation failed to meet the criterion of efficacy.²⁴

Another significant development in pharmaceutical patent law is compulsory licensing, which allows the government to allow the manufacture of patented medicines without the permission of the patent owner in cases where public health issues must take precedence. In 2012, for example, India granted a compulsory license on Bayer's cancer medicine Nexavar, authorizing a local

²¹ *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

²² *Association for Molecular Pathology v. Myriad Genetics*, 569 U.S. 576 (2013).

²³ India Patents Act, 1970, Section 3(d).

²⁴ *Novartis AG v. Union of India*, Civil Appeal No. 2706-2716 of 2013.

company to manufacture a significantly less expensive version of the drug.²⁵ This stimulated debate over when patent rights have to yield to public health imperatives to better meet poor and middle-income countries' needs.

3.2 Fair Use and Copyright Exceptions: Shifting Boundaries

Patent law is troubled by biotechnology and pharmaceuticals, but copyright law is still struggling to define the boundaries of fair use. Fair use allows for limited use of copyrighted works without permission for criticism, commentary, news reporting, teaching, scholarship, or research. However, in this digital era, especially in distance education, the simple application of fair use has become complex.

The rush of COVID-19 has hastened the advancement of digital learning platforms, causing debates over copyright exceptions for education to go mainstream. Educational institutions often use copyrighted materials, such as textbooks and journal articles, as well as videos. The kind of licenses that universities must hold for digital materials varies widely from jurisdiction to jurisdiction, while others are broader. It is worth noting here that in *Cambridge University Press v. Georgia State University*, it has been held that, as a whole GSU's digital course reserve system, incorporating parts of copyrighted works, was fair use; however, some parts were not.²⁶

3.3 Use of Fair Use in User-Generated Content on YouTube and TikTok

Another challenge of fair use comes from the surge of user-generated content that permeates YouTube and TikTok. In *Lenz v. Universal Music Corp.*, 2015, courts ruled that copyright owners must consider whether a use is fair before issuing a DMCA takedown notice.²⁷ A video of a child dancing to a Prince song sparked the debate between copyright enforcement and personal rights in the digital sphere.

Aside from fair use, another doctrine that allows for the use of copyrighted works is transformative use. Under this doctrine, it involves an alteration or a different effect of the work because of its transformation. In the case of *Cariou v. Prince* in 2013, the Second Circuit came out in favour of the artist, Richard Prince, and determined that Patrick Cariou's photographs which the artist used were indeed a form of transformation in usage and therefore were fair use.²⁸ This has enormous implications for artists, creators, and the entertainment world in general.

²⁵ *Natco Pharma Ltd. v. Bayer Corporation*, Compulsory License Application No. 1 of 2011.

²⁶ *Cambridge University Press v. Georgia State University*, 769 F.3d 1232 (11th Cir. 2020).

²⁷ *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

²⁸ *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

4. CONCLUSION

The intellectual property law is in dynamic evolution, which is driven by the advancement of technology and globalization. It is closely linked with the questions on both ethical and legal levels that raise concerns with biotechnology and pharmaceuticals. Patentable lives, as well as access to medicines, mean complicated issues and questions. Sometimes, courts and legislators face a requirement for balancing innovation and public health needs, especially the principle of global inequality.

On the other hand, copyright law finds itself challenged in this new digital age as incessant creative innovations put the very premises of fair use continually to the test. It is the explosion of user-generated content on digital platforms and the expanded access to online education that has spurred the need for a recasting of copyright exceptions within an environment that will both serve to protect rights holders and foster creativity.

The need for harmony and adaptation of legal frameworks globally to address cross-border challenges evolving into the trend. International treaties and cooperative agreements must be pursued to ensure consistency in the enforcement of IP through various jurisdictions. As AI, biotechnology, and digital media evolve at a breakneck rate, the law must be flexible enough to permit incorporation with rapid developments and be as alert to public concerns as possible.

Ultimately, the best balance between the encouragement of innovation and the protection of intellectual property will undoubtedly demand much effort in cooperation from several entities interested in or involved in the process, such as policymakers, the courts, and legal scholars, who have to link the multifaceted complexity of a globalised, technology-led economy with intelligent human access to knowledge and resource provision.

TOPIC- BRIEF STUDY OF SAME- SEX RELATIONS IN INDIA

Vrinda Kamra¹

Abstract

*This paper examines the historical, legal, and socio-cultural evolution of same-sex relations in India, tracing their trajectory from ancient acceptance to colonial criminalization and contemporary reform. Ancient Indian texts and temple art, such as the Kama Sutra, reveal early acknowledgment of same-sex relationships, which were later condemned under Section 377 of the Indian Penal Code imposed by British rule in 1861. The paper analyzes key judicial milestones—*Naz Foundation v. Government of NCT of Delhi* (2009), *Suresh Kumar Koushal v. Naz Foundation* (2013), and *Navtej Singh Johar v. Union of India* (2018)—highlighting the gradual decriminalization of consensual homosexual acts and the continuing struggle for marriage equality. A comparative perspective with countries like Canada, the Netherlands, and South Africa underscores India's ongoing legal and societal challenges. The study also explores the social, cultural, and economic implications of recognizing same-sex relationships and the role of religion and tradition in shaping public attitudes. Ultimately, it argues for sustained legal reform, education, and inclusive policies to ensure equality, dignity, and acceptance for the LGBTQ+ community in India.*

Keywords: *Same-sex relations, LGBTQ+ rights, Section 377, marriage equality, Indian legal system*

1. INTRODUCTION

Same-sex relationship, conceptualized as a relationship between two people of the same sex in a legally or socially permissible manner has been an issue of much deliberation and dynamism in India.² Earlier, Indian society being an orthodox and a religious society, has always defined and understood the concept of marriage being a bond between two people of opposite sex, a man and a woman. This perspective is due to many religious holy books and cultural protocols that have over the years been entrenched in the Indian social structure.

Same-sex relations in India, thus, has a complex history. Kama sutra and some sculpture depictions prove that, they might not be approved but same sex relations were not looked down upon in earlier India. However, during the colonial rule especially under the British rule, homosexuality was outlawed through the “section 377” of the Indian penal code that was passed in 1861.³

This law considered the act of “carnal intercourse against the order of nature” as unlawful, thus outlawing homosexuality. Thus, the contemporary movement for the LGBTQ+ rights in India started in the late 20th and early 21st centuries. A major breakthrough was reached in the year 2009 when the High Court of Delhi ruled that “Section 377” has elements that are unconstitutional to the extent that it provides that, consensual sexual intercourse between two adults of the same gender is a crime. However, this decision was rather overruled by the Supreme Court in 2013, thus, reinstating the law.⁴ After this, there was another landmark ruling by the Indian Supreme Court in September 2018 that sought to decriminalize the consensual acts of homosexuality and other queer sexualities once again in India.

Still, the situation of same-sex couples is still rather bleak, and they cannot legally marry in India. People insisted on the legalization stating that equality cannot be full if one cannot marry. Same-sex marriages are slowly being accepted by society due to awareness campaigns, lobbying and proper legal backing, although the fight is still on. The process to legalize same-sex marriage in India is still in progress while illustrating general fights for gay people’s rights and recognition in the country.

¹Law Student, Symbiosis Law School, Noida

²N.E. Williamson, *Sex Preferences, Sex Control, and the Status of Women*, 1 *Signs* 847 (1976).

³William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 *Va. L. Rev.* 1419 (1993)

1.1 Status of Same- Sex Relations in India

1.1.2 Historical Background

The status of same- sex relationships in India has evolved over time significantly in legal context. In historical sense, there has been dynamic sense of acceptance and tolerance in Indian society towards same- sex relationships. There have been various findings in the past which shows that these kinds of relationships were a part of society and were acknowledged like Kama Sutra and various other carvings of temples, however they might not be necessarily accepted. Moreover, the advent of Britishers in India significantly led to harsh attitudes towards the same.

1.2.3 Colonial Legacy: “Section 377” of the Indian Penal Code

Another important aspect was the sodomy law Section 377, of the IPC which was inserted by the British colonial rulers in 1861. Section 377, referred to as the ‘sexual intercourse in an unnatural manner’, revived homosexuality as a punishable offence, whether the intercourse was consensual or not, with man, woman, or animal. This law was similar to the moralities of Victorian Britain and did not represent indigenous Indian cultures since it was introduced by the colonizers.

1.2.1 Post Independence Era-

When India became independent and the new government and the parliament came into a position to reform the laws related to Independent India, “Section 377” of the IPC continued to stay as it is. This law targeted the LGBTQ+ community for many years making them a legal contradiction and socially outcast from how society viewed them. “Section 377” of the IPC criminalizing same sex relations was such that every member of the LGBTQ+ community was invariably vulnerable to police abuse and abuse for funds, rampant social prejudice⁵.

1.3 Legal Challenges and Landmark Cases

The fight for an equal status of same- sex relationships in India was not an easy one and is still going on. There are various legal challenges faced by the LGBTQ+ communities- *Naz Foundation v. Government of NCT of Delhi (2009)*⁶- It is one of the significant cases which dealt

⁴ P. Andiappan, Public Policy and Sex Discrimination in Employment in India, 14 Indian J. Indus. Rel. 395 (1979)

⁵ Joseph Chamie & Barry Mirkin, Same-Sex Marriage: A New Social phenomenon, 37 Population & Dev. Rev. 529 (2001)

⁶ Naz Foundation v. Government of NCT of Delhi, (2009) 6 S.C.C. 712.

with the decriminalization of homosexual acts between adults. The Delhi High Court made a

historical decision in this case of bringing out Section 377 which accepted the rights of homosexuals to have consensual sex as legal. This was considered as a landmark decision in the equal rights of Gay community and Lesbian but was resisted by the fundamentalist organizations and conservative people. *Suresh Kumar Koushal v. Naz Foundation (2013)*⁷- To the chagrin of the audience for gay rights, the Supreme Court of the India overturned the judgement of the Delhi High Court, and made consensual same sex acts a criminal offence. The court stated that such issues were legal and political and should not be entertained in the court of law and that it relied on parliament to repeal such laws if not satisfactory. This judgment was heavily condemned by the human rights activists and jurists all over the world.

*Navtej Singh Johar v. Union of India (2018)*⁸- In this case, when the matter came to the Supreme Court of India and in a unanimous decision the SC overruled the judgement revisiting the holding and decriminalizing consensual homosexual acts between adults. Specifically, the latest decision regarding Section 377 was for the extent that the court considered it unconstitutional to penalize same-sex consensual adults. It involved equality, non-discrimination, as well as a right to the protection of the right to privacy was upheld in arriving at the Judgment. Reflecting on the court's decision, social morality was not allowed to prevail over constitutional morality. The below ruling was one of the major developments in the fight of LGBTQ+ rights in India.

In India, decriminalization is one of the major outcomes of the Navtej Singh Johar Judgment which mainly affects the situation of homosexuals, sexual minorities and their rights to basic freedoms. The decision delivered by the Supreme Court of India in Navtej Singh Johar v. Union of India, 2018 was monumental for the legal and social position of same-sex relationships in India. It legalized homosexuality and same sex relations but did not go further to deal with other vital questions affecting the LGBTQ+ like marriages, adoption and inheritance. Thus, although the decision was a victory with which many affirmed, one knew that many fights which led to equality are still ahead.

There are many other legal challenges which were followed by the petitions on same- sex marriage which sought a recognized status for same- sex relations in India. It is argued by the people in support of same- sex relations, that denial of marriage rights leads to infringement of their rights and also hampers their fundamental rights of equality, freedom and right to live with

⁷ Suresh Kumar Koushal v. Naz Foundation, A.I.R. 2014 S.C. 563.

⁸ Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321.

dignity.⁹All these issues are being considered and will have an impact on the future of rights of

All this also affect rights of gays, lesbians and bisexuals asking for recognition of their right to adopt children and use services of surrogacy.¹⁰ Present legislation in India does not allow same-sex couple or individuals to adopt a child or resort to surrogacy; this creates legal and societal problems for the individuals belonging to the LGBTQ community. The legal besetting and place of homosexuality in India has experienced evolutionary changes regarding the status in the region especially in late years. Although in 2018 the criminalization of consensual same-sex acts was removed, it has been necessary to say that the problems are still relevant. This is why the legalisation of same sex marriages, adoption rights and full detailed anti- discrimination laws are the next steps to full equality for the queer community in India.¹¹

Mishaps and conflicts followed for a long time, along with alterations of peoples' perception and the growing presence of LGBTQ+ themes suggest progress on the way to understanding and fair treatment. But realizing this fundamental right is still a long way off, for which massive support and cooperation from judges, lawmakers, citizens, and the gay community are expected. The struggle is not over yet, but the reformation achieved up to the present encourages free society for everyone, especially those with same-sex orientations and genders.

2. COMPARITIVE SITUATION OF SAME- SEX RELATIONS IN DIFFERENT COUNTRIES

Specifically, if we look at the extent to which the concept of same-sex relationships is accepted and supported by law also depends on cultural, social and legal factors and is different for different world countries. While some countries permit marriage of same-sex partners nationality and prohibit discrimination based on sexual orientation, others continue to heavily punish sexual relations between people of the same gender. The world has different views and opinions regarding the same. In order to understand this, we need to look out at the aspects of different societies.

2.1 Progressive Societies-

Many western countries such as Canada, Netherlands and Spain are regarded as progressive as far as same sex relationships are concerned. Consensual relations in these nations are generally

⁹ Ruth Vanita, Wedding of Two Souls: Same-Sex Marriage and Hindu Traditions, 20 J. Feminist Stud. Religion 119 (2004).

¹⁰ Leila J. Rupp, Toward a Global History of Same-Sex Sexuality, 10 J. Hist. Sexuality 287 (2001)

¹¹ Anuja Agrawal, Law and "Live-in" Relationships in India, 47 Econ. & Pol. Wkly. 50 (2012).

welcomed in societies, and the gay and other members of the LGBTQ+ community have a lot of social liberty and acceptance.

2.1.1 Canada: Canada currently has a well- developed legislation on queer issues, and same sex marriage has been permitted across the country since 2005. In general, Canadian society remains rather liberal and equal opportunities within the population are guaranteed by the government.¹²

2.1.2 Netherlands: Some countries around the world have legalised same sex marriage with Netherlands being the first country to do so in the year 2001. LGBTQ+ people are accepted within the Netherlands since the Dutch society has been described to be liberal.

2.1.3 Spain: Same-sex marriage has been made legal in Spain in 2005 proving its progressive move though Spain has a Catholic heritage. Thus, the aspect of social acceptance has developed very actively in the recent years.

2.2 Conservative Societies-

On the other hand, most of the African nations, Middle-Eastern nations, and some Asian nations show high social sanctions against same sex relationships due to cultural and religious prohibitions.¹³

2.2.1 Nigeria: The Nigerian society is among the worst places that the LGBTQ+ members can find themselves in due to the support given to Anti-LGBTQ laws, most of which have a religious base. Sexual relations between individuals of the same gender are prohibited, and most people do not approve of such unions.

2.2.2 Saudi Arabia: In Saudi Arabia, homosexuality is not allowed by the Islamic law and hence individuals involved in such relationship may be imprisoned or punished through beating. As with the other three aspects of diffusion, social acceptance is almost absent here.

2.2.3 India: While there has been progress in law, the population of India does approve same-sex relationships with quite a lot of resistance, especially in the rural areas.¹⁴ There has been progress regarding the situation of LGBTQ+ communities, however, there is a social taboo still existing in the minds of the people which leads to unacceptance of these relationships.

¹² Miriam Smith, *The Politics of Same-Sex Marriage in Canada and the United States*, 38 *PS: Pol. Sci. & Pol.* 225 (2005).

¹³ T.G.M. Sandfort & V. Reddy, *African Same-Sex Sexualities and Gender-Diversity: An Introduction*, 15 *Culture, Health & Sexuality S1* (2013).

¹⁴ Leila J. Rupp, *Toward a Global History of Same-Sex Sexuality*, 10 *J. Hist. Sexuality* 287 (2001).

If we talk about the legal recognition and rights, there has been legalization of same- sex marriages by some countries like United States, after the judgement given in *Obergefell v. Hodges (2015)*¹⁵ same-sex marriages were accepted and given equal status in the whole nation. Germany and South Africa have also been progressive in this regard and legalized the same- sex marriage in 2017 and 2006 respectively. The legal framework of all these countries supports the same- sex relationships and does not allow the discrimination on the basis of sexual identity, henceforth, accepting the same- sex relationships.

There are various countries which support these relationships not fully, but partially. These nations are concerned about the rights of LGBTQ+ communities but does not allow full marriage equality. These countries like Australia and Japan show such partial recognition regarding these relationships and there is still a battle for nationwide recognition.¹⁶

There are also countries which are completely against the same- sex relationships and does not recognize these kinds of marriage. Russia and Egypt are some of these countries where there is discrimination in context of these relationships.

3. COMPARISON WITH INDIA

The cultural and legal rights for gay and lesbian couples in countries such as Canada, Netherlands, the United States, and South Africa contrast drastically with regard to that of India. These countries have a rather solid legal base for the protection of the rights of sexual minorities. For instance, long standing developed countries like Canada and the Netherlands have legalized same sex marriages, with Canada passing the law across the country in the year 2005 while, the Netherlands was the pioneer in passing the law in 2001.¹⁷ These countries have also ensured to pass strong anti-discrimination laws that ensure that the gay and lesbian persons are protected from all forms of discrimination like social, moral etc, and in organizations hence paving way for numerous societal acceptances.

The United States of America also legalized same-sex marriage across the country after the Supreme Court ruling in the *Obergefell v Hodges* case in 2015 resulting to what can be termed as marriage equality as a constitutionally recognized right. Likewise, in 2006 with the enactment of the Civil Union Act, South Africa became an African leader in the protection of the rights of the LGBTQ+ population by legalizing same-sex marriage and enshrining protection of people

¹⁵ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁶ Joseph Chamie & Barry Mirkin, Same-Sex Marriage: A New Social Phenomenon, 37 *Population & Dev. Rev.* 529 (2011)

based on their sexual orientation in the constitution.¹⁷ These legal developments are complimented by social change specifically to acceptance of those of the LGBTQ+ community although there is still some resistance.

On the other hand, India's fight for equal rights concerning the LGBTQ+ community is relatively more nascent and is still ongoing. The legalisation of the consensual relations between members of the same-sex in India came to reality after the apex court's ruling in *Navtej Singh Johar v. Union of India; 2018* where the court repealed Section 377 of the IPC which was of the British colonial imposition. But, the marriage between people of the same sex still remains illegal, and the attitude toward gays and lesbians differs depending on the region and is rather conservative and often religious, especially in rural areas.¹⁸ This is quite the opposite to the above-mentioned countries where both legal recognition of same-sex relations and the whole perception of such unions is significantly more tolerant. Yet, the general comparative picture again demonstrates that the legal recognition and extent of social tolerance of sexual minorities is much stronger in these other countries. India struggles with societal heterosexism and legal recognition, which shows that India is still far away from accepting and allowing equality in same-sex relationships. Looking at the various countries and their approach towards the same-sex relations clearly depicts the social, cultural and legal differences. While there have been a lot of achievements in certain countries towards equality, others are left behind at a very slow pace because of religion and tradition. The rights and acceptances of lesbian, gay, bisexual, transsexual, queer, and intersexual people around the world should be fought for; education and legal changes for the acceptance of equality for such people. These strategies, together with continued striving and collaboration on the international level, allow for the goal of global equalization and proper recognition of everyone's worth.¹⁹

¹⁷ Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 *Future of Children* 67 (2015).

¹⁸ Angela Jjuuko et al., *Expanded Criminalisation of Consensual Same-Sex Relations in Africa: Contextualising Recent Developments*, in *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* 63 (Angela Jjuuko et al. eds., University of London Press 2018).

¹⁹ Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 *Cal. L. Rev.* 1169 (2012).

2. IMPACT OF SAME-SEX RELATIONS ON SOCIETY

Recognition of same-sex relationships and its tolerance have far-reaching consequences for cultures and communities of the world. This makes the impacts observable in several social definitions that are based on social interactions, culture, and trade aspects. This way, analysing the given aspects, it is possible to comprehend the extended implications of accepting or rejecting the relations of same sex.²⁰

4.1 Social Impacts

4.1.1 *Social Acceptance and Inclusion-*

Legalization of Gay and lesbian couples' relationship and cultural integration entail improved recognition of people of various orientation. These countries include Canada and the

Netherlands, which have legalized same sex marriage, demonstrate better social organization and acceptance of homosexual intimate partners.²¹ These societies are usually liberal, originating cultures that are liberal, resulting to tolerance of individuals of different orientations.

4.1.2 *Eradication of prejudice and prejudice related to SQL-*

The legalization of same sex relationships also helps in eradicating the stigma of discrimination of the members of the LGBTQ+ community. Such laws tell people with the different sexual orientation that they are also part of this nation and should also be protected as anyone else in the society. This can result into a reduction in homophobia and hate crimes among members of the society.

LGBTQ+ people's relationships being considered legitimate and valued will bring positive impacts on mental health and well-being among the population. Acceptance of homosexuality by the law and society minimizes the negative psychological impact of concealing one's sexual orientation and rejection. Comparing populations of the heteronormative society with the inclusive society clearly indicates that the populations of the sexual and gender minorities have fewer mentally related problems. *Goodridge v. Department of Public Health (2003)*²² is an important case which made available marriage to same – sex couples in Massachusetts helping

²⁰ Gary J. Gates, Marriage and Family: LGBT Individuals and Same-Sex Couples, 25 *Future of Children* 67 (2015).

²¹ Nancy Bates & Theresa J. DeMaio, Measuring Same-Sex Relationships, 12 *Contexts* 66 (2013).

²² *Goodridge v. Dept' of Pub. Health*, 798 N.E. 2d 942 (Mass. 2003)

the members of LGBTQ+ to have better mental health and improved well-being.

4.2 Cultural Impacts-

Consequently, the normative recognition of homosexual relations presents wide changes in cultural and moral aspects. The communities that support the LGBTQ+ rights usually go through a change in the social norms concerning the established gender and sexuality. Thus, this change in culture can open the door for progression of other aspects in life such as marriage and roles of both genders as well.

In *Minister of Home Affairs v. Fourie (2005)*²³, the Constitutional Court of South Africa made a sympathetic decision to approval same-sex marriage that supported the change in the norms of South Africa culture towards the recognition of other family types and homosexuals.

4.2.1 Media and Arts as a Forms of Representation-

Thus, growing tolerance of individuals for the same sex relationships results in a broader and more realistic portrayal of members of the LGBTQ+ community in media and art.

Given this visibility is one of the ways of breaking the stereotype by showcasing different ways of life and different people's identity²⁴. Hence, it can be inferred that it is important for people from all diverse backgrounds to be depicted in media as it can cause changes in cultural attitudes and boost tolerance.

A significant decision that was made more recently was *Lawrence v. Texas (2003)*²⁵ which saw the American Supreme Court putting down the sodomy laws which also helped to increase representation of the sexuality and thus the LGBTQ+ population in American media and culture.

Intergenerational Dialogue-

The acknowledgement of same-sex relationships many- a- times leads to intergenerational dialogues as this results in growing of mutual understandings and bridge the gap between different generations. This helps in building an inclusive society fostering the principles of

²³ Minister of Home Affairs v. Fourie, [2005] ZACC 19.

²⁴ C.Q. Lau, The Stability of Same-Sex Cohabitation, Different-Sex Cohabitation, and Marriage, 74 J. Marriage & Fam. 973 (2012).

²⁵ Lawrence v. Texas, 539 U.S. 558 (2003).

equality and human rights.

4.3 Economic Impacts-

Inclusive policies on relationships of same sex can positively impact the economic production since it results to the production of a diverse and creative economy. Several enterprises state that, every person should be treated equally, which is why diversity and inclusivity practices enable great talents to be attracted as well as leads to development and high rates of workers' satisfaction.²⁶ This results in improved financial performance and increased competitiveness of the firm in the international market.

If we look at the tourism industry, The places that have legalized or have policies favorable towards S-S relations generally have increased tourism and travel. Members of the lesbian, gay, bisexual, trans, queer, and practicing intersex (LGBTQ+) community tend to choose locations that are welcoming to them. LGBTQ+ visits parades like the pride parade and numerous festivals like the pride festival can help boost tourism income and commerce of several regions. *Egan v. Canada (1995)*²⁷ talks significantly about how, Canada's image as a friendly country for travel among the queer community thus increasing tourism.

The consumer spending and the market's growth shows the striking points of legislation for same sex relationships; it can be inferred that customers play a more vital role in creating market opportunities. Today, it is very important that the state acknowledges the existence of LGBTQ+ people and couples because when empowered, they also spend their money in the economic market. Lavender markets including fashion, travel, and entertainment markets targeting customers from the mentioned sexual orientation can improve significantly.²⁸

2. ROLE OF RELIGION AND TRADITION IN SHAPING ATTITUDES OF THE SOCIETY

Change is contemporary to societal needs. Religion and Tradition play an important role in shaping societal norms and values. In India, there is a diversity of religions which gives rise to variety of opinions. Major religions often oppose rights of LGBTQ+ community because of their traditional interpretations and expectations from the society. There exists a traditional taboo in the society which believes in societal expectations of marriage being meaningful only if leads to procreation and specified gender roles. The mental attitude of the society is also very harsh and

²⁶ Sukhmani Jolly & Radhika Vohra, Recognition of Foreign Same-Sex Marriage in India: A Legal Exploratory Analysis, 59 J. Indian L. Inst. 302 (2017).

²⁷ *Egan v. Canada*, [1995] 2 S.C.R. 513

²⁸ David R. Shumway, Why Same-Sex Marriage Now?, 26 Discourse 73 (2004)

challenging as they want to preserve their traditions. Many people belonging to this community receives bullying in institutions, harsh comments on their characters and rejection along with non-acceptance. This leads to a toll on their mental health contributing to depression and social anxiety. Moreover, there is a need for the society to change their regressive mentality and accept people with their identity. Despite all this, there are support groups that deal with the mental well-being and public awareness leading to a more inclusive society.

3. WHAT CAN BE DONE NEXT- A ROAD AHEAD

The current situation is still a topic of debate as there is no complete acceptance of same- sex relations in India. There is a need for complete decriminalization of Section 377 so that these relationships can be recognized and acknowledged. Legal challenges are bound to occur because of societal mentality, however, raising awareness among the people through campaigns and workshops can help in achieving acceptance for the same. Change is contemporary to societal needs. A change which can promote equality and have a positive impact on the society should be encouraged through various dialogue and engagement. This can bridge the gap between the traditional and social beliefs, and the modern attitudes of community towards same- sex relationships. A balance needs to be made for the betterment of the society. This requires a collective effort from everyone. By working together on this contemporary issue, a more inclusive society can be established where everyone will have a right to choose their partners and marry whomever they love, without and gender and societal barrier.

4. CONCLUSION

There is a different interpretation of marriage in every culture. It is considered as an institution that acknowledges personal connections like family and sexual relations. The discrimination of homosexuals is clearly visible in the society. Same- sex relationships are still seen as a taboo in the Indian society as people consider it unholy and unnatural. Same- sex relations in India demonstrate the concern prevailing in the society and law in terms of the socio-cultural structure. The historic verdict of Navtej Singh Johar v Union of India, 2018 struck down Section 377 of IPC and helped the cause of the rights of LGBTQ+ community and equality of homosexual people.²⁹ This was definitely more victorious for the side of the LGBTQ+ people and the process of putting right the wrongs done to this group of people in the society.

However, legalization of same-sex relationships is still not well accepted in Indian society whether in urban or rural areas. As per the current trends seen in big cities and the young

generation, people support the rights of the LGBTQ+ community, but the majority of villages and conservative groups still judge and criticize the couples involved in same-sex relationships. Culture and religion hold significant influence over the population's perceptions, which leads to a fair amount of opposition to embracing more diverse and equal opportunities.³⁰

Due to the advancement in legal grounds because of lesbian, gay, bisexual, trans, these people have gained more attention in India. Nevertheless, issues remain unresolved, namely, the marriage of same-sex couples is not recognized in many countries and people fight for social justice to this day.³¹The problem indicates that there should be protection against discrimination in every aspect of the lives of the members of the LGBTQ+ community and provisions regarding the same should be implemented. All in all, in my opinion, the recognition and equal rights for same-sex relations in India are still a long way off. However, more legal changes and public awareness campaigns as well as shifting the norms in the society, it is possible that homosexual people are accepted with equal rights as others.³²The decision from the 2018 Supreme Court provides a starting point on which subsequent developments can be made to support progress toward the continuous improvement of the status of the marginalized in society for generations to come. Continuous support from all groups including government, civil society, religious leaders and stakeholders in society is required to create a healthy environment for the LGBTQ+ community, so that they can marry whomever they wish to. This will also promote rational equality and acknowledgement of everyone's wish as we live in a democratic set-up where people are supreme and everything is done for their growth and welfare.

²⁹ Deborah Umberson et al., *Challenges and Opportunities for Research on Same-Sex Relationships*, 77 *J. Marriage & Fam.* 96 (2015).

³⁰ Shinji Kamano & David Khor, *Toward an Understanding of Cross-National Differences in the Naming of Same-Sex Sexual/Intimate Relationships*, 8 *NWSA J.* 124 (1996).

³¹ Katherine E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 *Law & Soc. Inquiry* 629 (2003).

³² Joan Nagel, *States of Arousal/Fantasy Islands: Race, Sex, and Romance in the Global Economy of Desire*, 41 *Am. Stud.* 159 (2000).

JOURNEY OF MUSLIM WOMEN IN INDIA FOR THEIR RIGHTS FROM WOMB TO TOMB

Shweta Aggarwal¹

Abstract:

India upholds principle of democracy and ensures equal rights to all individuals regardless of sex, but inequalities persist across factors like caste, religion, class, region, and gender. Women's rights have not always been considered human rights, leading to social reform and women's movements. In the discussion of women's rights, religion, and human rights, it is crucial to consider the specific challenges faced by Muslim women. Opposing categories such as culture and universal human rights oversimplify the complexities of Muslim women's lives. Challenging these binaries is essential to defend women's rights and address cultural misconceptions. It is important to reinsert gender equality into the conversation and ensure inclusivity for marginalized groups. Indian law guarantees equality and protection from discrimination, but religious personal laws discriminate against Muslim women based on both religion and gender, highlighting the government's reluctance to uphold gender equality when it conflicts with group interests. The subjugation of women in India stems from the marginalization of their contributions and patriarchal interpretations of the Holy Quran. Regressive customary norms and the absence of proper codified law in Muslim personal law disadvantage women. Despite being accustomed to Indian social norms, Muslim women face discrimination in realizing their rights and accessing equal opportunities.

This article investigates the potential of a human rights framework in addressing the exclusion of Muslim women from substantive citizenship in India. While the Constitution formally enshrines the principle of equality, the persistence of religion-based personal laws perpetuates structural discrimination on both gendered and communal lines. Employing a human rights lens provides a critical tool to interrogate these legal and social contradictions. At the same time, the analysis acknowledges the ambivalent nature of human rights discourse, considering both its emancipatory promise and its inherent limitations in advancing the concerns of Muslim women within the Indian context. The article delves into the journey of Muslim women's rights in India, exploring their historical status and contemporary challenges. It discusses their rights in Islam, constitutional and legal rights, government policies for empowerment, and legal battles such as the landmark judgement of Shah Bano to Shaheen Bagh. The paper also focuses on Muslim

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women's political standing, their opposition to customs like triple talaq, Nikah Halala, and polygamy, and inspiring tales of empowerment, such as the Suli App campaign. Additionally, it analyzes the judiciary's role in defending and advancing Muslim women's rights, emphasizing the critical need to fully realize their rights in India. Furthermore, the article evaluates the potential of universal norms of human rights to recognize Muslim women's equality rights, which cultural relativist arguments might preclude.

Keywords: *Gender Equality, Bharatiya Muslim Mahila Andolan, Campaigns, Islam, Social Practices, Sulli App, Constitution*

1. INTRODUCTION

Religion and society have evolved to provide more rights to women, but gender inequalities still persist in many countries, including India. Discriminatory practices perpetuated by religious doctrines contribute to these inequalities, as conservative sections of society resist reforms in the name of "religious defense." India ranks low in the Gender Inequality Index and Global Gender Gap Report², reflecting the prevalence of patriarchal religious traditions and social practices that uphold inequities. Despite the state's commitment to secularism and religious freedom, the prolonged history of religious interpretations predominated by men has resulted in persistent discrimination against women. The Indian Constitution aims to create a reformed society based on equality and justice, emphasizing the protection of women's dignity and freedom from social discrimination. The Indian Constitution ensures the right to religious freedom; however, it does not clearly define the exact nature of the relationship between the State and religion. This has resulted in a unequal treatment of Muslim women in India. The liberal perspective advocates for empowering women by limiting the influence of religion and culture. The SC has introduced new laws to promote gender justice, but male-dominated interpretations of religion discriminate against women.³

Debates on women's rights and religion are frequently constrained by binary narratives that set cultures and belief systems in opposition, which can inadvertently reinforce gender hierarchies and obscure the lived realities of women. Such reductive approaches neglect the necessity of contextualizing international standards for women's human rights within the social and cultural fabric of specific communities. A more effective strategy lies in adapting universal human rights norms in ways that meaningfully engage local contexts and build connections between religious and secular domains.

Significant progress has been achieved through international law to secure equality for women in public domains, pervasive discrimination remains unaddressed within the domain of family life-the so-called private sphere-particularly for Muslim women governed by personal law frameworks. The persistence of these private legal regimes not only entrenches gender-based subordination but also reflects broader socio-political agendas that systematically exclude Muslim women from the full enjoyment of citizenship rights. As the law is often hesitant to

²"GlobalGenderGapReport2021-Weforum.Org." *Weforum.Org*, www3.weforum.org/docs/WEF_GGGR_2021.pdf. Accessed 1 Feb. 2024.

³ Tauseef ahmad, and Shweta, "Transformative Constitutionalism and Constitutional Morality with Respect to Religion and Gender Justice." *GIBS Law Journal*, vol. 3, no. 1, 2021.

intervene within the familial domain, it is within this sphere that women encounter the most significant forms of discrimination and subjugation.

The Indian State has traditionally expressed reluctance in codifying Muslim personal law, often invoking the need to safeguard minority rights as justification. Religious authorities within the community frequently defend this position by asserting that family law is divinely ordained and therefore immutable. However, this perception overlooks the historical dynamism of religious law, which has undergone adaptation across different social and political contexts. Contemporary reformists, such as Abdullahi An-Na'im, argue for a nuanced approach that seeks to reconcile human rights principles with indigenous cultural norms. His perspective highlights that both cultural relativism and the dictates of *sharī'a* are bound by the overarching requirement to respect minimum standards of human dignity and universally recognized human rights.

Similarly, Jack Donnelly contends that universal human rights are not inherently incompatible with cultural diversity, as they permit context-specific interpretations shaped by local traditions. Yet the highly abstract nature of these theoretical formulations often limits their practical utility. In practice, the realization of rights depends less on theoretical coherence than on the political will of nation-states to enforce them. In India, this structure of global human rights holds immense importance for Muslim women. By grounding their claims in universal rights discourse, they not only enhance the legitimacy of their demands but also assert the necessity of state accountability in ensuring equality and justice.⁴

The public–private divide in India has reinforced a religious–secular binary that undermines the foundational principles of constitutional secularism. By deferring to religious autonomy in the private domain, the State often refrains from intervention even when personal laws directly conflict with constitutional guarantees of equality and justice. This selective application of rights results in a regime of differentiated citizenship, where the obligations, entitlements, and protections of individuals are influenced by their religious and gender identities.

The Shah Bano case stands as a critical moment in this dynamic. When the SC upheld the right of a divorced Muslim woman to spousal maintenance under secular law, it was interpreted as an affirmation of gender justice within the constitutional framework. However, strong resistance from religious leaders compelled the government to legislate against the Court's ruling, thereby restricting Muslim women's access to spousal support. Instead of harmonizing constitutional values with minority rights, the State's decision reinforced patriarchal authority within the

⁴ Narain, Vrinda. "Muslim Women's Equality in India: Applying a Human Rights Framework." *Human Rights Quarterly*, vol. 35, no. 1, 2013, pp. 91–115. *JSTOR*, <http://www.jstor.org/stable/23352253>. Accessed 28 May 2024.

community while simultaneously distancing Muslim women from the promise of equal citizenship. This episode raises enduring questions about how multicultural democracies such as India negotiate the tensions among gender justice, minority rights, and the accommodation of cultural difference. By privileging community leaders in matters of family law, the State has effectively transferred regulatory power over women's rights to patriarchal institutions, abandoning the enforcement of constitutional principles in the intimate sphere of the family. The Shah Bano controversy thus reflects both the fragility of secularism and the precarious position of women caught between universal guarantees of equality and the politics of religious identity.⁵ The article examines how Muslim women in India face discrimination under religious personal law despite constitutional guarantees of equality.

1.1 Gender Inequality and Discriminatory Social Practices

Gender inequality within Islamic communities, especially in the Indian context, has become a subject of intense discussion and controversy. Despite constitutional protections, social customs and conservative values continue to lead to the mistreatment of Muslim women. Although the Holy Quran provides equality between men and women, Muslim women in India face inferior status and limited rights due to patriarchal ideologies. They face disparities in education, health, and economics, and are often limited to traditional roles of daughters, wives, and mothers.⁶ The dominant patriarchal and discriminatory attitudes within their communities further exacerbate their situation. It is crucial to interpret Quranic verses in a way that benefits Muslim women and to spread awareness about the rights they have and acknowledge that gender is a man-made concept.⁷ Overall, the debate on gender inequality in Islamic society has become controversial in India due to the inferior status and limited rights experienced by Muslim women.

In Islamic tradition, women are entrusted primarily with household responsibilities; however, they are also permitted to engage in other social, educational, or economic activities, provided these pursuits do not compromise their familial obligations. Men are assigned the roles of provider and caretaker for the family, including all relatives. Islam prohibits adultery for each gender and empowers both genders to put conditions on marriage. However, women have little say in marriage matters in practice. The Quran grants women the right to own property and earn independent financial income. Gender inequalities are present, reinforced by irrational fatwas

⁵ *ibid*

⁶ Nuzhat Khan, "Women and the Law" 1st ed., *Universal Law Publishing*, 2016.

⁷ Rajiv Azad, "Gender Discrimination, An Indian Perspective" 1st ed., *Atlantic Publishers and Distributors (P) Ltd*, 2014.

that favor men in economic, political, and social participation. The age of marriage for girls varies based on patriarchy dominance. Divorce in Islam allows husbands to divorce their wives by simply pronouncing talaq three times without cause, while wives must go through the court system. In terms of inheritance, men receive twice what women receive, justified by the idea that men need to provide for their families. Women's self-image and participation in decision-making are impacted by patriarchal dominance, but awareness is slowly increasing.

The advancement of educational initiatives is crucial for enhancing the Muslim women's status and effectively tackling issues of gender inequality. Muslim women need to be aware of their hurdles are man-made, not religion-made. Illiteracy is a significant problem, and education can pave the way for gender equality. Raising awareness about rights related to marriage, Mahr, and divorce, as well as enforcing existing laws against gender-based employment discrimination and sexual harassment, can help. The government ought to allocate financial resources to support childcare services and implement stringent measures to eradicate rape and sexual assault. Health disparities for Muslim women, such as higher maternal mortality rates and infant mortality rates, stem from sex-selective abortion, a preference for male children, and inadequate health and nutrition. It is everyone's responsibility to respect women's rights to basic health.

The health status of Muslim women in India is analyzed in detail, highlighting the challenges they face due to gender inequality and their effect on policies and schemes. Female health and nutrition are neglected, leading to higher rates of infant and maternal mortality, malnutrition, and anemia. The violation of women's right to basic health is a concern, and it is the duty of society to respect these rights. The overall development of society depends on the health and well-being of its members. The UDHR acknowledges the significance of good health and medical treatment for every individual.

The health of women is crucial for the well-being of families and future generations, as women's ill-health can negatively impact their children and family. However, gender-based discrimination is present in women's health, particularly within Muslim communities where socio-economic inequalities are visible. In India, many women suffer from illnesses such as reproductive tumors, cardiovascular risks, and sexually transmitted diseases. Muslim women often use temporary methods to prevent unwanted pregnancies, while surgical methods are forbidden by Islam. Additionally, Muslim women lack sufficient knowledge about illnesses such as AIDS caused by the HIV virus. A change can come from knowledge and understanding of Muslim women's human conditions to improve their health care and family planning.

The situation for Muslim women in India is dire, with lack of awareness of healthcare rights and

confinement to domestic duties contributing to their deteriorating status. National and international organizations should focus on women's healthcare as it is a fundamental human right and an economic necessity. Good health leads to productivity and wealth creation for nations.⁸

1.1.1 Polygamy

Polygamy is considered an evil plague and has been banned under Section 494 of the IPC. Despite being prohibited, it continues to afflict Muslim women in the 21st century, causing serious harm in health, social, economic, moral, and emotional aspects. Religious leaders and priests who support practices like Talaq-E-Bidat, Nikah-Halala, and Polygamy are misusing their influence, violating the basic rights of Muslim women as enshrined in the Constitution.

The concept of polygamy arose in the Seventh Century to address the welfare of widows and orphans left without support after the battle of Uhud near Medina. This battle resulted in the deaths of many Muslim men, leaving behind a significant number of vulnerable individuals. The concept was allowed to ensure the welfare of women and orphans, with a specific focus on the guardians treating the orphans justly and not exploiting their property. It's important to note that this allowance is not a general license for Muslims to marry multiple women in present times.

Under Muslim law, it is commonly accepted that a husband has the right to marry additional wives, up to a maximum of four, even if his previous marriage or marriages are still legally valid. However, a closer look at Islamic law reveals that this belief is not entirely accurate. The Quran only permits bigamy under strict conditions, with the husband being capable of ensuring equal treatment of both wives. However, it's not Quranic spirit. The Prophet has warned one who contracts bigamous marriage without being able to treat the wives equally that he will be punished on the Day of Judgment. The Holy Quran at Surah AI Nissa 4:129 it is said that

"And it will not be within your power to treat your wives with equal fairness, however much you may desire it..."

The current understanding of Muslim law in India allows for four marriages. However, unfair treatment among co-wives is a valid reason for divorce according to the Dissolution of Muslim Marriages Act of 1939. The Muslim Marriage Dissolution Act of 1939 specifies nine grounds for the termination of a marriage, including impotency, incapacity to fulfill marital obligations, and cruelty. Notably, there is no eligibility pre-condition for marriage, and Muslim husbands are not required to seek permission from their first wife before contracting a second marriage, placing

⁸ S.n Singh. *Muslims in India*. 1st ed., Anmol Publication Pvt. Ltd, New Delhi, 2003. p. 101

them outside the offense of polygamy. This law does not establish an eligibility pre-condition for marriage and exempts Muslim husbands from seeking permission from their first wife before marrying again, effectively excluding them from the offense of polygamy. However, there is no law to examine a man's capacity to contract a second marriage before he does so.⁹

In Islam, a married Muslim woman is prohibited from entering into a subsequent marriage while her current marriage is still valid. Conversely, Muslim men are permitted to marry additional wives, up to a limit of four, concurrently with their existing marriage, provided they meet the conditions of justice and fairness among their spouses. This allowance for men, known as polygyny, is rooted in Islamic jurisprudence and is not applicable to women.

Under Muslim law in India, a woman has the option to include a particular clause in her marriage contract (Nikahnama) that prevents her husband from marrying another woman while their marriage is in effect. If this condition is included and the husband enters into a second marriage, it is considered a breach of the contract. However, this does not invalidate the second marriage according to Muslim personal law, where polygamy remains legally permissible. This contractual provision allows the wife to legally contest the second marriage, but it does not affect its legal validity under Muslim law.

According to Maulana Maududi and Parvez, polygamy is allowed only if certain conditions are met, including treating all wives fairly and justly. The Quran indirectly forbids the plurality of wives, suggesting monogamy is more encouraged. Polygamy was introduced to provide shelter, but is not a general rule in Islam. In Islam, monogamy is the general rule, while polygamy is a reservation for certain circumstances.¹⁰

The concept of veil or hijab in Islam is often misunderstood and associated with the idea of women being strictly controlled and confined at home. However, this is not the Quranic spirit. The observance of hijab is meant to protect both men and women's modesty and chastity. The Quran commands men to lower their gaze and guard their modesty, just like women. This is known as the "hijab of the eyes." Women are also commanded to lower their gaze and keep their modesty. The private areas (Satar) of both men and women ought to remain covered.

Both men and women are obligated to observe modesty, which includes guarding their private parts and refraining from unlawful activities like fornication or adultery. Women are also commanded to cover their satar to protect their modesty and chastity. While there are

⁹ "Government of India Law Commission Report on Reform of Family Law." <https://Archive.Pib.Gov.in/Documents/Rlink/2018/Aug/P201883101.Pdf>, 31 Aug. 2018, archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf. Accessed 6 Feb. 2024.

¹⁰"Status of Women in Islam" https://Shodhganga.Inflibnet.Ac.in/Bitstream/10603/127598/8/08_chapter%204.Pdf, archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf. Accessed 6 Feb. 2024.

controversies among scholars regarding the hijab or veil, the Quran emphasizes that women should dress in a dignified manner and cover their body properly to prevent ill-conduct towards them. The restrictions imposed on women aim to protect their chastity and individual dignity rather than confining them to their homes or traditional veils.¹¹

The interpretation of the Quranic verse regarding hijab has been a subject of dispute among scholars and jurists. According to Ibn Abbas, only the hands and face need not be covered, while Hadrat Abdullah-bin-Masud and his followers believe that they should also be covered. The Hanafi School accepts the view.

In Islam, women are commanded to draw a veil to prevent temptation and protect them from lustful looks. Elderly women who are past the prospect of marriage are exempted from this rule. Chastity is the norm while the veil was a contextual means to achieve it. The emphasis is given on decent wearing, and the hijab or veil should not be a barrier for women's progress. The purpose and meaning of hijab are broad and should be applied to both men and women. Dr. Asghar Ali Engineer suggests that the sociological and empirical should be as important as the theological for a dynamic and creative concept of morality in society.¹²

The article emphasizes the importance of modest dressing in Islam. The hijab or veil is not a barrier for women's progress, but a means of achieving chastity and modesty. Hijab should be applied to both men and women in their behavior, appearance, and thoughts.

1.1.2 Nikah Halala

Presently, once a Muslim woman has been divorced, her husband is not permitted to take her back even if he had pronounced Talaq under influence of any intoxicant, unless his wife undergoes Nikah-Halala, which involves her marriage with another man, who subsequently divorces her so that her previous husband can re-marry her. This unfortunate practice was highlighted by the media in the case of Nagma Bibi of Orissa, whose husband divorced her in the spur of the moment in a drunken state and wanted her back the next morning, when he realized that he had committed a mistake. Unfortunately, she was prevented by her community's religious leaders, who forcibly sent her with three children to her father's house suggesting that she will have to undergo Nikah-Halala before she can re-unite with her husband.

In Islam, 'halala' stems from the term 'halal', meaning permissible or lawful. In the context of marriage, it allows a divorced woman to become lawful for her ex-husband after completing

¹¹ Chaudhury, Muhammad S. *Women 'S Right in Islam*. 2006. pp. 104-105.

¹² Mahmood, Tahir, and Saif Mahmood. *Muslim Law in India and Abroad*. Universal Law Publishing Co. Pvt. Ltd., 2012. p. 169.

nikah halala. According to Islamic law, a Muslim man can divorce and remarry the same woman twice. However, after the third divorce, the woman can only remarry her first husband if she marries another man, consummates the marriage, and then becomes available again through either the death of the second husband or his willingness to divorce her.

Moulana Ashraf Ali Thanvi, an Indian Muslim jurist who lived from 1863 to 1943, provided a clear explanation of the concept in *Bahishti Zewar*, a comprehensive guide to Islamic beliefs and practices. According to him, when a person pronounces a revocable (*raji*) talaq and then reconciles and resumes cohabitation, two or four years later, if he pronounces a revocable talaq again under provocation and then resumes cohabitation upon recovering from the provocation, two talaqs have been completed. From this point on, any further pronouncement of talaq will be considered the third talaq, leading to the immediate dissolution of the marriage, and if the parties desire to remarry, it would require halala (intermediary marriage).¹³

In Islamic law, once talaq (divorce) is pronounced, the wife becomes 'haram' (forbidden) for the husband, meaning he is not allowed to remarry her immediately. To curb the misuse of divorce as a means to oppress wives, the rule of irrevocability was introduced. This rule was intended to uphold discipline and prevent marriage from being treated lightly or mocked. The Prophet Muhammad established that after the third pronouncement of talaq, following two attempts at reconciliation, the divorce becomes final and irrevocable, thereby prohibiting the husband from repeatedly divorcing and remarrying the same wife to cause her harm.

In *Bahishti Zewar*, jurist Moulana Ashraf Ali Thanvi explained a condition regarding a third marriage between a husband and wife. He stated that for a woman to remarry her first husband after a third talaq, she must first marry another man and consummate that marriage. If the second husband either dies or divorces her after consummation, she may remarry her first husband following the completion of the Iddat period. However, if the second husband dies or divorces her before consummation, remarriage to the first husband is not permitted. This practice, observed by a small segment of the Muslim community, is known as *Nikah Halala*.

In India, the practice of *nikah halala* has been subject to misuse, with various instances of manipulation and abuse. An incident from October 2016 highlighted an Indian Muslim woman who was raped by a friend of her husband. The husband, having lost his wife to his friend through a gambling game, was compelled to divorce her. To reclaim her, he requested his friend to sleep with her, labeling it as "*nikah halala*." Exploitative websites and social media platforms have

¹³ What is *Nikah halala*, how it was established and where it stands in modern India, *available at*: <https://indianexpress.com/article/what-is/what-is-nikah-halala-how-it-was-established-and-where-it-stands-in-modern-india-triple-talaq-4618415/> (last visited on March 10, 2024).

surfaced, providing halala marriage services to divorced women. These services frequently involve coercion and inflated charges. During a BBC undercover investigation, a journalist posing as a divorced Muslim woman was quoted a fee of £2,500 for a fictitious temporary marriage.¹⁴

1.1.3 Triple Talaq

The Constitution of India helps govern the country and various laws have been passed to remove social issues like Sati Pratha and Child marriage. The Muslim women (Protection of Rights on Marriage) Act, 2019 was passed to strengthen the constitutional, fundamental, and democratic rights of Muslim women, making Triple Talaq illegal and punishable. Other Muslim majority nations like Egypt, Sudan, Pakistan, Bangladesh, Iraq, Syria, and Malaysia had already abolished Triple Talaq. The Act only applies to "Talaq-e-Biddat" or instant and irreversible divorce. The correct way of divorce by men according to Quranic verses or by the tradition of Prophet (PBUH) is unaffected, as is divorce by mutual consent between the husband and wife. Evidence would be needed to prove if a man has pronounced a talaq in violation of Muslim law.

1.1.4 Women in Mosque

The capacity for Muslim women to pray in mosques has been a subject of debate and contention for quite some time. This issue is important not only from a religious standpoint but also from a legal and constitutional angle. Recently, the Jama Masjid in Delhi announced a contentious directive prohibiting individual girls or groups of female worshippers from entering the mosque. This move has drawn criticism from individuals across various backgrounds, who see it as indicative of a fundamentalist mindset. The Delhi Commission for Women (DCW) chief Swati Maliwal has condemned the ban as a violation of women's rights and has issued a notice to the imam of Jama Masjid. The mosque's administration justifies the ban by stating that the mosque is a place of worship and girls coming alone and waiting for their dates do not align with the purpose of the mosque. However, the restriction has been questioned by many and has caused public outcry. The 17th-century Mughal-era monument is a significant religious and tourist attraction in Delhi.¹⁵

In Islamic jurisprudence, women are not prohibited from attending mosques for congregational

¹⁴ What is Nikah halala, how it was established and where it stands in modern India, *available at*: <https://indianexpress.com/article/what-is/what-is-nikah-halala-how-it-was-established-and-where-it-stands-in-modern-india-triple-talaq-4618415/> (last visited on March 10, 2024).

¹⁵ Delhi's Jama Masjid bans entry of 'girls', *available at*: <https://www.theweek.in/news/india/2022/11/24/delhis-jama-masjid-bans-entry-of-girls.html> (last visited on March 20, 2024).

prayers, and the call to prayer is inherently gender-neutral. Across several regions, including West Asia, North America, and Canada, women are permitted and often facilitated to participate in mosque-based worship. However, in India, the majority of mosques lack designated spaces or provisions for female worshippers, resulting in these spaces functioning primarily as male-only zones. Scholarly consensus within Islam generally recognizes women's right to enter mosques, while also noting that women were historically exempted from the obligation of attending due to domestic and familial responsibilities.

Points of divergence arise concerning women's access to shrines (dargahs) and cemeteries, where interpretations and practices are not uniform. Importantly, the Quran frames the obligation of prayer in universal terms without imposing gender restrictions, and the adhan (call to prayer) is considered an open summons to all believers, irrespective of gender.

In the Indian constitutional context, gender equality is enshrined as a fundamental right, ensuring that men and women possess equal entitlement to religious and public spaces. This has fueled legal challenges to practices of exclusion. A significant milestone occurred in 2016, when the Bombay High Court upheld women's right to enter the Haji Ali Dargah, setting a precedent for broader debates about women's access to mosques and other religious institutions in the country.¹⁶

The majority of mosques in India do not allow women to worship and lack proper accommodations for them. Exceptions include mosques maintained by the Ahl-e-Hadith sect and a few under the Jamaat-e-Islami Hind. This has resulted in mosques being a male-dominated space.

The Quran and the teachings of Prophet Muhammad stress the equal value and respect of all people, regardless of gender. Additionally, there are no specific limitations on women entering mosques, which reflects the inclusive nature of Islamic teachings. The recent case of *Yasmeen Zuber Ahmad Peerzade v. Union of India*¹⁷ has brought attention to this issue. The Supreme Court is slated to determine whether customs that prohibit the entrance of women into mosques contravene the right to equality under Article 14 of the Constitution and whether this right can be enforced against private entities. This case raises crucial inquiries regarding gender parity, religious freedom, and constitutional entitlements. It is a pivotal moment for the judicial system to reassert its dedication to safeguarding the basic rights of all individuals, regardless of gender. The outcome of this case is likely to create far-reaching effects, influencing not only the lives of

¹⁶ Salam, ZIYA U. "On the Entry of Women in Masjids." *The Hindu*, 29 Nov. 2022. <https://www.thehindu.com/news/national/explained-on-the-entry-of-women-in-masjids/article66202043.ece>

¹⁷ *Yasmeen Zuber Ahmad Peerzade v. Union of India* WP (C) 472/2019

Muslim women but also the larger discourse on gender equality within religious contexts.

The right to worship in a mosque extends beyond religious practice; it represents a fundamental human right. Denying women entry into mosques solely on the basis of gender conflicts with the constitutional tenets of equality and justice. While religious bodies may enjoy a certain level of autonomy, they are still bound by the legal obligations of fairness and non-discrimination. Although some supporters of such restrictions may claim that these practices stem from longstanding religious traditions deserving respect, it is important to recognize that traditions evolve over time. Religious texts and teachings must be interpreted in ways that respond to changing social and cultural realities. In this context, it becomes necessary to align religious practices with the democratic ideals of equality and inclusivity. A pivotal legal dimension of this debate lies in whether the right to equality under Article 14 can be invoked against private or non-governmental entities, raising broader questions about how the justice system enforces fundamental rights. The Supreme Court's ruling in this matter will not only address this immediate issue but also set an important precedent for future cases at the intersection of constitutional guarantees and religious practices.

In conclusion, the question of Muslim women's access to mosques is deeply tied to religious liberty, constitutional protections, and gender equality. The judiciary must carefully consider the broader implications of this issue while upholding its responsibility to safeguard the rights of every individual, irrespective of gender. The verdict in this matter could significantly influence how the balance between religious practices and fundamental rights is interpreted, setting a landmark precedent that reinforces the values of equality and non-discrimination within religious spaces.

1.1.5 Marriageable Age and Consent

In India, personal laws governing different communities set distinct criteria for marriage, including the minimum age of consent. Notably, Muslim personal law traditionally recognizes puberty—often presumed at around 15 years—as the threshold for marriage, differing significantly from the statutory age prescribed by secular laws. The Prohibition of Child Marriage Act (PCMA), 2006, sets a uniform legal standard across the country by declaring marriages involving women below 18 years of age and men below 21 years of age unlawful, regardless of religious affiliation. The Special Marriage Act, 1954, similarly prescribes these ages for marriage consent. Recently, the Supreme Court dismissed a plea filed by the National Commission for Protection of Child Rights (NCPCR) challenging a Punjab and Haryana HC ruling that upheld the validity

of marriage involving a Muslim girl who had attained puberty but was under 18. The Court held that the NCPCR had no locus standi in the case and recognized the personal law provision that allows marriage upon attaining puberty, underscoring the ongoing tension between religious personal law and constitutional legislative standards.¹⁸

To tackle these disparities and advance gender equality, the Union Cabinet in 2021 put forward a proposal to raise the legal minimum marriage age for women from 18 to 21 years, matching the existing age for men. This initiative aims to bring personal laws into alignment with statutory regulations and is motivated by concerns such as women's health, empowerment, and lowering maternal and infant mortality rates. The proposed legislation plans to amend the PCMA, Hindu Marriage Act, and Special Marriage Act to create consistent legal marriage age standards for all communities across India.¹⁹

This legal landscape highlights ongoing debates at the intersection of religious autonomy, gender justice, and state interests in India's pluralistic society.

The Special Marriage Act specifies that the minimum legal age for marriage is 18 years for women and 21 years for men. However, if one or more parties are below the legal age, the marriage is not void or voidable but only liable for a fine. The PCMA deems a marriage with a minor as voidable at the minor's option. The husband is the legal guardian of his wife, whether she is a minor or not. The question arises whether the law should register child marriages allowed under personal laws or turn a blind eye. The Delhi High Court recommends compulsory registration of marriages to discourage parents from marrying off their minor children. Written documents of ages would prove the illegality of such marriages.²⁰

According to the Dowry Prohibition Act, 1961, in the case of a marriage involving minors, the bride's stridhan is to be kept by her husband and father-in-law until she attains the age of majority. Despite this provision, underage marriages persist in India, highlighting the need for ongoing dialogue to guarantee that women gain access to their stridhan upon reaching adulthood. The Medical Termination of Pregnancy Act, 1972, requires the husband's consent if the wife is a minor. However, if the husband is also a minor, the consent is not required. These laws acknowledge the reality of child marriage in India and should be updated to avoid contradictions

¹⁸ Supreme Court Dismisses NCPCR's Plea Against Punjab & Haryana HC Ruling Allowing 16-Year-Old Muslim Girl's Marriage Valid Under Personal Law, available at: <https://theleaflet.in/leaflet-reports/supreme-court-dismisses-ncpcrs-plea-against-high-court-decision-that-a-muslim-girl-can-marry-after-attaining-puberty> (last visited on September 20, 2025).

¹⁹ The Prohibition of Child Marriage (Amendment) Bill, 2021, available at: <https://prsindia.org/billtrack/the-prohibition-of-child-marriage-amendment-bill-2021> (last visited on March 10, 2024).

²⁰ "Government of India Law Commission Report on Reform of Family Law." *Https://Archive.Pib.Gov.in/Documents/Rlink/2018/Aug/P201883101.Pdf*, 31 Aug. 2018, archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf. Accessed 6 Feb. 2024.

with other existing laws.²¹

The article argues for a uniform Marriageable Age and Consent in India to promote gender equality, specifically advocating for the legal age of 18 for both men and women. The Criminal Law (Amendment) Act 2013 criminalizes intercourse with minors under the age of 18, regardless of marital status. The article also highlights a Supreme Court ruling that recognizes girls under the age of 18 as children and prohibits intercourse with them, even if they are married.²² The current interlaced legislative system in India often leaves gaps in the law, allowing some cases to fall through the cracks. The article advocates for a more consistent approach to the legal Marriageable Age and Consent in order to promote gender justice.

2. BHARATIYA MUSLIM MAHILA ANDOLAN

Bharatiya Muslim Mahila Andolan (BMMA) is an organization committed to the rights and empowerment of Muslim women in India. Established in 2007, BMMA has emerged as a leading advocate for gender justice, legal reforms, and social change within the Muslim community, working to ensure equal rights and opportunities for Muslim women.

One of the key issues that Bharatiya Muslim Mahila Andolan (BMMA) focuses on is the practice of triple talaq, which permits instant divorce in some Muslim communities. The organization has been at the forefront of efforts to eliminate this harmful practice that strips many women of their legal rights and leaves them vulnerable. Through advocacy, research, and legal interventions, BMMA works to secure equal rights and protections for Muslim women, similar to those enjoyed by women from other religious backgrounds in India. Their nationwide campaigns and surveys have shown overwhelming opposition to triple talaq among Muslim women, contributing to the eventual criminalization of the practice by the Indian Parliament in 2019.

BMMA, in addition to legal reform work, is actively promoting education and economic empowerment for Muslim women. Bharatiya Muslim Mahila Andolan (BMMA) believes that education is crucial in empowering women to make informed decisions about their lives and futures. By offering education and vocational training, BMMA aims to equip Muslim women with the necessary skills and knowledge to improve their economic prospects, thereby enabling them to secure better opportunities for themselves and their families.

²¹ Ibid.

²² Independent Thought v. Union of India AIR 2017 SC 4904.

This method is in harmony with wider initiatives aimed at tackling the educational and vocational challenges faced by many Muslim women in India, including limited access to formal education and vocational training due to socio-economic and cultural barriers. Providing tailored education and skill development helps bridge these gaps, promoting self-reliance and economic empowerment among Muslim women.²³

BMMA does more than only address the issues related to the personal laws and inheritance rights along with domestic violence in Muslim communities. By reaching out to religious leaders, community members, and policymakers, the organization strives for innovative ways that will bring a lasting change where all Muslim women in India would stand to benefit is sustainably achieved through such interventions.

BMMA's effort to promote the codification of Muslim personal law is one of its distinguished initiatives. The organization pushes for a full and gender-fair codification that stands on par with equality and justice principles. By reaching out to all interested parties for dialogue and consultation, BMMA seeks to help build a system of laws which will provide rights and respect the identity of women belonging to the Muslim community.²⁴

Additionally, the BMMA has played a key role in establishing a forum for Muslim women to express their concerns and share their experiences. The group has initiated public hearings and consultations to articulate the hurdles faced by Muslim women—emphasizing through these the plight of the under-served sector seeking substantial reforms.

To conclude, Bharatiya Muslim Mahila Andolan is thus an essential organisation in the pursuit of fighting for the rights and empowerment of Muslim women in India. With its multi-prong strategy of legal advocacy, community engagement and public education, BMMA has been our one stop solution to help fight for a positive change in Muslim communities that are lasting as well. While the organisation still has a long way to go, it now stands as a glimmer of hope for Muslim women searching justice, equality and dignity.

²³ Evolving Horizons: Muslim Women's Education in Contemporary India. Available at: <https://muslimmirror.com/evolving-horizons-muslim-womens-education-in-contemporary-india/> (last visited on September 20, 2025).

²⁴ Bharatiya Muslim Mahila Andolan. available at: <https://supwr.org/struggles/bharatiya-muslim-mahila-andolan/> (last visited on March 10, 2024).

2.1 Role of Bharatiya Muslim Mahila Andolan

Over the past few years, the Bharatiya Muslim Mahila Andolan (BMMA) has been leading the way in empowering Muslim women and fighting for their rights. Through a variety of campaigns and projects, BMMA has been working tirelessly to address the unique obstacles that Muslim women encounter and to open up opportunities for their progress.

One of BMMA's most effective initiatives focuses on education and career development for Muslim women. Understanding the significance of education in empowering individuals, BMMA has launched programs to offer scholarships, mentorship opportunities, and career guidance for young Muslim women. By investing in their education and professional development, BMMA aims to provide Muslim women with the necessary skills and support to excel in their chosen fields. Bharatiya Muslim Mahila Andolan (BMMA) has also been instrumental in promoting the economic empowerment of Muslim women. Through targeted campaigns, BMMA has raised awareness about the employment challenges faced by Muslim women and advocates for the creation of more inclusive economic opportunities. By encouraging entrepreneurship, enhancing financial literacy, and facilitating access to resources, BMMA is working to build a fairer economic landscape where Muslim women can thrive and secure financial independence for themselves and their families.

Furthermore, BMMA has been actively involved in addressing social and cultural barriers that hinder the progress and empowerment of Muslim women. Through various awareness initiatives and community outreach programs, BMMA has aimed to challenge stereotypes, combat discrimination, and promote social integration for Muslim women. By encouraging dialogue and empathy, BMMA strives to establish a more supportive and inclusive environment for Muslim women to flourish. The efforts of BMMA have not gone unnoticed, as they have garnered support from scholars, advocates, and groups dedicated to gender equality and social justice. Scholars have acknowledged the significance of BMMA's work in highlighting the complex challenges faced by Muslim women and have provided valuable insights to advance the organization's mission.

In a historic decision on July 30, 2019, the Indian Parliament declared Triple Talaq illegal and unconstitutional, with enforcement starting from August 1, 2019. This ruling follows extensive advocacy by groups such as the Bharatiya Muslim Mahila Andolan (BMMA), marking a significant shift towards aligning personal laws with constitutional values and ensuring the rights

and dignity of individuals, particularly women. The ban on Triple Talaq serves as a testament to the Indian government's commitment to gender equality and reflects the impact of collaborative efforts in bringing about legal reforms.

While outlawing Triple Talaq represents a major milestone, it is essential to continue addressing broader challenges related to gender equality and personal law reforms. Advocacy efforts must focus on advancing the rights and well-being of women across all religious communities, ensuring justice and fairness for every individual regardless of their faith. Achieving true gender parity requires systemic changes that promote equal freedoms and protections for all. The ban on Triple Talaq represents progress in ensuring gender fairness and protecting Muslim women's rights, but there is a continued need to work towards comprehensive legal revisions that promote gender equity and uplift women from diverse communities in India.

Women from the Muslim community have achieved a major triumph by gaining access to the Haji Ali Dargah in Mumbai after a prolonged battle spearheaded by the Bharatiya Muslim Mahila Andolan.²⁵ The Bombay High Court decided in favor of allowing women's entry, declaring the prohibition unjust on August 26, 2016.²⁶ The Haji Ali Dargah, a sacred place of worship, had previously prohibited women from entering the inner chambers, a move that was seen as biased. The movement for women's access was rooted in the belief that Islam advocates for parity and does not impose specific limitations on women entering mosques. The court decision not only put an end to the biased practice but also established a model for gender equality in religious settings. This triumph signifies the ongoing fight for women's rights within Islam and ignites discussions on gender equality globally. It underscores the significance of promoting parity and non-discrimination in religious and cultural traditions. Ultimately, this success showcases the strength of unified efforts and the dedication to justice and parity.

The demand to end controversial marriage practices in Indian Muslim Personal Law, such as polygamy and temporary marriages, has sparked a heated debate. The Bharatiya Muslim Mahila Andolan (BMMA) introduced the "Muslim Marriage and Divorce Act" draft in 2014, with the goal of abolishing practices like polygamy, *nikah halala*, and other discriminatory customs to safeguard Muslim women's basic rights. On December 12, 2022, following a PIL filed by BMMA, the SC issued notices to the central government and the Law Commission, urging them to consider abolishing such practices. This judicial intervention signals increasing

²⁵ Discrimination at Haji Ali Dargah cannot be passed off as Islamic: Bharatiya Muslim Mahila Andolan, *available at*: <https://www.firstpost.com/india/discrimination-at-haji-ali-dargah-cannot-be-passed-off-as-islamic-bharatiya-muslim-mahila-andolan-2555176.html> (last visited on April 26, 2024).

²⁶ Dr. Noorjehan Safia Niaz v. State of Maharashtra, 2016 SCC OnLine Bom 5394.

acknowledgment of the necessity to protect Muslim women's rights. The final decision in this case will have profound consequences for Muslim marriage laws and women's rights within the community in India.²⁷

A groundbreaking study published by the Bharatiya Muslim Women's Movement (BMMA) titled "Status of women in polygamous unions and necessity for legal protection" sheds light on the experiences of women in polygamous marriages in India. The research presents strong evidence that highlights the immediate necessity for legal changes to protect the rights and well-being of these women. 84% of participants believe that polygamy should be banned, showing widespread acknowledgment of its harmful consequences. Moreover, 73% of participants think that husbands who practice polygamy should be held accountable, indicating a call for justice and responsibility.²⁸ The study highlights that 45% of husbands threaten to divorce their initial wives if they oppose taking a second wife, establishing a coercive atmosphere and highlighting power imbalances that disadvantage women. Emotionally, women in polygamous unions feel deceived and endure a loss of self-esteem. The study discloses that 50% of participants suffer from emotional distress, such as depression and suicidal thoughts. The results call for immediate legal protections and reforms, underlining the inadequacy of the current legal structure. Decision-makers, legal scholars, and community organizations must engage in substantive discussions to explore effective strategies to assist these vulnerable women. This includes making polygamy a crime and imposing penalties for non-consensual polygamous unions. Increasing awareness and offering support services for emotional and psychological well-being are also crucial. Society and the judiciary have a duty to prioritize the rights and honor of women in polygamous marriages, ensuring their welfare and independence. The study serves as a rallying cry for transformative change in these susceptible marital circumstances.

The Bharatiya Muslim Women's Movement (BMWM) took a significant step towards empowering women in 2016 by setting up Darul Uloom Niswan, a school aimed at training female judges. This project aimed to equip women with the skills to challenge the abuse of authority by some male religious leaders in the Muslim community, who supported one-sided divorce, issued legal opinions, and promoted practices like 'temporary marriage', which exploited power dynamics. Through the training of female judges, the BMWM aimed to create a more inclusive legal system that addressed women's needs and concerns while challenging

²⁷ Constitutionality of Muslim Marriage Laws, available at <https://www.scobserver.in/cases/sameena-begum-v-union-of-india-constitutionality-of-muslim-marriage-laws-case-background/> (last visited on April 26, 2024).

²⁸ Women's rights group releases book on polygamy, asks for criminal action, *available at*: <https://www.indiatoday.in/india/story/women-rights-group-releases-book-polygamy-asks-for-criminal-action-2311620-2022-12-21> (last visited on April 15, 2024).

entrenched male-dominated structures.²⁹ This initiative is a crucial move towards addressing deep-rooted issues, empowering women, and challenging the authority of male religious leaders. Furthermore, the training of female judges caters to specific needs and ensures that women's perspectives and rights are safeguarded. By empowering women to assume leadership roles, the BMWM is nurturing a society that is inclusive and fair for all. The establishment of Darul Uloom Niswan marks a significant milestone in advancing gender equality and justice within the Muslim community, holding the promise of fostering transformative changes in legal and social frameworks.³⁰

Muslim Women are employing a variety of tactics to combat prejudice and bring about transformation. Social networking sites such as Twitter, Facebook, and Instagram have proven to be invaluable, enabling advocates to generate awareness using hashtags, online initiatives, and personal anecdotes. Grassroots movements and public displays of solidarity have likewise been arranged to exert pressure on religious figures and community figures in order to confront the issue head-on. These endeavors have instigated dialogues and prompted some places of worship to reconsider their regulations and become more welcoming. Muslim women are also participating in intellectual debates, teaming up with scholars of Islam to challenge established narratives that sideline women. This push represents a broader societal move towards gender parity and the acknowledgment of women's entitlements in religious settings. Every member of the Muslim society should engage in constructive discussions and stand behind these women's endeavors for meaningful transformation.

In summary, the Bharatiya Muslim Mahila Andolan (BMMA) has made remarkable strides in overcoming numerous challenges that restrict the progress of Muslim women. By focusing on key areas such as education, economic empowerment, and social inclusion, BMMA has paved the way for meaningful improvements and opportunities. It is essential for academics and advocates to continue supporting and amplifying the efforts of organizations like BMMA, which play an important role in advancing gender equality and empowering marginalized groups. Collectively, these initiatives help create a fair and equal society in which every person, irrespective of their background, has the opportunity to thrive and achieve their full potential.

²⁹ Women Qazi Training Institute: Darul Uloom Niswaan, *available at*: <https://bmmaindia.wordpress.com/2016/02/10/women-qazi-training-institute-darul-uloom-niswaan/> (last visited on April 20, 2024).

³⁰ How female qazis took the law into their own hands *available at*: <https://economictimes.indiatimes.com/news/politics-and-nation/how-female-qazis-took-the-law-into-their-own-hands/articleshow/60241677.cms?from=mdr> (last visited on April 20, 2024).

2.2 Gender Inequality and Constitution of India

The practice of Triple-Talaq, Polygamy, and Nikah-Halala is deemed unconstitutional and violative of Articles 14, 15, and 21 of the Constitution, as it goes against public order, morality, and health.³¹ The Muslim Personal Law (Shariat) Application Act, 1937, is also considered unconstitutional in recognizing Polygamy and Nikah-Halala. The absence of eligibility pre-conditions for marriage and the lack of requirement for the permission of the first wife before contracting a second marriage place Muslim males outside the scope of the offense of Polygamy. The Constitution envisions a secular society and mandates a UCC for all citizens. The law relating to marriage, divorce, succession, and inheritance should not be inconsistent with fundamental rights, particularly Articles 14, 15, and 21. Additionally, Article 25 protects the positive mandate of religion, not the permissions or practices within a religion. The state is not hindered in making laws for social welfare and reform.

The Indian Constitution promotes a secular society and emphasizes the need for a Uniform Civil Code. The Constitution guarantees equal treatment and protection under the law through the Fundamental Rights, particularly the right to equality. All laws, including marriage laws, must adhere to these fundamental rights. Article 25 protects the positive mandates of religion, but not practices that overlook fundamental rights. The court recognized the issue of gender discrimination faced by Muslim women, including arbitrary divorce and polygamy, which are not protected by Article 25. These practices violate the Constitution's provisions on gender equality and right to a dignified life under Articles 14, 15, and 21. The court stated that Triple Talaq, Polygamy, and Nikah-Halala are arbitrary, violative of constitutional articles, and harmful to public order, morality, and health. Consequently, these practices can be regulated or prohibited by the state, similar to the prohibition of human sacrifice or sati. They can be treated as offenses under relevant sections of the Indian Penal Code (IPC).

3. From Shah Bano to Bulli Bai – Journey of Muslim Women Struggle

The participation of Muslim females in different movements in India has been a notable and motivating aspect of societal and political transformation. Starting from the Shah Bano situation to the latest Shaheen Bagh demonstrations, Muslim females have had a vital part in supporting for their liberties and molding the discussion on topics that impact their societies.

Five Muslim women, Shayara Bano, Gulshan Parveen, Afreen Rehman, Atiya Sabri, and Ishrat Jahan, took on conservative elements in their community and stood up against patriarchal

³¹ The Constitution of India, 1950.

mindsets. Their defiance against orthodox groups and conservative clerics demonstrates the increasing assertiveness of women across communities.

In April 1978, Shah Bano, a 62-year-old woman, sought maintenance following her divorce using triple talaq. Despite winning her case, the government overturned the judgement in 1985 to appease Muslim orthodox movements. This decision sparked a national outcry, leading to the implementation of the Muslim Women's (Protection of Rights on Divorce) Act in 1986, which was met with opposition from both progressive women's groups and many Muslim men. They objected to prioritizing religious community interests over gender equality and the narrow doctrinal principles that set Muslims apart from others.³²

In 2019, Muslim women led the fight against the discriminatory citizenship law during the anti-CAA-NRC-NPR struggle. They created inclusive protest spaces, or "baghs," uniting to oppose hate and uphold the values of equality and justice in the Constitution. These women defied traditional dress codes that have long been a point of contention within their community, making the recent unease with the hijab difficult to understand.

The hijab has become a prominent symbol of the Muslim community, serving as a form of protest against Hindutva violence. However, internal criticism of the hijab as a patriarchal practice risks being overlooked, and religious institutions' agendas are becoming mainstream. This homogenizes the experiences of Muslim women, hiding the struggles of those from marginalized and working-class backgrounds. Calls for reform from within communities are hindered by male dominance and conservative attitudes. Muslim women face power dynamics that stifle their voices, both in their homes and in society. The fight for and against the hijab should be recognized as assertive acts by Muslim women. The court's verdict on the hijab issue will impact various parties, but ultimately, the choice to wear or not wear the hijab is a political standpoint for the Muslim woman. In the past decades, Muslim women's organizations have faced challenges from religious conservatism and patriarchy within their communities. Issues such as protests against the fatwa issued against Imrana and debates over the UCC have been prominent. Nonetheless, the topic of religion has not received substantial attention or meaningful discourse.³³

Muslim women in India faced a new wave of targeted trolling on January 1, 2022, when an app called 'Bulli Bai' hosted on Github listed them for auction. This app showcased photos of Muslim

³² Triple talaq abolition is only the start of a larger campaign for gender justice in India, available at: <https://theconversation.com/triple-talaq-abolition-is-only-the-start-of-a-larger-campaign-for-gender-justice-in-india-83089> (last visited n April 10, 2024).

³³ Muslim Women's Movement from from Shah Bano to Shaheen Bagh, *available at*: <https://www.newsclick.in/muslim-womens-movement-shah-bano-shaheen-bagh> (last visited on April 25, 2024).

women with the phrase "Your Bulli Bai of the day is...", using the derogatory term 'Bulli/Sulli', which is an Islamophobic slur. Previously, a similar app called 'Sulli Deals' had also listed Muslim women for auction on Github. This situation caused immense distress and anxiety for Muslim women in India, who have already experienced instances of Islamophobia and discrimination in their daily lives.

The intense situation caused some women to suffer nervous breakdowns, fearing for their safety and recalling experiences of hate and violence directed at Muslims. Many chose to deactivate their social media accounts and isolate themselves. Although messages of solidarity appeared mainly from fringe groups, reports and videos revealed rallies promoting economic boycotts of Muslims and obstructing their religious freedoms across India. Muslim women were particularly exposed to this targeting. Fernand de Varennes, the UN Special Rapporteur on the Rights of Minorities, highlighted the urgent need to denounce and act immediately against harassment and hate speech aimed at minority women, emphasizing the importance of protecting the human rights of all minorities equally.

Political and social activist Sadaf Jafar, who was also targeted by this hate campaign, highlighted that the aim was to silence Muslim women and divide communities. The app aimed to target the Muslim-Sikh unity seen during the Shaheen Bagh and anti-farm laws movements. Jafar expressed concern for the effect this campaign could have on the social mobility and security of Muslim women.

Entrepreneur and activist Amina Kauser, the only Indian American Muslim woman listed on the app, described the sheer humiliation and discrimination she felt. She believes she was targeted because of her vocal criticism of the Indian government's policies against Muslims. Despite the humiliation, Kauser continues to use social media to voice her opinions and defy the goal of silencing her.

Living without fear, hate, threat, or discrimination is a challenge for marginalized communities in India. However, Muslim women remain resilient and empowered, fighting for their rights and demanding equality and dignity as equal citizens of India. They rely on the Indian constitution as their greatest strength and will continue to speak up for justice.³⁴

Cases have been registered by police in two Indian states after an application shared photographs of over 100 Muslim women, claiming they were on sale. The app, called Bulli Bai, was hosted on GitHub, but has since been taken down. This incident follows a similar attempt in July, when

³⁴ 'Bulli Bai', 'Sulli Deals': On Being Put Up for 'Auction' as an Indian Muslim Woman, *available at*: <https://thewire.in/communalism/indian-muslim-woman-auction-bulli-bai> (last visited on April 10, 2024).

an app and website called Sulli Deals created profiles of more than 80 Muslim women and described them as "deals of the day". Both instances aimed to degrade and humiliate Muslim women by sharing their personal images. The police have yet to make any arrests in the Sulli Deals case. Journalist Ismat Ara, whose name appeared on the Bulli Bai app, filed a complaint against unidentified individuals for sexual harassment and promoting religious enmity. Another woman on the Bulli Bai list also filed a complaint, leading to a second case being registered in Mumbai. The lack of progress in these investigations has raised concerns among the victims. The Indian government and the National Commission for Women have demanded that measures be implemented against those responsible for these offenses. Activists and critics have denounced these events as deliberate assaults on educated Muslim women who voice their perspectives on Islamophobia, suggesting a concerning rise in online trolling and harassment in recent years.³⁵

The emergence of Muslim women's activism, driven by autonomous women's groups such as the Bharatiya Muslim Mahila Andolan (BMMA) and the Bebaak Collective, has led to a strong movement against gender injustice and deeply rooted power dynamics present in both the Muslim community and the larger state apparatus. These organizations focus on advocating for equal citizenship rights for all women irrespective of religion, moving beyond calls for mere changes in personal laws. BMMA and Bebaak challenge the authority of the Muslim Personal Law Board, which has traditionally held significant influence over religious and family matters, while also addressing the broader social and political discrimination faced by Muslims in India. Their activism has sparked extensive debates on social reform, gender justice, and the intersection of religion and state, pushing for a more inclusive and equitable future for Muslim women.

Examples of their efforts include grassroots campaigns for legal reforms such as abolishing triple talaq and nikah halala, raising awareness about women's economic and educational rights, and creating safe spaces for Muslim women to voice their concerns. These groups also engage in community dialogues and legal interventions to dismantle patriarchal norms and promote progressive change within Muslim society. Their sustained activism highlights the importance of recognizing Muslim women not just as subjects of religious laws but as equal citizens with rights and voices in public discourse and policymaking.

³⁵ Bulli Bai: India app that put Muslim women up for sale is shut, *available at*: <https://www.bbc.com/news/world-asia-india-59856619>

4. CONCLUSION

Islamic feminism arose in the 1990s as a reaction to women's rights within Islam. In India, organizations such as MWRN and BMMA advocate for Muslim women's rights through Islamic feminist principles. MWRN emphasizes legal issues, while BMMA focuses on empowering Muslim women. These movements aim to balance religious beliefs with gender equality and combat discrimination. Their efforts played an important role in the passing of the Muslim Women (Protection of Rights on Marriage) Act in 2019, criminalizing triple talaq. Additionally, BMMA supports victims of domestic violence in accessing justice and support services. The emergence of Muslim women-led networks signifies a significant shift in the Indian political landscape, challenging stereotypes and working towards reforming Islamic laws within their communities. The 1985 Shah Bano case further ignited the discussion on civil and religious laws, protecting the rights of Muslim women after divorce.

The situation of Muslim women in India reflects a complex and unequal society, characterized by deep-rooted communitarian hierarchy and persistent misogyny. Muslim women face increasing marginalization due to institutionalized persecution, ghettoization, and replication of misogyny within their own community. Despite these challenges, they have shown resilience and determination to fight for their rights. Movements such as MWRN and BMMA have been created to defend their autonomy and financial security, challenging discriminatory social norms. However, significant improvement requires ending the stigmatization of the Muslim community and the insecurity faced by Muslim people in India.

Hence, Islam grants women various rights to uplift their status and restore their dignity. However, their position still remains backward due to ignorance and lack of education, making them vulnerable to deception. Muslim women must be educated and aware of their rights and Islamic law to prevent injustices against them. And there is need for the codification of Muslim Personal Laws which are stand in the way of gender equality. These personal laws should be tested for Fundamental Rights violation

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

Dr. Poonamdeep Kaur¹

Abstract:

The right to bail, a crucial statutory right, is constitutionally protected under Article 21 of the Constitution of India. The conditions of bail for an accused depend on the nature of the statute. 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 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.

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1. 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 law. The 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 that unless there are compelling reasons such as the accused trying to thwart justice, attempting to escape, threatening the witnesses or committing another offence, etc., the basic rule of bail should prevail, which is the bail rule and jail exception. This basic principle has been endorsed 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 implementation of the FERA Act.³ The Enforcement Directorate has been successful in securing the prosecution of many money launderers, strengthening the legal system, but at the same time invited controversy for the potential misuse of its power. The ED wields extensive power under PMLA, including tracing of 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 Similarly, the Unlawful Activities (Prevention) Act of 2019 is another such legislation at the centre 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, <https://enforcementdirector.gov.in>, (Aug.15, 2024, 9:15 PM).

⁴ *Ibid.*

1.1 The Judicial Scrutiny of the Principle of Bail under the PMLA and UAPA Post-2022.

1.1.1 *Vijay Madanlal Choudhary v. Union of India*⁵- In this case, a significant and thought-provoking constitutional challenge was mounted over various provisions of the PML Act, most importantly, sections 45⁶ and 50⁷ of the 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 still pending. Section 45 of the PML Act deals with bail conditions and is controversial. The section states that an under-trial would only be granted bail if he satisfies the twin conditions, namely (1) there should be reasonable grounds 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 it is unlikely on the part of the accused to commit any offence while he is on bail. These two conditions, 'twin conditions' for bail, 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 laws. 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, they are entitled to when the offence is punishable for 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 a reasonable nexus with the object of the PML Act. Moreover, the PML Act is in par with the recommendations of International Conventions on Money Laundering, and India is committed to fulfilling its international commitment globally. Since the money laundering offence 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 PML Act, which provides vast powers to the ED to

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

⁶ The Prevention of Money Laundering Act, 2002, S.45.

⁷ The Prevention of Money Laundering Act, 2002, S.50.

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 PML Act do not become compelled testimony, even if they are incriminatory. After all, the proceedings of the ED are solely investigative to determine whether the proceeds of the crime money fall under section 3 of the PML Act. The defence of Article 20 (3) would be available after the registration of a formal FIR and not merely at the summoning stage. Secondly, protection under Article 20 (3) would be available only if the person is “accused” of an offence. When ED summons a person without specifying the reasons, it cannot be presumed that he has been called as an ‘accused’ for interrogation.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 grundnorm, and all other laws must abide by its 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, following *Vijay Madanlal*, a visible trend reversal was observed in the Supreme Court's decisions in money laundering and Unlawful Activities cases, upholding the accused’s right to personal liberty against the stringent provisions of these Acts.

1.1.2 *Pankaj Bansal v. Union of India.*¹⁰ In this case, the petitioners did not assail to challenge section 19 of the PML Act. Still, they requested to read into section 19 of Act, the principles laid down in *Vijay Madanlal*’s case, which provides for furnishing the accused with grounds for arrest. After analyzing some of its earlier judgments, especially *V. Senthil Balaji v. The State*¹¹ on Section 19 of the Act, the Supreme Court concluded that, as per the Constitutional mandate, the person arrested should be made familiar in writing about the grounds of his arrest so as to enable him to prepare for his release. The PLM Act, 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

⁸Shraddha 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.

(1) of the Constitution. It would make it difficult for the accused to secure his release. Therefore, the accused was released for noncompliance with Section 19 of the PML Act and Article 22 (1) of the Constitution.

1.1.3 *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 individual's right to personal liberty confined in custody. In such cases, the proper procedure for the Special Courts is to allow custody only when the 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.

1.1.4 *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 Court 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 pursue the bail before the Supreme Court as he was conscious 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 PML Act. 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 does not need to conduct a mini-trial to establish a 'reason to believe' before making an arrest. If there are incriminating statements against the accused, the ED has full power to make an arrest, and the court cannot interfere to examine 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 authority 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

¹²Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office, 2024 LiveLaw (SC) 383.

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

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 its 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 received 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.

(4) No person can be arrested by the ED 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 specifying the causes of arrest for an individual accused and arrested under the Act.

1.1.5 *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 the 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 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 offence falls is penal. Upholding 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. To contend that bail is untenable under any specific law is legally flawed, for it contradicts the core principles of our constitutional system. Thus, the court allowed bail to the appellant due to his prolonged incarceration in jail.

¹⁴ Sheikh Javad Iqbal @ Ashfaq Ansari @Javed Ansari v. State of Uttar Pradesh, 2024 LiveLaw (SC) 486.

1.1.6 *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 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 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.

1.1.7 *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 on the Right to Life and Personal Liberty, declared that where the accused is lodged in prison for a long incarceration, he is entitled to Bail irrespective of the nature of the offence he has committed. 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 were obligated to provide the accused with a system that ensured the right to a speedy trial as guaranteed by Article 21 of the Constitution.

¹⁵ Parvinder Singh Khurana V. Directorate of Enforcement, 2024 LiveLaw (SC) 502.

¹⁶ Manish Sisodia v. Directorate of Enforcement, 2024 Livelaw (SC) 563.

The Court observed that the ED had assured the court that the prosecution of all the accused involved in the scam would commence within 6-8 months. However, this was never 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.

1.1.8 *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 bail before the Special Court, which was denied, but the High Court granted bail to the co-accused. Hence, he filed the present appeal before the Supreme Court. Before the Apex Court was the question relating to the interpretation of section 43-D (5) of the UAPA¹⁸ 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

¹⁷ *Jalaluddin Khan v. Union of India*, Criminal Appeal No. 3173 of 2024.

¹⁸ *The Unlawful Activities (Prevention) Act, 1967*, S. 43D (5).

¹⁹ *Gurwinder Singh v. State of Punjab*, (2024) 5 SCC403.

²⁰ *National Investigation Agency v. Zahoor Ahmad Shah Watali* (2019) 5 SCC 1.

and the case diary 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.

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 observed that the evidence collected against the accused must show his involvement in committing the offence.
- (2) Once the court frames the allegations 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 permitting or rejecting bail to the accused. The court, at that stage, should desist from delving deep into appreciating the pieces of evidence.
- (4) When the court is required to determine the involvement of the accused in the commission of an offence, its decision should be based on the broad prospect of probabilities of his involvement rather than seeking proof beyond a reasonable doubt of his involvement.
- (5) Section 45 D of the 1967 Act lays down special procedures concerning the trial and investigation of offences 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 scrutiny over the rigorous provisions of the Act.
- (6) The evidence gathered by the investigating agencies and attributed to the accused must be considered in toto and not in pieces.

(7) The admissibility of a document or other evidence should be decided at the stage of trial, but until then, the court should proceed and take into consideration the contents of the document on the face of it.

(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.

1.1.9 Prem Prakash v. Union of India through the Director of Enforcement²¹- 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

²¹ Prem Prakash v. Union of India through the Director of Enforcement, SLP (Crl.) No. 5416/2024.

of evidence.

1.1.10 *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.

1.1.11 *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 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.

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.

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.

2. CONCLUSION

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.

USE OF AI IN ANTITRUST: SHAPING FAIR COMPETITION IN A DIGITAL WORLD

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Abstract

In the twenty-first century, all the nations are competing with each other to outgrow their economies. There are a number of transactions, from agreements to mergers and acquisitions, taking place in the market, and new players are coming into the sector as they see the potential for development. To regulate all these activities, there are Antitrust laws that foster business competition by guaranteeing that economic power distribution stays stable and economies continue to grow. But as technology is growing, new ways have developed to distort the competition in the market. In the present study, the authors focus on the current standing of leading economies such as India, the UK, and the USA about their competition laws and their limitations in regulating technological advancements such as artificial intelligence, which is/can be used to distort the healthy competition in the economy. The study further focuses on the involvement of artificial intelligence in cartelization, merger and acquisition, price fluctuation, etc. by the players in the economy to indulge in anti-trust practices. To overcome such obstacles where technology is growing at an unprecedented rate, the competition authorities need technological advancement “to fight technology with technology”. The way the economy is advancing highlights the need for competition law to be modified, and the enforcement agencies should do the same. The study primarily focuses on the usage of artificial intelligence by the competition authorities to regulate the market and whether there are any provisions in the existing laws of the above-mentioned countries, to allow authorities to take action. The author aims to advance suggestions in furtherance of the same.

Keywords - Artificial Intelligence (AI), Anti-trust Investigations, Need to Use AI, Benefits of Using AI, Critical Analysis.

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1. INTRODUCTION

The art of healthy competition relies on the players' integrity. Competition has been prevalent since the very beginning of time and can even be seen in the most diminutive aspects of life. Even the concept of "survival of the fittest" depends on competition. Competition has always been a quintessential part of success. People all around the world have been involving themselves in all kinds of competition, throughout their lifetime, be it sports or any other activity. Even though every person in the world is familiar with the term competition, the competitiveness or nature of competition differs from situation to situation. The term competition is gnomic as it does not have a fixed meaning to it. Even the laws governing competition across the globe do not provide for an explicit definition of competition. Justice Woodward, in *Re Queensland Cooperate Milling Association*,² stated that competition is a process where the competitiveness amongst firms is dependent on the market structure.

Adam Smith, in his book "*The Wealth of Nations*",³ stated that only unrestrained competition makes the products a paragon, that is, only in a perfectly competitive market is the exposure of a product to innovation and improvisation possible.⁴

The economy of the nation can grow fully when all the competitors can compete with each other naturally without any dominance. They are not affected by anti-trust or anti-competitive practices that may adversely affect them. Anti-trust laws mean to restrict an individual or a group of individuals to control the prices unfairly or to create a monopoly. These practices affect the competition by creating unlawful restraints in various forms, such as an agreement between the influencing players of the market for collusion regarding mergers, cartelization, bid rigging, and many other such practices. The intent of these rules is to increase efficiency and productivity in the economy by promoting competition.

Technology was initially developed to facilitate humans in every sphere of life, but today its challenges raise systemic concerns. The commercial sector plays an outsize role in the use and development of AI. Its usage can have multiple incentives for the authorities that curb anti-competitive practices and the companies that perform such practices. It can help companies identify and create operational efficiencies and also has the potential to create substantial antitrust risks for businesses. This technology can be used to facilitate collusive behavior that unfairly inflates prices, among other things. On the other hand, it can be used by the authorities to identify and remove any harm by taking appropriate action to restrict further damages. Therefore, it is all

² (1976) 8 ALR 481.

³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (2nd ed. 1776).

⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (2nd ed. 1776).

the more necessary to use AI by the competitive authorities to rule out the concentration of resources by the dominant firms.⁵

This article shall discuss the stance of the leading economies on the use of AI to regulate such practices and how it can be helpful in the investigations, with a particular reference to the US, the UK, and India.

2. POSITION OF LEADING ECONOMIES

2.1 The United States of America

There are two major Acts that govern the competition in the US market. These are the Sherman Antitrust Act and the Clayton Act.⁶ These acts help in regulating not only the agreements to restrain trade or to monopolize certain sectors of the economy but also the mergers and acquisitions to reduce competition.

However, the parts of the Sherman Act were dismantled⁷ as it was considered ambiguous in defining certain key terms of the Act. It does not also differentiate between the agreements that are for public benefits and those that are in restraint of trade. The court considered the potential competitive effects of the agreement in question to decide whether the restraints violated the Act. The court found that price fixing per se violated the Sherman Act.⁸ On the other hand, the Clayton Act primarily focuses on mergers and acquisitions, and its subsequent amendments⁹ also focus on the same aspect. Both Acts are more than 100 years old and are silent on the use of technology in distorting the competition.

Numerous measures have been introduced to regulate technology and online platforms in order to address these issues and limit the number of acquisitions that have developed in recent years. One of the bills namely, "*The Platform Competition and Opportunity Bill, 2021*"¹⁰ was proposed to restrict the acquisition by large and controlling market players who aim to purchase online start-ups instead of providing investment to them. It was a general way in which the firm provides

⁵ Altamas Kabir, "Competition Laws and the Indian Economy" 23(1) N.L.S.I.U. Law Rev.,4 (2011).

⁶ The Antitrust Laws (2023), available at: <https://www.justice.gov/atr/antitrust-laws-and-you> (last visited on March 28, 2024).

⁷ United States v. E. C. Knight Company 156 U.S. 1 (1895).

⁸ Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

⁹ Clayton Antitrust Act of 1914: History, Amendments, Significance available at: <https://www.investopedia.com/terms/c/clayton-antitrust-act.asp#toc-clayton-antitrust-act-amendments> (last visited on March 28, 2024).

¹⁰ Julie Carlson, (2022) '*The Platform Competition and Opportunity Act Is a Solution in Search of a Problem*', available at: <https://itif.org/publications/2022/01/31/platform-competition-and-opportunity-act-solution-search-problem/> (last visited on March 28, 2024).

investment and clears out its competition from the market. This bill's most significant feature is that it puts the onus of proof on the buying company to demonstrate that the acquisition was made without intending to interfere with market competition.¹¹ Section 5 of the Act considers the bill violation to be an unfair manner.¹²

Section 5 of the Sherman Act is the essential source of regulation for the Federal Trade Commission ("FTC"). It prohibits "unfair or deceptive acts or practices in or affecting commerce."¹³ The FTC has the power to evaluate whether an action is unfair, even when it complies with other legal requirements.¹⁴ Additionally, it can initiate proceedings against unfair practices that are not yet covered by more specific statutes.¹⁵ Therefore, it can be seen that the authority under Section 5 is wide in its scope to address challenging issues. This is the suitable section under which FTC can regulate the new and emerging challenges brought about by the technology. Moreover, the FTC's instruments, such as design requirements and disclosures, can lessen the risks that algorithmic decision-making systems pose. It can regulate the unanticipated regulatory issues AI is likely to create using these tools.¹⁶

It is a relevant provision to kick-start the regulation of AI. However, the FTC frequently depends on informal reporting of infringements due to staffing and financial limitations.¹⁷ Furthermore, the FTC under Section 5 is not able to regulate injuries caused by consumers in non-commercial circumstances, nor does it have jurisdiction over non-profit organizations, common carriers, financial institutions, or certain other businesses.

The Anti-trust practices are not limited to mergers and acquisitions and can affect the USA's large tech-heavy companies uncertainly and can disrupt the overall technological edge of the USA in the leading economies; therefore, just as the definition of market fairness has evolved, so too have the legal guidelines guiding the competition policy.

The Office of Technology¹⁸ is an attempt to regulate under the aegis of FTC and the Department of Justice to curb the menace of the companies involved in anti-competitive practices. It aims to

¹¹ The Platform Competition and Opportunity Bill USA 2021, s. 3(d).

¹² The Federal Trade Commission Act, 1914.

¹³ Constitution of the United States, USA 1789, s. 45(a)(1).

¹⁴ Sherman Anti-Trust Act USA 1890, s. 5.

¹⁵ Sherman Anti-Trust Act USA 1890, s. 5.

¹⁶ Daniel J. Solove and Woodrow Hartzog, "The FTC and the New Common Law of Privacy", 114 *Colum. L. Rev.* 583, 599 (2014).

¹⁷ Andrew D. Selbst and Solon Barocas, "Unfair Artificial Intelligence: How FTC Intervention can Overcome the Limitations of Discrimination Law", 171 *U. Penn. Law Rev.* 1023 (2023).

¹⁸ White House OSTP Applauds Launch of New FTC Office of Technology (2023), available at: <https://www.whitehouse.gov/ostp/news-updates/2023/02/17/white-house-ostp-applauds-launch-of-new-ftc-office-of-technology/> (last visited on March 28, 2024).

prepare the agency to handle present and future technological threats by creating a group of technologists with in-depth knowledge in a variety of specialized domains, such as data security, software development, data science, digital markets, artificial intelligence, machine learning, and human-computer interaction design.¹⁹ It also supports strengthening the investigation by the officers using AI.

This seems to be a good initiative by the FTC, but it is not an effective solution to the menace of AI. A similar attempt was made in 2015 when the Office of Technology Research and Investigation was established to expand the agency's technology expertise.²⁰

2.2 The United Kingdom

The current competition law policy of the United Kingdom is relatively newer than that of the United States. The UK established numerous independent regulators in several important markets during the privatization reforms of the 1980s with the goal of boosting competition and improving consumer outcomes.

The major objectives of its competition policy are laid down in the Competition Act, 1998, dealing with competition law and antitrust matters.²¹ It was created to uphold the UK's anti-competitive laws and encourage the legal foundation for competition.

The Act's Chapter I prohibits measures that aim to limit or restrict competition within absolute bounds and that may have an influence on two or more undertakings²², coordinated efforts, or agreements within the UK (or any portion of it).²³ An exemption is outlined in Section 9 of the Act, subject to the limitations specified in the section; the prohibition does not apply in situations where an agreement, although theoretically anti-competitive, offers benefits (such as improving production or distribution or promoting technological or economic advancement) that outweigh any drawbacks to competition.²⁴ It was created to uphold the UK's anti-competitive laws and encourage the legal foundation for competition.

Further, Chapter II of the Act addresses the abuse of a dominant position in a market,²⁵ section

¹⁹ Stephanie T. Nguyen, (2023) '*A Century of Technological Evolution at the Federal Trade Commission*', available at: <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/02/century-technological-evolution-federal-trade-commission> (last visited on March 30, 2024).

²⁰ '*FTC Seeks Technologists for New Research, Investigations Office*' (2015), available at: <https://www.ftc.gov/news-events/news/press-releases/2015/03/ftc-seeks-technologists-new-research-investigations-office> (last visited on March 30, 2024).

²¹ The Competition Act, 1998.

²² The Competition Act, 1998, c. 1.

²³ The Competition Act, 1998, s. 2.

²⁴ The Competition Act, 1998, s. 9.

²⁵ The Competition Act, 1998, c. 2.

18, which prohibits firms with dominant positions from engaging in unfair practices that harm competition.²⁶

The United Kingdom adheres to general anti-trust law principles followed in leading economies across the world. The Competition and Markets Authority (CMA) was established in 2013 by the Enterprise and Regulatory Reform Act 2013, which established a framework for assessing and controlling mergers and acquisitions to make sure they don't significantly reduce competition in the UK market. As mentioned, being one among many, the CMA is established as the primary regulatory authority responsible for enforcing the Competition Act 1998 by ensuring enforcement of its provisions.²⁷

While examining market concentration between 1998 and 2018, it was found, that after the 2008 financial crisis, industry-level concentration increased throughout the economy. While concentration decreased after 2010, it remained higher in 2018 than before the crisis. In 2018, the average combined market share of the ten largest firms in an industry remained 3% higher than in 1998.²⁸ Though there have been various policy measures by the government, they have been unfulfilling the objective of increasing market competition and reducing market power in the economy. The unfavourable condition in an economy where some firms possess the power to increase prices and decrease output in the market when seen concerning a competitive market is market power, and the increase in the market share by the top ten firms in industries indicates decreasing competition and increasing market power.

The UK competition law landscape has undergone significant change as a result of new challenges and new issues, such as the growing importance of the digital economy.

2.3 India

India was handed over to the Indians in a crippling state of the economy. The first five-year plan focused on the agrarian sector, while the subsequent plans, along with plan holidays taken by the then government regimes, added to the monopoly of the state in Indian markets, caused by a lack of state intent for a free market economy, until the Liberalization, Privatization, and Globalization reforms in the 1990s. In one of the initial enactments aiming at curbing anti-competitive practices, the then government passed the Monopolies and Restrictive Trade Practices Act, 1969,²⁹ as an enactment of a 1964 proposal of the *K.C. Das Gupta Committee*

²⁶ The Competition Act, 1998, s. 18.

²⁷ The Competition Act, 1998.

²⁸ Competition and Markets Authority, "The State of UK Competition Report 2020", available at: <https://www.gov.uk/government/publications/state-of-uk-competition-report-2020> (last visited on March 30, 2024).

²⁹ Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969).

following the duties of the state enshrined under *Articles 38*,³⁰ and *39* of the Constitution of India.³¹ The second chapter of the above-mentioned act required the union government to form a commission called the Monopolies and Restrictive Trade Practices Commission (MRTPC) to inquire into matters relating to restrictive trade practices.³²

After the LPG reforms in the 1990s, the old act regulating the competition in Indian markets seemed vague and ambiguous; hence, a new act was enacted to regulate and inquire into anti-trust matters in India, submitting the recommendations made by the *Raghavan Committee* in 2000.³³ The competition law in India is now governed mainly by the Competition Act, 2002.³⁴

The Competition Commission of India (hereinafter 'CCI') was setup to deal with competition law disputes under the new Competition Act.³⁵ Since the Competition Act was passed, the CCI's nature has changed significantly. Initially, it was created as an authority to resolve issues pertaining to the Act. It was unclear, though, at the time, whether the CCI was a judicial body or an expert regulatory agency because of various conflicting statements in the Act. Following the decision of the apex court in *Brahm Dutt v. Union of India*,³⁶ the Parliament amended the Competition Act in 2007 to make it clear that the CCI is an expert organization that was set up as a regulator.³⁷

The Competition Act, unlike the Monopolies and Restrictive Trade Practices Act, provides various provisions to maintain healthy competition in the economy. The main focus of this act is not to eradicate the industries having an Appreciable Adverse Effect on Competition or holding a dominant position but to regulate such activities and restrict the dominant industry from abusing its position. The Competition Act has defined various terms that its predecessor, the Monopolies and Restrictive Trade Practices Act, had negligently failed to define. The Competition Act, focusing primarily on the consumer's welfare, has described the term consumer as a person who buys, hires, or avails of any of the goods or services for compensation payable as promised, in a part of a deferred manner.³⁸ Any person or enterprise aggrieved by the orders of the Competition Commission can challenge such orders in the National Company Law Tribunal, which was substituted for the Competition Appellate Tribunal in the recent amendments made to the

³⁰ The Constitution of India, a. 38.

³¹ The Constitution of India, a. 39.

³² The Monopolies and Restrictive Trade Practices Act, IND 1969, s-10.

³³ Raghavan Committee Report (2000).

³⁴ The Competition Act, 2002 (Act 12 of 2003).

³⁵ The Competition Act, 2002 (Act 12 of 2003), s. 7(1).

³⁶ *Brahm Dutt v. Union of India* 2 SCC 431 (2005).

³⁷ The Competition (Amendment) Act, 2007 (Act 39 of 2007).

³⁸ The Competition Act, 2002 (Act 12 of 2003), s. 2(f).

Competition Act.³⁹

The Act regulates all kinds of anti-competitive activities that can destroy the healthy competition between the industries of a particular market. Under the Act, any agreement that causes an Appreciable Adverse Effect on Competition (AAEC) is labelled to be an anti-competitive agreement; that is, any agreement entered into by an enterprise or a group of people to hold command over the supply or production of a product is a void agreement.⁴⁰ There is no necessity for an explicit agreement to be put in writing; the mere concurrence of will or consensus of minds is sufficient to prove the existence of an agreement.⁴¹ Furthermore, the joint intention of the parties to conduct their commerce in a specified manner also acts as an agreement between the parties.⁴²

The concept of abuse is generally related with the behavior of an undertaking in a dominant position, through which it influences the structure and competition of the market by acting as a hindrance to the same.⁴³ The shift of a large consumer base to an entrant, equipped with a new product or technological innovation, explains, clearly, the concept of dominant position.⁴⁴ Determining the market for the endeavor is the conventional method of identifying a dominant position. In addition, the Competition Act specifies a number of five factors that need to be taken into consideration when assessing an undertaking's position in the market.⁴⁵

The major objectives behind devising a competition law were to restrict anti-competitive agreements, abuse by dominant undertakings, and to regulate the combination of undertakings.⁴⁶ Merger is a method of inorganic growth advocated by various undertakings as a means to develop their business expeditiously.⁴⁷ These actions of the industries help them to grow without the need for them to start fresh. Merger, as discussed earlier, means the integration of two different industries into one large industry either by absorption or by an agreement.⁴⁸ They have proved to be essential in developing industries and saving some of them from going out of business. The OECD, in their report, stated that mergers pose very little threat to the market.⁴⁹ Due of the

³⁹ The Competition Act, 2002 (Act 12 of 2003), s. 53(a).

⁴⁰ The Competition Act, 2002 (Act 12 of 2003), s. 3.

⁴¹ Volkswagen AG v. Commission, Case T-62/98, (2000).

⁴² Bayer AG v. Commission, Case T-41/96, (2000).

⁴³ P.Tomra v. Commission, Case C-549/10 (2006).

⁴⁴ Fast Track Call Cab Pvt. Ltd. v. ANI Technologies, Case No. 6&74/2015 CCI (2015).

⁴⁵ The Competition Act, 2002 (Act 12 of 2003), s. 19(4)

⁴⁶ Justice K. C. Das Committee, "Report of the Monopolies Inquiry Commission", 166 (1965).

⁴⁷ Dr. J. J. Irani Committee, "Report of the Expert Committee on Company Law" (2004).

⁴⁸ Sandeep Shastri, Lal Bahadur Shastri, 'Politics and Beyond' (2019).

⁴⁹ OECD and World Bank Report, "A Framework for the Design and Implementation of Competition Policy and Law" (1991).

advantages they provide, mergers and combinations are not considered anti-competitive per se. Justice D. Y. Chandrachud, in *Re. Ion Exchange Ltd.*⁵⁰ stated that restructuring the corporate market is a method used by, most, industries to adapt to the ever-developing market. He also mentioned that the law must function in such a way that it does not disrupt the discretion of the industries. Justice Putnam, in the case of *United States v. Patterson*,⁵¹ stated that for a combination to be illegal, the means and intention, by which it is going to acquire the market need to be proved. He also stated that combinations are admirable as the parties to the combinations are engaged in selling their goods at a cheaper price.

3. FACTORS FOR DEVELOPING AI ENFORCEMENT TOOLS

At the end of the day no matter how useful this technology is, it has certain intricacies that should be considered. It has its own set of drawbacks and issues. The authorities are at their nascent stage and are floundering in using AI to combat such practices as they lack funds to develop such technologies and expertise. However, the tech-heavy companies are already equipped in both these terms, and therefore they have an upper edge over the authorities.

These tools are inaccurate in their detection capabilities, which are limited by their inability to access large amounts of data sets and identify and understand new algorithms used to create disturbances in the competition. It may be a reflection of the prejudices of their developers, producing incorrect and perhaps unlawful results.

A new technology tool, i.e., '*generative AI*,' creates new content without using the existing data, and it is indistinguishable from content created by humans.⁵² When only a group of companies has access to essential inputs, that are required to create such tools, then it may distort the competition.

Sometimes it is difficult to collect data for essential inputs that are easily available to already established firms collected over years, and it becomes much easier when these firms have their online platforms for consumers that have large data sets. It may be used by these firms to hold onto their positions by disrupting the established models with the use of these data sets and perhaps serving as obstacles to entrance for new competitors.

Another challenge posed by AI is the use of algorithms that can be used for collusion, exploitative

⁵⁰ *Re. Ion Exchange Ltd v Unknown* 105, 115 (2001).

⁵¹ *United States v. Patterson* 55, 605 (2022).

⁵² Staff in the Bureau of Competition & Office of Technology (2023), '*Generative AI Raises Competition Concerns*' available at: <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>. (last visited on March 30, 2024).

behavior, and exclusionary conduct.⁵³ These algorithms can also be used to artificially fluctuate the prices in a coordinated manner, which makes it difficult for the regulators to differentiate between the actual price rise and anti-competitive prices.

AI as a tool is evolving faster with new and efficient algorithms, and the existing technology is becoming outdated. To maintain the pace with AI, the authorities need to collect large amounts of data with the help of human forces who have the necessary expertise to handle such data, but retaining such a workforce is difficult. The companies in the market can retain the human force by leveraging the higher pay rate than the government authorities.

4. HOW AI CAN HELP ANTI-TRUST REGULATING AUTHORITIES

As more dynamic practices are emerging, there is an increased need for regulatory authorities to use AI. The use of machine learning will help identify anticompetitive patterns and behaviors. The availability of more market data with the help of Artificial technology (hereinafter AI) would be advantageous to authorities. The increased information flow accessible to authorities will enhance their overall capacity to identify antitrust violations, hence facilitating the creation of new capacities. The use of artificial technology by the authorities is becoming necessary as the market players are also using AI to implement their anticompetitive practices.

The most common form of antitrust practice is merger. Therefore, it is essential to regulate mergers, among other forms using artificial intelligence. When the authorities are informed about the probable merger with the intention of anti-competitive practice, the authorities need to take prompt actions under uncertainty before the merger can take place. In such situations, artificial intelligence would help in analyzing large, extensive documents before making such decisions. Since data is the foundation of merger analysis, the authorities have challenges in processing all the data within the allotted period.⁵⁴ AI might then be useful in giving authorities the means to assess large data sets in a timely manner.

It would further help in identifying illegal intentions when they analyze companies' internal documents.⁵⁵ The use of AI will increase the speed by which authorities can analyze these documents, thus bringing more efficiency and analysis capabilities to the authorities. The technology can further help the authorities by coordinating with other such authorities to bring more efficiency.

⁵³ OECD (2023), Algorithmic Competition, OECD Competition Policy Roundtable Background Note, *available at*: <https://www.oecd.org/daf/competition/algorithmic-competition-2023.pdf> (last visited on March 30, 2024).

⁵⁴ Thomas B. Leary, The Inevitability of Uncertainty, *Competition L. Int'l* 3(1) 27-31 (2007).

⁵⁵ Suzanne Rab, "Artificial Intelligence, Algorithms and Antitrust" 18(4), *Competition L.J.* 141, 142 (2019).

Artificial Intelligence can further benefit the design, monitoring, and evaluation of antitrust policies. AI can help in improving the authorities past investigations, and analysis of documents and policies. One such instance is that the Federal Trade Commission⁵⁶ has expressed its intention to carry out more focused empirical research to examine previous merger decisions involving large digital firms.⁵⁷ It will help in the systematic auditing of their overall process to ensure that they remain effective. The authorities can carry out specific studies of a particular sector in the economy to understand what conditions gave rise to new players when the overall market was at its extreme.

The usage of AI will help in analyzing the cost-benefit analysis of new policies and legislation that they intend to bring by mostly being predictive based on past experiences, which will further help in making an informed decision.

5.CONCLUSION

Navigating the world of rapidly evolving technology, especially with advancements like AI, calls for smart and timely responses. While AI adds a layer of complexity, legal systems in places like the United States, the United Kingdom, and India are working hard to keep competition fair. As tech keeps changing, it's crucial for regulators to adapt and find a balance between fostering innovation and maintaining oversight.

AI brings both exciting opportunities and significant challenges when it comes to spotting and preventing unfair practices. It's all about finding the sweet spot between encouraging new ideas, refining legal rules, and working together globally. In today's digital era, this balance is vital for economic growth and a fair market that benefits consumers. Regulators need to stay agile and responsive to these changes, ensuring we have a competitive environment that works for everyone.

⁵⁶ FTC, (2019) Overview of the Merger Retrospective Program in the Bureau of Economics, Federal Trade Commission, *available at*: <https://www.ftc.gov/policy/studies/merger-retrospective-program/overview> (last visited on March 30, 2024).

⁵⁷ Fabiana Di Porto & Mariateresa Maggolino, "Algorithmic Information Disclosure by Regulators and Competition Authorities" 19(1), *Global Jurist*, 2(2019).

NAVIGATING THE DIGITAL FRONTIER: TECHNOLOGY'S ROLE IN MODERN MEDIATION

FUTURE OF MEDIATION: RISE OF MEDIATION AS A MAINSTREAM DISPUTE RESOLUTION MECHANISM; EVALUATION AND EFFECTIVENESS OF MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION

Aditi Mittal¹

Abstract

Rapid technical innovation has placed mediation at a crossroads in the field of conflict resolution. A new era is being ushered in by embracing innovations like blockchain for transparency and AI-driven platforms for worldwide accessibility through Online Dispute Resolution (ODR). Physical barriers are eliminated by virtual landscapes, allowing for inclusive discussions and quick resolutions amongst people from different backgrounds and locations. However, there are numerous obstacles to overcome, such as closing the gap in digital literacy and protecting privacy in virtual spaces.

In this digital transformation, mediators are crucial because they manage cultural differences and build trust by fusing digital dexterity with conventional empathy. They examine various settlement solutions and promote nuanced debates by utilizing collaborative platforms and secure communication methods. Even in the face of these developments, upholding moral principles of justice and objectivity is necessary.

Anticipating a future where disputes are resolved quickly and compassionately is possible if technological advancements are welcomed while upholding core principles of fairness and inclusivity. In order to achieve harmony in the interconnected global world, it is necessary to protect the ethics and integrity of mediation techniques in addition to accepting change.

Keywords: *Online Dispute Resolution (ODR), Digital Mediation, Artificial Intelligence, Conflict Resolution, Ethics and Fairness, Technological Transformation*

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1. INTRODUCTION

In the timeless art of conflict resolution, mediation orchestrates harmony from discord. Today, as we approach the dawn of the digital age, mediation is at a crossroads. Cutting-edge technology offers effectiveness and agility while overcoming limitations. Technology enhances the mediator's arsenal by providing connectivity and in-depth understanding of human conflict, ranging from virtual negotiation environments to artificial intelligence insights. Technology is pushing mediation beyond its conventional bounds. Examples include virtual bargaining platforms that break down geographical borders and artificial intelligence algorithms that reveal minute nuances. It combines innovation with traditional methods, redefining the way conflicts are perceived and handled in our digital age, much like a symphony performed through virtual channels. This change transforms mediation processes globally by providing new opportunities for understanding and resolution.

But even in the middle of these revolutionary advances, problems arise, much like precedents in the law that are unfamiliar. It is important to use caution when navigating issues like differences in digital literacy and the need to protect privacy online. Notwithstanding, while legal experts construe legislation, mediators skillfully maneuver these virtual environments, upholding moral principles of impartiality, openness, and discretion.

2. BRIDGING WORLDS: TECHNOLOGY'S ROLE IN EVOLVING MEDIATION PRACTICES

The introduction of technology has signaled a sea change in dispute resolution, similar to a tidal wave distorting traditional boundaries.² Previously dependent on in-person conversations rooted in regional traditions and interpersonal relationships, mediation is currently leading the way in a digital transformation. Global access to mediation services has become more accessible because of platforms like Zoom, Microsoft Teams, and Google Meet, which cut across time zones and physical boundaries.³ For example, in countries such as China, where parties to a dispute may be located far apart, virtual mediation platforms have given rural people access to conflict resolution that was previously limited to urban areas.⁴

²Meliora Legal Center, *The Role of Technology in Mediation: Advantages and Challenges*, Meliora Legal Center (June 19, 2023), <https://www.mplegalfirm.in/2023/06/the-role-of-technology-in-mediation.html>

³Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 *J. Disp. Resol.* 633 (2017).

⁴Jie Zheng, *The Role of ODR in Resolving Electronic Commerce Disputes in China*, 3 *Int'l J. Online Disp. Res.* 41 (Dec. 2016).

The vast transformation that is taking place is highlighted when contrasting these digital platforms with conventional face-to-face mediation. Virtual mediation uses safe data sharing capabilities and real-time communication, whereas traditional techniques stress interpersonal relationships and nonverbal indications. This change has been crucial in settings like the UN, where digital mediation tools help global parties negotiate, removing logistical obstacles and promoting quick resolutions. By moving mediation from physical to virtual venues, it not only expedites its procedures but also improves openness and inclusion, allowing a range of views to be included in international discussions.

3. NAVIGATING LEGAL FRONTIERS FOR DIGITAL MEDIATION IN GLOBAL CONTEXTS

There is considerable variation in the legal and regulatory frameworks that oversee digital mediation platforms and Online Dispute Resolution (ODR) across different jurisdictions. Each has responded differently and at a different pace to technological improvements in mediation. One important piece of legislation governing cross-border e-commerce disputes in the European Union is the European ODR Regulation, which serves as a cornerstone and creates a uniform platform for online consumer dispute resolution.

In order to provide ODR platforms a fighting chance in business disputes, the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (ESIGN) established the legal foundation for electronic contracts and signatures in the US.⁵ State-specific laws add the cherry on top for thorough legal support by further refining legislation pertaining to online mediation agreements' enforceability, privacy, and secrecy. Jurisdictions like Singapore and Australia, which are located in the Asia-Pacific area, have been proactive in promoting the adoption of ODR. The essential lubricant that keeps the wheels going is provided by initiatives such as the Australian Centre for International Commercial Arbitration (ACICA) and the Singapore International Mediation Institute (SIMI), who certify ODR providers and guarantee adherence to regional norms.

By balancing technological innovation and legal certainty, these developing legal frameworks hope to meet the demands of a globalized digital economy by guaranteeing that online dispute

⁵DocuSign, Electronic Signatures, "*ESIGN Act and UETA*" (accessed July 7, 2024), available at <https://www.docusign.com/learn/esign-act-ueta>.

resolution (ODR) and digital mediation platforms offer effective, equitable, and safe conflict resolution processes.

4. FROM BORDERS TO BYTES: INNOVATIONS IN MEDIATION TECHNOLOGY

Technological integration in mediation offers a myriad of advantages that revolutionize the traditional conflict resolution landscape. Improving communication and teamwork is crucial, and online platforms and video conferencing provide real-time interactions. Because of the removal of the requirement for physical proximity, mediation is now convenient and available to people all over the world. In Australia, rural aboriginal communities have successfully employed technology to obtain mediation services via video conferencing, thereby increasing cultural inclusivity and surmounting geographical hurdles.⁶ Dialogue efficiency is further enhanced by secure messaging systems and virtual negotiation spaces, which encourage fruitful discussions between parties in conflict.⁷ Furthermore, because technology removes geographical constraints, it improves accessibility and convenience. For example, online mediation tools, which take use of seamless connectivity and real-time collaboration, have proven crucial in Singapore's fast cross-border resolution of business disputes.⁸

Secure storage and well-organized access to important papers and evidence are provided by information and document management systems like Google Drive and specialist mediation software. The United States serves as an example of this, as these platforms facilitate the exchange of legal documents and evidence in intricate litigation proceedings, guaranteeing openness and accessibility for all parties.⁹ Additionally, by using massive datasets to find trends and possible solutions, data analysis technologies enhance mediation outcomes with customized insights.

⁶ Hon. Tom Bathurst AC, ADR, ODR, and AI-DR, Do we even need courts anymore?, Speech at Inaugural Supreme Court ADR Address (Sept. 20, 2018).

⁷EPIQ Global, eHearings and Arbitrations, EPIQ Global (May 9, 2019), <https://www.epiqglobal.com/en-au/experience/ehearings/services/ehearings-arbitrations>.

⁸ Ministry of Law Singapore, Maxwell Chambers Expands to Boost Singapore's Status as Dispute Resolution Hub (Ministry of Law Singapore, July 26, 2019), <https://www.mlaw.gov.sg/news/press-releases/maxwell-chambers-expands--to-boost-singapores-status-as-dispute>

[/#:~:text=Singapore%20is%20today%20a%20leading,made%20Singapore%20an%20attractive%20location.](#)

⁹Harvard Journal of Law & Technology, vol. 26, p. 241 (2021), available at <https://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf>.

5. THE EVOLVING ROLE OF MEDIATORS AS FACILITATORS OF TECHNOLOGICAL INTEGRATION

Beyond only resolving conflicts, mediators are essential in today's tech-driven society. They use digital platforms, video conferencing tools, and secure messaging services to plan fruitful conversations. Mediators provide fair access and involvement, creating inclusive spaces where obstacles posed by technology vanish. In order to maintain objectivity in online exchanges, they skillfully handle subtleties of communication to guarantee impartiality during mediation.¹⁰

By bringing traditional methods into the digital sphere, mediators use virtual technologies like collaborative document management systems and shared whiteboards to enhance comprehension and thoroughly consider all available settlement choices. Most importantly, they build rapport and trust in virtual environments by bridging cultural and contextual gaps through sympathetic interaction and active listening.¹¹ In a technologically mediated setting, mediators skillfully steer the mediation process, manage timelines, organize talks, and preserve the moral principles of informed consent and secrecy.¹²

Following international crises such as the COVID-19 pandemic, mediators have quickly adjusted and become proficient using video conferencing software in order to continue providing essential mediation services. Their ability to adapt highlights their potential to use technology as a medium for fair and efficient global dispute resolution, rather than just as a tool.¹³

6. CHALLENGES IN INTEGRATING TECHNOLOGY INTO MEDIATION

When incorporating technology into mediation procedures, a number of important issues come up that need to be carefully navigated. First off, unequal participation may be impeded by differences in participants' digital literacy and access to technology. Second, in order to preserve confidentiality and trust, it is critical to implement strong security measures to safeguard sensitive

¹⁰Typeset, How can Mediators Use Technology to Resolve Conflicts?, Typeset (last visited July 5, 2024), <https://typeset.io/questions/how-can-mediators-use-technology-to-resolve-conflicts-1qj7kszd5>.

¹¹Jørgen P. Bansler, Technology-Use Mediation: Making Sense of Electronic Communication in an Organizational Context, 01 Scandinavian J. Info. Sys. 1 (2004).

¹²Supra note 1.

¹³Sigal Kordova & Ron S. Hirschprung, Effectiveness of the Forced Usage of Alternative Digital Platforms during the COVID-19 Pandemic in Project Communication Management, 2023 Colum. J. Sci. & Tech. L. 123 (2023).

information shared during mediation.¹⁴ Another challenge is technical reliability, which can be disrupted by things like software malfunctions or problems with internet connectivity.¹⁵

Furthermore, the lack of non-verbal indications in virtual environments might result in misunderstandings, therefore skilled verbal cue interpretation is essential for successful mediation. Since virtual connections are impersonal, it becomes more difficult to establish rapport and trust. As a result, methods for creating a supportive atmosphere even in the face of physical separation are required.¹⁶ In addition, maintaining technological independence while taking cultural sensitivity into account and offering sufficient technical assistance are essential components of inclusive and successful mediation. And lastly, maintaining the integrity and equity of the mediation process depends on respecting ethical norms pertaining to consent, confidentiality, and objectivity. These difficulties highlight how crucial careful planning and adaptability are when utilizing technology to achieve favorable mediation results.¹⁷

7. WAY FORWARD

The convergence of cutting-edge technology and the age-old values of inclusivity and justice represents the future of mediation. The potential for technology to completely transform conflict resolution on a global scale is evident as we continue to explore this digital frontier. Our available tools are transforming the way disagreements are perceived and settled, from blockchain for more transparency to AI-driven systems for effective Online Dispute Resolution (ODR).

In light of these technological developments, it will be critical to give the ethical concepts of permission, confidentiality, and impartiality top priority. In order to promote trust and empathy in virtual worlds, mediators must continue to adapt by utilizing emotional intelligence. Furthermore, in order to guarantee fair access and protect sensitive data, it will be crucial to address issues like privacy concerns and gaps in digital literacy.

Collaboration between legal framework developers, tech companies, and mediation practitioners

¹⁴United Nations Peacemaker, Digital Toolkit Report (United Nations Peacemaker, 2020), <https://peacemaker.un.org/sites/peacemaker.un.org/files/DigitalToolkitReport.pdf>.

¹⁵Arfa Afzal, Saima Khan & Sana Daud, Addressing the Digital Divide: Access and Use of Technology in Education, 3 J. Soc. Sci. Rev. 883 (2023).

¹⁶ODR Europe, What Role Should Technology Play in Mediation?, ODR Europe (last visited July 5, 2024), <https://www.odreurope.com/news/articles/online-dispute-resolution/1287-what-role-should-technology-play-in-mediation>.

¹⁷KP Strongman, Role of Technology in Mediation, KP Strongman (last visited July 5, 2024), <https://kpstrongman.com/role-of-technology-in-mediation/>.

is critical to realizing this objective. Lawmakers and international organizations ought to keep improving and unifying rules that facilitate the use of technology in mediation procedures. Promoting safe data management standards and guaranteeing the enforceability of international mediated agreements are two examples of this.

Through innovation and adherence to fundamental values, we can create a future in which conflicts are settled amicably, quickly, and across national and cultural barriers. In addition to efficiency, the path towards technological integration in mediation promises a stronger dedication to justice and understanding among all people in our globalized society.

EMERGING TRENDS IN THE INDIAN JURISPRUDENCE REGARDING DEEPFAKES

Shivangi Mathur¹

Abstract

According to the Global Survey conducted by McKinsey & Company, the number of corporations utilizing Generative AI tools in their routine operations has almost doubled compared to the figures from the previous year. This evidences that it growing at an exponential speed and more and more companies are shifting to the use of the same as it increases efficiency, reduces human error and results in an overall decrease in prices. Deepfake is a relatively new type of Generative AI and as they become increasingly intricate and prevalent, they present novel challenges to the legal frameworks worldwide, including India. This paper examines the emerging trends in Indian jurisprudence concerning deepfakes and analyzes the current Indian legal landscape's response to deepfakes, drawing from the laws that are currently in force. The research focuses on the recent judicial decisions that have slowly but surely recognized the adverse impacts of deepfakes especially with respect to personality rights and right to privacy. The paper also examines the international regulations in place, as well as the sectoral laws that exist in the United Kingdom and the United States of America that govern and promote the responsible use of AI. The paper also explores proposed laws, which inter alia includes the Digital India Bill and its impact on deepfakes, as well as the National Strategy for AI.

Keywords: *Deepfake, Artificial Intelligence, Generative AI, Personality Rights, Misinformation*

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1. INTRODUCTION

Due to the rapid advancements in technology, Artificial Intelligence (“AI”) has become increasingly integrated into our daily lives and has now become an indispensable part of them. Although one may not necessarily realise even Google’s auto-complete feature in the search uses AI algorithm by analysing the common search queries made by people and using it to predict the queries.² Even in-built applications such as Apple’s Siri, Amazon’s Alexa, Google Maps etc. make use of AI software. In addition to such uses, AI is also used on a larger scale in areas like the healthcare, manufacturing and processing, hospitality and aerospace sectors. The increasing use of AI can be attributed to the benefits offered by it, such as reduction of human errors, faster processing of data, round-the-clock availability, efficient decision making and automation of repetitive tasks.³

Though AI performs multiple functions such as Machine Learning and Deep Learning, one of the most popular, albeit controversial applications of AI today is Generative AI. Generative AI is essentially an artificial intelligence model designed to create different types of content.⁴ A well-known example would be ChatGPT which is an application that performs various functions namely generation of text, analysing and summarising data, translation etc. Generally, this type of AI Model involves three steps⁵:

First. Training: This step involves foundation models used for text, image, and sound generation which are created through deep learning algorithms that process large amounts of data.

Second. Tuning: This refers to the process of fine-tuning a model and applying reinforcement learning with human feedback to improve its accuracy, enabling it to generate more precise responses to specific prompts.

Third. Generation and Evaluation: This step involves regular assessment of the outputs of the model and further fine-tuning to improve performance.

² *Everyday examples and applications of artificial intelligence (AI)*, TABLE FROM SALESFORCE <https://www.tableau.com/data-insights/ai/examples#:~:text=Well%2C%20it%20can%20be%20almost,of%20auto%2Dnavigation%20and%20robotics>.

³ Cole Stryker, Eda Kavlakoglu, *What is Artificial Intelligence (AI)*, IBM, (2024) <https://www.ibm.com/topics/artificial-intelligence>

⁴ *What is AI (Artificial Intelligence)*, MCKINSEY & COMPANY, (2024) <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-ai#/>

⁵ *Supra* note 2

2. WHAT IS A DEEPPFAKE?

Deepfake is a type of Generative AI Model and has been defined as

*"an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said"*⁶

Deepfake is any video, audio or image that is generated through Artificial Intelligence by making use of a person's voice, image, persona or likeness. It is often used with malicious intent to misrepresent someone and spread misinformation. The word 'deepfake' was first used in 2017 on a Reddit forum a user created to post pornographic content made with open-source face-swapping technology.⁷ Henry Ajder, head of threat intelligence at the deepfake-detection company Deeptrace, noted that 'deepfake' has since broadened to encompass "synthetic media applications" that were around before the Reddit page as well as new technology like StyleGAN, which leads to hyper-realistic images of non-existent people.

2.1 Benefits of Deepfake Technology

Despite generally being used in a negative context deepfakes do have certain benefits, especially for the entertainment, educational, media, games, and e-commerce industries. For instance, in the entertainment sector deepfakes may be used in situations to advance face editing in post-production phase of movies or for improvement of audio and video quality. It can also allow for realistic dubbing which will allow better quality of translated movies to be released across the world. For instance, in a 2019 global malaria campaign, David Beckham appeared multilingual through the use of visual and voice-altering technology, overcoming language barriers.⁸

In gaming industries as well, this technology facilitates real-time natural-sounding interactions between players which facilitates a smoother gaming experience and interactions. It may also allow players to create virtual avatars that they can use for an immersive experience in the game.

⁶*Deepfake*, MERRIAM-WEBSTER

<https://www.merriam->

[webster.com/dictionary/deepfake#:~:text=deep%C2%B7%E2%80%8Bfake%20%CB%88d%C4%93p%2D%CB%8Cf%C4%81k,not%20actually%20done%20or%20said](https://www.merriam-webster.com/dictionary/deepfake#:~:text=deep%C2%B7%E2%80%8Bfake%20%CB%88d%C4%93p%2D%CB%8Cf%C4%81k,not%20actually%20done%20or%20said)

⁷ Meredith Somers, *Deepfakes, explained*, MIT SLOAN SCHOOL OF MANAGEMENT (Jul 21, 2020)

<https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained>

⁸ Mika Westerlund, *The Emergence of Deepfake Technology: A Review*, TECHNOLOGY INNOVATION MANAGEMENT REVIEW, (2019) <https://timreview.ca/article/1282>

Celebrities can also commercially exploit their persona, by creating avatars through deepfakes and entering into contracts that allow the other party to utilize these avatars for various purposes.⁹ For instance, singers, dancers and other performers can hold virtual concerts, which can help them gain a larger fanbase.

In e-commerce industries especially with respect to the fashion sector, deepfake technology can allow people to create a digital model out of themselves and use it to try on various clothing before deciding what to purchase. Deepfakes can also be helpful in employee training, recruitment and customer service dealings by rendering realistic simulations of such interactions and thereby assessing the capabilities of the employee.¹⁰

2.2 Threats posed by Deepfake

Deepfakes are infamous for spreading misinformation for instance in a recent event, AI generated images of the American singer Taylor Swift were posted by the US presidential candidate Donald Trump in which she was shown endorsing his campaign. Considering the fact that Taylor Swift is one of the most influential artists currently, this could have had a significant impact on the US presidential Elections, and the same was addressed by Taylor Swift who cautioned against the deceptive use of Generative AI tools and the spread of misinformation.¹¹ Another case is the video in which Mark Zuckerberg talks about possessing ‘total control over billions of people’s stolen data’. In India recently the cricketer, Sachin Tendulkar flagged a video as a false video¹². In the said video he was promoting a game application that lures users for easy money and also stated that his daughter used the application.

In addition to the political risks, AI has also been found to not be free of biases and has the potential to aggravate the existing discrimination against the marginalised society. One illustration of this would be the creation of pornographic deepfakes. Such content has been attributed to propagating content which continuously sexualises and objectifies women. This does affect the moral perception of people and causes harm to the public mindset. Not only this, deepfakes might depict a conflict between two already clashing communities which can

⁹ Dr. Deborshi Barat, Reshma Gupta, Nupur Agrawal, *Can Deepfakes be Leveraged Responsibly?* S & R ASSOCIATES (2024) <https://www.snrlaw.in/can-deepfakes-be-leveraged-responsibly/>

¹⁰ *Ibid*

¹¹ Nick Robins-Early, *How did Donald Trump end up posting Taylor Swift deepfakes?*, THE GUARDIAN, (2024) <https://www.theguardian.com/technology/article/2024/aug/24/trump-taylor-swift-deepfakes-ai>

¹² Nikhila Henry, *Sachin Tendulkar: Indian cricket legend flags 'disturbing' deepfake video*, BBC NEWS (2024), <https://www.bbc.com/news/world-asia-india-67989930>

exacerbate the differences between them and cause loss of harmony.

3. REGULATION OF DEEPFAKES: A NECESSITY

Deepfakes have often been used to create synthetic videos of celebrities promoting certain goods and services, to generate views, and to create pornographic content. It is evident from the aforementioned instances that circulation of deepfakes has often been linked to dissemination of deceptive information not only in the political context but have also been attributed to infringing the personality rights of celebrities. In *Titan Industries Ltd. v. Ramkumar Jewellers*¹³, the Delhi High Court recognized publicity rights to be the protection of a celebrity's proprietary interest in their persona. These rights are based on an individual's right to authorize or restrict others from commercially exploiting their likeness or distinct characteristics. The Court also highlighted the “basic elements comprising the liability for infringement of the rights of publicity”, which are:

First. Validity: The plaintiff must have a recognizable and enforceable right to their identity or persona, and

Second. Identifiability: The person must be identifiable in the defendant's unauthorized use.

Thus, ownership, by the plaintiff, of the publicity right that he seeks to assert is, therefore, the sine qua non for a valid claim, it cannot be a mere non-possibility or for an unrecognized persona or identity.

Additionally the use of deepfakes can also result in a violation of the Right to Privacy of an individual, which the Supreme Court of India, through the process of judicial construction,¹⁴ has recognized as an integral part of the Right to Life and Liberty laid down in the Constitution of Indian.¹⁵ Not only this but creation of deepfakes of celebrities and artists infringes performers' moral rights enshrined under Section 38-B of Copyright Act, 1957. Performers are the intermediaries who use their professional acumen to distribute the work. Thus, performers' rights protect those who assist the intellectual creators in communicating their message to the public. It is necessary to protect such rights so as to not only uphold fundamental rights but also ensure the economic and moral interests of the performers.

¹³ *Titan Industries Ltd. v. Ramkumar Jewellers*, 2012 (50) PTC 486 (Del)

¹⁴ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

¹⁵ INDIA CONST. art. 21

4. INTERNATIONAL SCENARIO

4.1 European Union Artificial Intelligence Act¹⁶

The European Union (EU) introduced this regulation in 2021 as part of its wider digital agenda. It is the first comprehensive framework, which came into force on August 1, 2024, classifying AI systems into four risk categories: unacceptable, high, limited, and minimal. AI systems that are deemed unacceptable, such as technologies that manipulate people, would be banned, while high-risk systems must meet strict regulatory standards. Limited-risk systems are subject to lighter obligations primarily concerned with transparency. In those circumstances, developers would have to indicate whether the content was generated by an AI application so that the user can differentiate between material generated by a machine and material created by a human. The Act also exempts the AI systems employed in military, national security, and research and development activities.

The Act specifically covers General Purpose AI (GPAI), which refers to models that are based on large datasets and can perform various functions. These GPAI may be categorized as high risk on their own, or they may be deployed in a high-risk context requiring high-risk AI provider oversight. The Act also creates an AI Office under the European Commission, which is responsible for oversight of GPAI compliance. Likewise, it establishes a European AI Board, Advisory Forum, and a Scientific Panel of Independent Experts to inform the regulation and governance of AI across member states of the EU.

4.2 Bletchley Declaration¹⁷

In 2023, the world's first global summit on Artificial Intelligence was held at Bletchley Park, which resulted in an agreement between twenty-nine countries, including India, wherein they recognized the enormous opportunities that AI presents while also keeping in mind the risks it

¹⁶ EU AI Act: first regulation on artificial intelligence, EUROPEAN PARLIAMENT, (2023), <https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>

¹⁷ *Policy Paper: The Bletchley Declaration by Countries Attending the AI Safety Summit*, GOV.UK (2023) <https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023>

may pose and the steps that must be taken to prevent any “*catastrophic harm, either deliberate or unintentional*”.

The declaration emphasizes the necessity of collective action by state, international organizations, civil society, and academic stakeholders to ensure the safe use of AI. The agenda of the declaration highlights the importance of recognizing the risks to using AI and building a common global understanding of those risks. Countries should aim to build risk-based policies which are tailored to their unique legal scenario with emphasis on collaboration, transparency and safety testing.¹⁸

4.3 Seizing the opportunities of safe, secure and trustworthy artificial intelligence systems for sustainable development

This is a draft resolution adopted by the United Nations (“UN”) which is backed by more than 120 member States. This resolution is a non-binding agreement and its objective is to safeguard human rights, protect personal data and monitor and manage AI risks. The resolution encourages the Member States to establish national laws regulating AI and address the ethical, social and security concerns associated with the use of AI. The UN resolution fits into the broader context of sustainable development as it will likely have an impact on global issues like poverty, climate change and healthcare. The resolution promotes fair distribution of the benefits generated by AI between developed and developing countries. It further focuses on promoting transparency, accountability and collaboration between the public and the private sector to ensure responsible use of AI. To achieve that end it suggests the establishment of technical standards, well-made regulations and strong international cooperation.

4.4 Other Countries

United Kingdom does not currently have any comprehensive AI regulation. The current framework mainly consists of General Data Protection Regulation (GDPR), the Human Rights Act of 1998, and the Equality Act of 2020. Also, the UK has introduced some regulatory frameworks with a more sectoral focus that bring AI in as part of their regulation. For example, the Medicines and Healthcare Products Regulatory Agency (MHRA) have documented

¹⁸ Government of UK, <https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023>

requirements for AI and software for use within medical devices.¹⁹ Similarly, the USA too does not have a unified AI regulation but instead has multiple guidelines to regulate the AI sector on a federal level.

5. INDIAN SCENARIO

While, India does not have any singular legislation that regulates AI, Courts have repeatedly relied on provisions of acts such as the Information Technology Act, 2000, Copyright Act, 1957 and Indian Penal Code, 1860 to protect the rights of individuals in situations wherein they have been infringed by AI, specifically deepfakes.

5.1 Information Technology Act, 2000 (“IT Act”)

According to the Information Technology Act, any person who fraudulently or dishonestly uses another person's electronic signature or any other unique identification feature shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to one lakh rupees.²⁰ This penal provision also applies to the process of impersonation undertaken through a device or a computer resource, aligning with the government legislation dealing with cheating by impersonation.²¹ Penalty may also follow if someone creates or transmits a pornographic or obscene deepfake.²²

Additionally, Rule 3(1)(b) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, states intermediaries shall publish clear and accessible terms of use, privacy policy, and acceptable use policy to users and shall take reasonable efforts to remove or disable access to harmful or unlawful content. The intention of this provision is to ensure digital platforms are proactively isolating this misinformation, false or misleading information, and even deepfake content.

5.2 Performers' Rights

Performers' rights were first recognized under the Rome Convention in 1961. This granted

¹⁹ Kostiantyn Ponomarov, *How to Navigate UK AI Regulation*, LEGAL NODES, (2023) <https://legalnodes.com/article/uk-ai-regulations>

²⁰ Information Technology Act, 2000, s.66(C), No. 21, Acts of Parliament, 2000 (India)

²¹ *Ibid*, s. 66(D)

²² *Ibid*, s. 67

performers in audiovisual works protection against unauthorized broadcasts or recordings of their performances for 20 years.²³ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) later extended this term to 50 years. In India, the Copyright Act of 1957²⁴ gives moral rights to performers regarding the works they help create. These rights let a performer, regardless of any rights assignment, stop or seek damages from anyone who distorts, mutilates, or modifies their performance in a way that harms their reputation. Such protections are especially important in relation to deepfakes. These often involve manipulating and distorting artists' images, voices, likenesses, and other personal traits.

5.3 Digital Personal Data Protection Act, 2023

Although this Act does not specifically mention Artificial Intelligence, it outlines the general duties of a Data Fiduciary. A Data Fiduciary is any person or organization that decides the objective and method of processing data, such as Amazon.²⁵ Under the Act, a Data Fiduciary must ensure that personal data is complete and correct, especially when it might impact the individual it concerns. They also need to establish proper safeguards to protect personal data they have or control.²⁶ Thus, the responsibility of the data fiduciaries may be extended to deepfakes as they have an obligation to ensure that the data is accurate, i.e., not used to spread misinformation and since deepfakes are likely to affect the person to whom they relate, the fiduciaries should ensure that the personal data is appropriately protected.

The Act further states that the data principal, i.e., the individual to whom the data pertains²⁷, has the right to request the deletion of their personal data²⁸. This right is known as the Right to be Forgotten, and has been recognized by the Delhi High Court in the case of *Zulfiqar Ahman Khan vs M/S Quintillion Business Media Pvt*²⁹. The Court in this case held that the right to be left alone and the right to be forgotten are fundamental parts of the right to privacy, protected under Article 21 of the Indian Constitution.”

²³ Performers' Rights- Background Brief, WORLD INTELLECTUAL PROPERTY ORGANISATION
<https://www.wipo.int/pressroom/en/briefs/performers.html>

²⁴ Copyright Act, 1957, s. 38-B, No. 14, Acts of Parliament 1957 (India)

²⁵ Digital Personal Data Protection Act, 2023, s.2(i), No.22, Acts of Parliament 2023 (India)

²⁶ *Ibid*, s.8

²⁷ *Ibid*, s.2(j)

²⁸ *Ibid*, s.12

²⁹ *Zulfiqar Ahman Khan vs M/S Quintillion Business Media Pvt*, 2019 SCC OnLine Del 8494

5.4 Penal Provisions

Deepfakes typically involve personation, and if done with malicious intent, may also constitute cheating. They may also involve the use of forged documents and electronic records which are likely to mislead and defraud people. Moreover, the use of celebrities' likeness, persona etc. in deepfakes often amounts to defamation if used for advertising or promoting restricted activities such as betting and gambling. They are also used to create vulgar, obscene and maybe even pornographic material which would result in the mutilation of the celebrity's personality. Under the Indian Penal Code, 1860 as well as the Bharatiya Nyaya Sanhita, 2023 provisions exist for the offences of Cheating by personation³⁰, Forgery for the purpose of cheating³¹, and Punishment for Defamation³². So, depending on the nature of the deepfakes they might be punishable under the relevant sections of the Acts.

5.5 Notifications by Ministry of Electronics and Information Technology

According to the Union Minister of State for Skill Development & Entrepreneurship and Electronics & IT, Shri Rajeev Chandrasekhar,

“Misinformation is a significant threat to the safety and trust of internet users. Deepfakes, as a form of AI-powered misinformation, further amplify this threat. “

Through an advisory issued on November 7, 2023, the Ministry of Electronics and Information Technology directed major social media platforms to:

- First. take reasonable steps to find misinformation and deepfakes, especially those against rules, regulations, or user agreements;
- Second. act quickly on these cases within the timelines set by the Information Technology Rules, 2021 (IT Rules);
- Third. discourage users from posting such content;
- Fourth. remove any reported content within 36 hours of being notified; and
- Fifth. quickly restrict access to the inappropriate content.

The Ministry also reminded platforms that not following the IT Act and IT Rules could lead to

³⁰ Bharatiya Nyaya Sanhita, 2023, s. 319, No. 45, Acts of Parliament 2023 (India)

³¹ *Ibid*, s. 336

³² *Ibid*, s. 356

losing their usual protections.³³

In a subsequent advisory dated 26th December 2023, attention was drawn to the growing concerns surrounding AI-powered misinformation, particularly deepfakes. The advisory obligated the intermediaries to clearly and precisely communicate to users what constitutes prohibited content, especially as specified under Rule 3(1)(b) of the IT Rules. It emphasized that digital intermediaries must ensure users are made aware of the penal provisions, including those contained in the Indian Penal Code, 1860 and the Information Technology Act, 2000. Furthermore, the terms of service and user agreements must clearly state that intermediaries and platforms are required to report legal violations to law enforcement authorities in accordance with applicable Indian laws.

In a follow-up advisory dated 15th March 2024, the Ministry directed that any intermediary which, by means of its software or other computer resources, provides or encourages the synthetic generation, creation, or alteration of text, audio, visual data, or combinations thereof, especially in case of its use for spreading misinformation or becoming a deepfake, has to label such content or embed a permanent, unique metadata or identifier therewith. This metadata needs to provide a way to identify the source computer of the intermediary from which the content comes. Moreover, if a user alters the content, the metadata has to be set up to record the identity of the user or the computer asset for such changes.

a. National Strategy for AI (2018)

This paper by Niti Aayog highlights that while AI is generally viewed as a neutral decision-making source, there may be in-built biases in the existing data which could affect the fairness of the algorithms. It also talks about the “Black Box Phenomenon” according to which there is a lack of understanding among the people as to how AI makes decisions. It suggests that the focus should be on ‘how’ the decision-making is done rather than the result.

This paper highlights the risks arising from the growing use of AI and proposes the development of a framework based on the seven core principles of data protection and privacy, namely:

First. informed consent

³³ *Ibid*, s.79(1)

- Second.* technology agnosticism
- Third.* data controller accountability
- Fourth.* data minimisation
- Fifth.* holistic application
- Sixth.* deterrent penalties
- Seventh.* structured enforcement

It further suggests the creation of a sector-specific regulatory framework, similar to the ones other countries have adopted. For instance, Japan has a framework for the specific AI issue of next-generation robots. The paper also recommends aligning the current national data protection regime and privacy laws with the international standards and raising public awareness on the significance of consent, ethics, and privacy in interactions with technology.

6. RECENT JUDICIAL DECISIONS

6.1 Arijit Singh v. Codible Ventures LLP³⁴

The plaintiff, singer Arijit Singh, filed this case to protect his rights to his name, voice, photographs, likeness, and other parts of his persona from unauthorized commercial use. In this lawsuit, the defendants were Artificial Intelligence platforms along with their owners and managers. These platforms used AI algorithms to create audio and visual content that mimicked the plaintiff's personality traits. They also offered a feature that allowed users to turn any text or speech into the plaintiff's voice.

The Delhi High Court ruled that Arijit Singh's personality and its elements are protectable under his personality and publicity rights. The Court stated that offering AI tools that can change any voice into that of a celebrity which is an essential part of their personal identity and public, without their consent constitutes not only a violation of their right to control and safeguard their likeness, but also undermines their ability to prevent deceptive use of their identity. The Court ordered the defendants to remove or delete all mentions of the plaintiff's name, image, voice, and personality traits, while leaving the rest of the video intact.

³⁴ Arijit Singh v. Codible Ventures LLP, 2024 SCC OnLine Bom 2445

6.2 Jaikishan Kakubhai Saraf v. Peppy Store³⁵

This suit was instituted by the plaintiff, Mr. Jaikishan Kakubhai Saraf, (popularly known as Jackie Shroff), a well-known Indian actor, seeking protection of his own name, image, likeness, and other distinguishable elements of his persona, against unauthorised use.

The Delhi High Court, in its ruling restrained the defendants from infringing upon Jackie Shroff's personality rights for monetary gain without his consent, or from utilizing the plaintiff's persona through formats and mediums such as Artificial Intelligence.

6.3 Akshay Tanna v. John Doe & Anr.³⁶

In this matter, the personality and publicity rights of Akshay Tanna, the plaintiff who was a senior executive and head of a private equity firm were violated by unknown persons. His name and photographs were misused on social media and other messaging platforms to impersonate him and run an investment scam. A deepfake video was also created which falsely depicted Akshay Tanna encouraging members of the general public to invest their money with the persons falsely claiming association with him and his company.

The Delhi High Court in this case issued a John Doe order, restraining the defendants from exploiting the name, likeness and other personality rights of the plaintiff. The Court held that the defendants, by misrepresenting themselves as the plaintiff to engage in nefarious activities had defrauded the public, which in turn had caused damage to the goodwill and reputation of the plaintiff. All the social media platforms were directed to remove the accounts, profiles and groups that misused the plaintiff's likeness. It also directed that in case any infringing material popped up in the future the plaintiff may provide details regarding the same to the social media intermediaries who shall thereafter remove or block access to it.

6.4 Anil Kapoor v. Simply Life India³⁷

In this case, Anil Kapoor, the plaintiff sought protection of his personality and publicity rights, along with attributes linked to his persona such as his name, voice, image/photograph/likeness, manner of speaking and dialogue delivery, gestures, and signatures. Multiple defendants were

³⁵ Jaikishan Kakubhai Saraf v. Peppy Store, 2024 SCC OnLine Del 3664

³⁶ Akshay Tanna v. John Doe & Anr., 2024 SCC OnLine Del 1444

³⁷ Anil Kapoor v. Simply Life India, 2023 SCC OnLine Del 6914

impleaded in this case for publishing and commercially exploiting his photographs, morphed images, voices and dialogues and using Artificial Intelligence to create images and videos that were very vulgar and obscene in nature and included not only the plaintiff but also other actresses.

The Delhi High Court ruled that using the plaintiff's likeness, image, voice, or other personal traits through Artificial Intelligence, Machine Learning, or deepfakes for commercial gain violates their rights, and accordingly restrained the defendants from engaging in such acts. The Court emphasized that the right to privacy, implicit in Article 21³⁸, encompasses the 'right to be left alone.' It further affirmed that every citizen has the right to safeguard the privacy of themselves and their family, and no one may publish material relating to such matters without consent.

7.CONCLUSION

The exponential growth in the realm of AI, specifically Generative AI and deepfakes, presents both opportunities and significant challenges all over the world. While deepfakes offer opportunities in sectors such as entertainment, education and e-commerce, they also pose serious threats to privacy, reputation and the spread of misinformation. Generative AI also has a very big carbon footprint as it requires the systems to be constantly running throughout the day. And makes use of vast amounts of data which it extracts from various sources. It has also been said to aggravate community conflicts, gender-based discrimination, political and financial disturbance.

While few countries have started adopting sector specific frameworks to regulate AI, there is as such no comprehensive international framework to govern the same. In India specifically, the recent judicial decisions demonstrate the willingness of the judicial system to protect personality rights from commercial exploitation without consent. The Courts have also acknowledged that Intermediaries have an obligation to make use of AI technologies to identify infringing content and take it down automatically in an efficient manner.

However, existing laws might be inadequate to tackle the entire gamut of intricacies and quick technological developments in deepfakes. According to the Minister of Information and Broadcasting in India, India is not yet planning to propose any regulation or set laws for

³⁸ *Supra* note 14

governing AI in the country. India is also set to introduce the Digital India Bill which will replace the Information Technology Act, 2000 with an aim to curtail hate speech, false news, biased trade practices, and the unprecedented expansion of intermediaries. The Bill suggests a legal and institutional quality testing framework that will be monitoring high-risk AI systems, providing algorithmic accountability. It also stresses the ethical application of AI-powered tools and aims to encourage responsible online behaviour, including efforts to avoid misuse by deepfakes and AI chatbots.

As technology continues to evolve, Indian jurisprudence will need to remain flexible and responsive. Collaboration between lawmakers, technologists, civil society, and the public at large will be crucial in developing a robust and receptive framework that effectively addresses the challenges posed by deepfakes while harnessing their potential benefits. Moreover, it is the need of the hour that the regulating efforts align with global actions, such as the EU's AI Act and the Bletchley Declaration, to ensure a cohesive international response to this transnational issue.

CASE COMMENT: MANISH SISODIA V. DIRECTORATE OF ENFORCEMENT

Paravathy S¹

Abstract

In an increasingly interconnected and complex financial landscape, the threat of money laundering poses a significant risk to the economic stability of a country. The repercussions of money laundering reach far beyond the financial sector, impacting national security, economic development and social justice. The Indian Government has acknowledged the seriousness of this issue and has implemented substantial measures to combat money laundering. In 2002, the Indian government passed the Prevention of Money Laundering Act (referred to as PMLA) to prevent and control money laundering. In Manish Sisodia v. Directorate of Enforcement, the Supreme Court has interpreted the bail provisions under PMLA and emphasised the importance of speedy trial to ensure that the accused person is not detained in jail for a prolonged period due to a slow trial or without trial. The Supreme Court bench comprising Justice B R Gavai and Justice K V Vishvanathan has stated that bail should be the rule and its refusal should be the exception. This landmark judgment is expected to set a precedent for future money laundering cases. The case highlights the importance of safeguarding the fundamental rights of those charged in cases governed by the Prevention of Money Laundering Act (PMLA), particularly in accordance with the stringent bail conditions imposed under the Act due to the serious nature of the offence, while ensuring that the objectives of the Act are not compromised.

Keywords: *Bail, PMLA, Fundamental rights, Speedy trial.*

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1. INTRODUCTION

In the case of *Manish Sisodia v. Directorate of Enforcement*,² the Supreme Court's landmark decision to grant bail to Delhi's former Deputy Chief Minister, Manish Sisodia, in the liquor policy case could potentially provide hope for individuals accused under the Prevention of Money Laundering Act. This judgment not only secured Sisodia's release but also offered hope for numerous accused who were detained without trial or due to the slow progress of their trials. The Supreme Court's ruling emphasised that the right to a speedy trial should be considered in conjunction with section 45 of the Prevention of Money Laundering Act (Hereinafter referred to as PMLA). Section 45(1) of the PMLA pertains to bail under the PMLA Act. It specifies that an individual cannot be granted bail unless the Public Prosecutor is given the opportunity to contest the bail application. Furthermore, if the Public Prosecutor opposes the bail application, the court should be satisfied that there are substantial grounds to conclude that the individual is innocent of the charges and is unlikely to engage in any further unlawful activities while released on bail. This section essentially places the responsibility of proving innocence on the accused, which deviates from the usual criminal jurisprudence, where the burden of proving guilt rests with the prosecution. PMLA imposes stricter conditions for the grant of bail, reflecting the gravity of the offence it addresses. Despite the strict provision that almost makes it impossible for an accused person to obtain bail, the court has observed that section 45 of the PMLA will not prevent bail from being granted to an accused who has been in long-term incarceration without trial or due to a slow trial. On August 9, 2024, the two-judge bench of the Supreme Court, comprising Justices B. R. Gavai and K. V. Viswanathan, unequivocally declared in the case of Manish Sisodia that a speedy trial is an indisputable fundamental right enshrined within the broad scope of Article 21 of the Constitution and granted him bail. This pivotal article ensures citizens the inalienable right to life and personal liberty. The prolonged pre-trial detention should not amount to punishment without conviction. The primary goal of criminal legislation is to safeguard society by punishing wrongdoers and ensuring that no individual is punished without a fair trial. Manish Sisodia's bail establishes a precedent for other money laundering cases, ensuring that the alleged offender is not detained indefinitely to uphold the balance between personal liberty and justice.³

² *Manish Sisodia v. Directorate of Enforcement*, 2024 LiveLaw (SC) 563.

³ *Manish Sisodia v. Directorate of Enforcement* (2024). Available at https://www.livelaw.in/pdf_upload/2926620242024-08-09-554508.pdf.

2. FACTUAL BACKGROUND OF THE CASE

During February 2023, Manish Sisodia, the former Deputy Chief Minister of Delhi, was arrested for the Delhi liquor policy scam. Sisodia was accused of modifying the 2021 excise policy to extend undue favours to licence holders who are private persons. He was one of several Aam Aadmi Party (AAP) leaders, including Delhi's Chief Minister Aravind Kejriwal, who were accused in the case. Allegations were made that Sisodia, Kejriwal, and others had been involved in facilitating bribes to Aam Aadmi Party during the drafting of Delhi's Liquor Policy for 2021-22 and created loopholes in the now-repealed liquor policy for their personal gains. The Central Government investigative agencies Central Bureau of Investigation (Hereinafter referred to as CBI) and Enforcement Directorate (Hereinafter referred to as ED) claimed that the policy had provided preferential treatment to private entities in the liquor business. Sisodia's arrest led to multiple rounds of appeals and bail applications at trial courts, the Delhi High Court, and the Supreme Court. CBI arrested Manish Sisodia in February, 2023. Sisodia was accused of criminal conspiracy and corruption under the Prevention of Corruption Act, 1988 (PCA) and the Indian Penal Code, 1860 (IPC). The ED who was investigating the case, arrested Sisodia on 9 March 2023 and levied charges under the Prevention of Money Laundering Act, 2002 (PMLA). The trial court rejected Sisodia's bail application in the money laundering case. The Delhi High Court dismissed Sisodia's bail application, holding that Sisodia did not meet the two-fold conditions for bail eligibility outlined in section 45 of the Prevention of Money Laundering Act, 2002. These conditions mandate that the accused demonstrate their innocence and show that they are not guilty and are unlikely to commit the offence. With unfavourable orders in both CBI and ED cases, Sisodia moved to the Supreme Court, appealing against both decisions of the Delhi High Court. On October 30, 2023, a Division Bench comprising Justices Sanjiv Khanna and S.V Bhatti rejected Sisodia's bail plea as ED had established that some big liquor distributors had earned a collective profit of nearly ₹338 crores due to increased licence fees from the liquor policy and a money transfer worth ₹338 crores had taken place as a result of the policy was 'tentatively established.' However, the Bench reassured Sisodia that he could file a fresh bail plea if the trial were not concluded in the next six to eight months. Eight months after the initial rejection of Sisodia's bail plea, a fresh bail application was filed. After 17 months of incarceration, the Division Bench comprising Justices Gavai and Viswanathan granted bail to Sisodia, stating that his right to a speedy trial had been violated.⁴

⁴ Sushovan Patnaik and Advay Vora, "A game of snake and ladder": Tracing Manish Sisodia's 17-month journey to bail, SUPREME COURT OBSERVER (Sep 15 2024, 4.00 PM), <https://www.scoobserver.in/journal/a-game-of-snake-and-ladder-tracing-manish-sisodias-17-month-journey-to-bail/>.

3. ANALYSIS

The judgment in *Manish Sisodia v. Directorate of Enforcement*⁵ represents a significant advancement in the PMLA cases, particularly in relation to safeguarding the fundamental rights of the accused persons detained for a prolonged period without trial in money laundering cases. The issue in this case involved the accused seeking bail after being incarcerated for a prolonged period, even without the commencement of the trial. The court's judgment granting bail to Sisodia after 17 months of incarceration shows its commitment to safeguarding the personal liberty of the person accused of the offence. The Bench asserted that even though PMLA cases carry significant gravity, the fundamental right to a speedy trial cannot be ignored. The preliminary objection made by the respondents against the appellant's bail application was that the order passed on October 30, 2024, in which the court had granted the liberty to submit a fresh bail application after the chargesheet is filed, such a bail application was to be filed only in a trial Court. Only if the trial Court rejected the application, then he could approach the High Court, but he was not permitted to approach the Supreme court directly. The bench rejected the objection by stating that relegating the appellant to approach the trial Court again and then the High Court and later the Apex Court would be an empty formality and compared it to making the concerned person play a game of 'snake and ladder'.

The court also looked at the case of *Ramkripal Meena v. Directorate of Enforcement*,⁶ where the accused had been in custody for over a year. Considering the length of custody and the possibility that the trial would not be completed within a short span of time, the strictness of Section 45 of the Act was relaxed to grant bail to the petitioner. The court also noted that the trial has not yet begun in Sisodia's case, so he is entitled to renew his request for bail due to the delay and denial of his right to a speedy trial. The court observed that Sisodia had been in jail for 17 months, even without the commencement of the trial, which has deprived him of his right to a speedy trial. The Bench, while delivering its judgment, relied on some of the judicial pronouncements which emphasised the right to life and personal liberty. In *Prabir Purkayastha v. State (NCT of Delhi)*,⁷ it was held that the right to life and personal liberty is the most sacrosanct fundamental right guaranteed under the constitution and in *Roy V. D v. State of Kerala*,⁸ the court held that the right to life and personal liberty is of such a sacrosanct nature that any infringement upon it is permissible only in accordance with the procedure established by law.⁹ These judicial

⁵*Manish Sisodia v. Directorate of Enforcement*, 2024 LiveLaw (SC) 563.

⁶ *Ramkripal Meena v. Directorate of Enforcement*, SLP (Crl.) No. 3205 of 2024 dated 30.07.2024.

⁷ *Prabir Purkayastha v. State (NCT of Delhi)*, 2024 SCC OnLine SC 934 : 2024 INSC 414.

⁸ *Roy V. D v. State of Kerala*, 2000 LawSuit (SC) 1691.

⁹ SCC ONLINE, <https://www.scconline.com> (last visited Sept 6, 2024).

pronouncements observe that the right to a speedy trial and the right to liberty are sacrosanct rights to be secured to the accused in all cases.¹⁰ So, Article 21 of the Constitution is applicable irrespective of the gravity of the crime. The Supreme Court was of the view that the well-settled principle of law is that bail must not be denied as a tool for pre-trial punishment. The Court further stated that the trial courts and High courts attempt to play safe in matters of grant of bail, the bail is a rule and refusal is an exception is followed in breach. It directed the trial courts and the High Courts to follow this principle as the non-grant of bail results in the flooding of a massive number of bail applications, which adds to the huge pendency of the courts. As this case involves nearly 493 witnesses, more than a thousand pages of documents and over a lakh page of digitised documents, the Court has formed the opinion that the trial would not be concluded in the near future, so keeping the Appellant behind bars for an unlimited period would deprive his fundamental right to liberty guaranteed to citizens by virtue of Article 21 of the Indian Constitution. The Court pointed out that the objective of keeping a person in judicial custody pending trial or disposal of an appeal is to secure the attendance of the prisoner at trial. The Court held that prolonged incarceration before the judicial determination of guilt should not be allowed to operate as punishment without trial. The court denied the apprehensions of the appellant fleeing away from the country and the possibility of tampering with the evidence. The Court vested the State with the authority to impose stringent conditions to address such concerns. The Court directed Sisodia to surrender his passport and report to the investigating officer every Monday and Thursday between 10 am and 11 am. He is required to furnish bail bonds amounting to ₹ 10 lakhs, accompanied by two sureties of equivalent value and the court also allowed the probe agency to seek cancellation of bail in case of violation of any condition.

The grant of bail to Sisodia in the Delhi liquor policy case could set a precedent not only in cases related to the Prevention of Money Laundering Act (PMLA), but it could also become a precedent for other laws with strict bail conditions, such as the anti-terror law Unlawful Activities (Prevention) Act (UAPA). Previous rulings strictly adhered to the twin conditions under section 45 of PMLA, which required the accused to prove that they were not guilty and would not commit further offences. However, the Sisodia case ruling showed a shift in this perspective. This shows the changing approach of courts in balancing both the fundamental rights of the accused with the objectives of the PMLA. The prolonged detainment without trial or due to slow trial and misuse of powers for arrest by the authorities would have caused the courts to change their approach.

¹⁰ Debby Jain, Trial courts & High Courts try to play safe in bail matters, Have forgotten 'Bail is the rule': Supreme Court in Manish Sisodia's Case (Sep 10 2024, 9.30 PM), <https://www.livelaw.in.cdn.ampproject.org>.

The principle that bail is a rule and jail is an exception, which is a facet of Article 21, has been established in several judicial decisions so as to ensure the accused a fair trial. The court has applied this principle in this case, even though generally this principle is ignored by the courts in PMLA cases, considering the severity of the offence. The delay in a trial without any fault on the part of the accused constitutes an infringement of his fundamental right to a speedy trial and personal liberty. Regardless of the severity of the offence, the Indian Constitution guarantees the accused the right to a speedy trial, which is the basis of this judgement.

4. CONCLUSION

The twin conditions for bail under section 45 of the PMLA inverted the presumption of innocence which is contrary to the principle of criminal jurisprudence. Due to the serious implications of the offence, the bail conditions were made more rigorous, reflecting the extensive economic, political and social effects of money laundering on society. Even though the money laundering offence is of a grave nature, the fundamental rights of the accused cannot be infringed. There should be a balance between safeguarding the fundamental rights of the accused with the fulfilment of objectives of PMLA. The persistent misuse and overreach by authorities under the PMLA have forced the courts to relax these stringent bail conditions for serving justice to the affected persons. As the accused in money laundering cases are generally influential persons who tend to interfere with the evidence, mandating strict requirements for bail is also necessary in order to prevent them from escaping prosecution. Therefore, the courts should decide the matter considering the facts involved therein and securing the presence of the accused to stand trial on a case-to-case basis. As the PMLA cases against political leaders have been increasing in recent years, the PMLA authorities are being accused of serving as the ruling party's political instrument in order to further its own political objectives. The low conviction rate in PMLA cases and the inability to conclude trials on time due to insufficient evidence, which ultimately led to extended pre-trial detentions, fuels the speculation that authorities under PMLA act as the accomplices of the ruling party. These concerns can only be addressed by producing strong evidence and ensuring that the accused are held accountable through conviction. The Union Minister of State for Home Nityanand Rai, on 6th August 2024, provided the data regarding the low conviction rate under the PMLA that 5000 cases were registered since 2014 and convictions have been obtained only in 40 cases. Such statistics show the need to change the bail jurisprudence under PMLA to keep a check on extended pre-trial detention. The judgment in *Manish Sisodia v. Directorate of Enforcement* shows the shift of approach by the court to ensure the accused with

the right to a speedy trial in case of prolonged incarceration, which would be a mark in the bail jurisprudence under PMLA.

THE JURISTIC AND POLITICAL IDEAS OF LÉON DUGUIT: A CRITICAL ANALYSIS

Dr. Mohd Azher Khan¹

Abstract:

Léon Duguit (1859–1928) was a prominent French legal scholar whose contributions to the theory of law, state, and governance have left a lasting impact on the evolution of modern public law. His thoughts are particularly distinguished for the transition from a subjective, individualist conception of law and rights to an objective, social-functionalist understanding. Duguit rejected the traditional notion of sovereignty, emphasized the concept of "social solidarity," and promoted the role of law in regulating human behavior based on social needs rather than abstract legal principles. This paper critically analyzes the juristic and political ideas of Léon Duguit, highlighting their historical significance, core tenets, and their influence on modern legal and political theory.

Keywords: *Modern Public Law, Social Solidarity, Conception of Law, Legal Principles, Juristic and Political Ideas.*

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1. INTRODUCTION

The transition from traditional, individual-centered legal theory to one that places societal welfare at its center is a defining characteristic of modern jurisprudence. Among the foremost architects of this transition was Léon Duguit, a French jurist whose work reshaped the relationship between the state, law, and individuals. Duguit's ideas, emerging during a time of growing industrialization and social upheaval in the late 19th and early 20th centuries, addressed the shifting needs of society. He opposed the classical doctrine of state sovereignty and sought to place social welfare, rather than individual rights or the will of the state, at the center of legal and political theory.

This paper examines the fundamental tenets of Duguit's juristic and political philosophy, analyzing key concepts such as social solidarity, the rejection of sovereignty, and the objective nature of law. Furthermore, the study explores the implications of his ideas on contemporary legal thought, with a focus on their relevance in addressing the challenges posed by modern governance.

2. Historical and Intellectual Context

Léon Duguit lived and wrote in a time when Europe was undergoing dramatic social, political, and economic transformations. The late 19th century witnessed the rise of industrial capitalism, urbanization, and the growing influence of socialist movements. These changes posed a significant challenge to traditional legal and political doctrines, which were largely predicated on liberal individualism and laissez-faire economic principles.

In the realm of legal theory, the dominant school of thought was legal positivism, exemplified by scholars like Hans Kelsen. This school emphasized the separation of law and morality and held that law derived its authority from the sovereign will of the state. Duguit, however, departed from this tradition by arguing that the legitimacy of law did not rest on the authority of the state or the sovereignty of rulers but on its ability to promote social solidarity and meet the needs of society.

3. The Rejection of Sovereignty

One of the most distinctive aspects of Duguit's thought is his radical rejection of the traditional concept of sovereignty. He argued that the idea of sovereignty as an absolute, indivisible power

residing in a person or institution (such as a monarch or a government) was both outdated and dangerous. According to Duguit, the modern state is not an expression of sovereign will but a complex institution whose legitimacy is derived from its ability to serve the community.

Duguit's critique of sovereignty was heavily influenced by his reading of sociological and philosophical literature, particularly the works of Émile Durkheim, whose concept of "social solidarity" played a central role in Duguit's own theory. For Duguit, sovereignty represented a fiction that masked the real basis of law and political order: the interdependence of individuals within society. He contended that the state did not possess any inherent right to command obedience from its citizens but was instead subject to the same principles of law as any other social institution.

Key Arguments:

1. The state is not a sovereign entity; it exists to fulfill the needs of society.
2. Authority must be rooted in social utility, not abstract rights or coercive power.
3. Duguit's concept of the state is functionalist—it should be judged by how well it performs its social role.

4. Social Solidarity: The Core of Duguit's Legal Theory

At the heart of Duguit's legal philosophy lies the concept of social solidarity. Borrowing from Durkheim's sociology, Duguit posited that human beings are inherently social creatures whose actions are interdependent. As societies become more complex, individuals and groups rely increasingly on each other for their survival and well-being. This mutual dependence creates obligations that are not derived from individual rights or contracts but from the very fact of living in society.

For Duguit, law exists to maintain and promote social solidarity. It is not a tool for enforcing the will of the sovereign but a means of regulating human conduct to ensure the smooth functioning of society. Legal norms, therefore, should be grounded in the objective needs of the community, rather than in abstract principles such as natural rights or the will of the majority.

Key Arguments:

1. Social solidarity is an objective reality that provides the foundation for law.

2. Law should reflect the needs of society, not the will of rulers or abstract principles.
3. Duguit's theory prioritizes social function over individual rights.

Implications:

1. The rights of individuals are subordinate to the needs of society as a whole.
2. Legal and political institutions must be judged by how well they promote social solidarity.

5. The Objective Nature of Law

Duguit's rejection of sovereignty and emphasis on social solidarity led him to develop a theory of law that is fundamentally objective in nature. According to Duguit, law is not a subjective creation of the state or of individual will but a reflection of the objective requirements of social life. This view marks a sharp break with traditional legal theories that base the legitimacy of law on the will of a sovereign or on the supposed "natural rights" of individuals.

In Duguit's view, the primary function of law is to regulate the conduct of individuals and institutions in a way that promotes social solidarity. The legitimacy of legal norms, therefore, rests not on their conformity to abstract principles but on their ability to meet the needs of society.

Key Arguments:

- Law is objective, rooted in the social function it serves.
- Legal norms derive their legitimacy from their capacity to promote social solidarity, not from the authority of the state.
- The rule of law should apply equally to all, including the state itself.

Implications:

- Legal systems must be flexible and responsive to changing social conditions.

- Law must be judged by its effectiveness in promoting social welfare, not by its adherence to abstract principles or traditions.

6. Duguit's Impact on Modern Legal and Political Thought

Léon Duguit's ideas had a significant influence on the development of public law, particularly in France and other parts of Europe. His rejection of sovereignty and his emphasis on social function influenced later developments in administrative law and constitutional theory. Duguit's work also prefigured many of the concerns of modern welfare states, which prioritize the promotion of social welfare over the protection of individual rights.

However, Duguit's ideas have also been subject to criticism. Some legal scholars argue that his emphasis on social solidarity risks subordinating individual rights to the needs of the state or society, potentially leading to authoritarianism. Others contend that his rejection of sovereignty undermines the very basis of democratic governance, which rests on the principle of popular sovereignty.

7. Conclusion

Léon Duguit's juristic and political ideas represent a significant departure from traditional legal theory, shifting the focus from individual rights and state sovereignty to social function and solidarity. His rejection of sovereignty, his emphasis on the objective nature of law, and his focus on social solidarity mark a major contribution to the evolution of modern public law. Duguit's ideas remain relevant in contemporary debates about the role of law in promoting social welfare and addressing the needs of increasingly complex, interdependent societies. However, the challenge of balancing individual rights with social obligations remains a central issue in both legal and political theory, highlighting the enduring importance of Duguit's work.

In this light, Duguit's contributions, while groundbreaking, continue to prompt critical reflection on how legal systems can best serve the common good in a way that respects the dignity and autonomy of individuals within society.

Book Review**CRIME, PUNISHMENT AND DUE SENTENCE: JUDICIAL APPROACH TO GUILT IN CRIMINAL JUSTICE.**

Dr. Arif Rasheed¹

This book scrupulously presents the law domain in crime, punishment and due sentencing especially highlighting the same in several continents, including India. The review of the book speaks its priceless piece of knowledge contribution in the repertoire of law. The taxonomy of the book contains three parts. The introduction of the book act as a premise for the readers to outline the book's purpose, criminal system, sentencing procedure and complexities. The introduction manifest readers to understand the overall framework and purpose of the book discussing crime, punishment and due sentencing. The last portion of the book deals with the element of leniency and mercy in sentencing. The introduction, does not fall under the first part nevertheless helps readers to understand the structure of the book. A brief account of the book is presented in the subsequent introductory part before going deep into the chapters under three different parts. Author initiates the introduction quoting Emile Durkheim and Merton with a view that Crime is a normal and integral aspect of all healthy social lives. The author writes that the view of human quest for pursuance of justice is ever lasting. He, however, raises question that why does the quest continue? The author further moves on to expound that the miscarriage of justice is often wholly the result of human failings and argues that it is not the result of flaws in the impersonal machinery of justice. He quotes Emile Durkheim who says that even a society composed of person possessing angelic qualities would not be free from violations of the norms of that society. In fact, criminal justice is evolutionary in nature just like "justice". Author turns to the Western thought on modern criminal jurisprudence observing that the state's primary task and indeed is to secure for its citizens the conditions of order and security that are prerequisites of freedom. The author discusses the adversarial system, inquisitional and alternative systems in world context. This also includes social and community crime prevention through the use of surveillance. The next significant aspect vie with the sentencing issue is fair trial rights. The author finishes writing that sentencing in India is a midway between judicial intuition and strict application of rule of law. There is no uniform sentencing policy in India and sentencing reflect the individual philosophy of the judges and discretion of the trial judges in sentencing. Thus, a

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brief is presented account of the book is presented. The Part I includes 6 chapters; Part II covers 5 chapter and the remaining 2 chapters in Part III of the book.

Chapter 1 entitled as the “Purpose of sentence: from retribution to reformation”, highlights the ‘fear’ as a central issue in the criminal justice system. This chapter focuses on the pronouncements of Supreme Court of India on the purpose of sentencing principle of proportionality and social goal of sentencing. It concludes the discussion by pointing out the absence of sentencing legislation in India, need for sentencing guidelines and greater focus on reformation and rehabilitation.

Chapter 2 entitled as “The desert theory of sentencing” is inspired by the theory of Andreas Von Hirsch which emphasises the degree of seriousness of the offender’s crime in deciding the severity of his punishment. The theory explores the proportionality-based sentencing in the context of Swedish scheme. The chapter also deals with the importance of rationale of proportionality and approaches as alternatives besides discussions on ethical foundations of desert rationale, censure and penal desert, inclusion of crime control aims, increased penal severity, exceptional departures and limiting retributism. In the concluding part of the chapter, discussion is made on modified desert model.

Chapter 3 entitled as “Sentencing law in Europe, North America, Australia and New Zealand”, covers areas of lack of empirical research on sentencing and reluctance of judges to speak about the manner and mechanism of sentencing in the United Kingdom and other countries. The chapter focuses on the step-wise sentencing approach prevalent in UK, and certain other countries and involves extensive discussion on Sentencing Guidelines, departure test, nine step sentencing mechanism, and improving consistency and transparency in sentencing justice.

Chapter 4 entitled as “Crime Punishment and Mercy in Islamic Law”, deals with crime (*Jarima*) and punishment (*Uquba*) in Islamic law and focus on the punishments in *Shari’a* law which includes fix punishment (*Hudud*), retribution (*Qisas*) and discretionary punishment (*Ta’zir*). The high place of repentance and reform in Islamic law and juristic views on repentance is discussed at length in this chapter. It also covers the importance accorded to just retaliation, blood money, financial compensation, and the importance of forgiveness in Islamic law. It emphasises on the elements of doubt and its impact on punishment, punishment for rape (*Zinaa*), theft (*Sarigah*),

banditry, terrorism, consumption of liquor, slanderous accusation (*Qadhf*), judicial policy and deterrent punishment.

Chapter 5 entitled as “Mercy, leniency and misplaced sympathy in sentencing justice”, deals with the issue of application or elimination of passions or emotions in legal philosophy and judicial analysis. The chapter would deal with the degree to which these passions or emotions should be applied or eliminated in judicial decision-making process with particular reference to sentencing justice. It covers discussion on the application or non-application of leniency in sentencing process. In this manner, it explores the sources of such passions and emotions in the religio-cultural context besides attempting to explain the judicial approach in India with respect to the degree of application as well as limitations on consideration of these emotions in judicial orders restraining the courts from falling prey to what has been termed as “misplaced sympathy” by the Supreme Court of India.

Chapter 6 in the Part II of the book entitled as “Age of Reformation, Capital Punishment and Sentencing Approach in murder trials,” this Chapter explores and examines such issues in the present age of reformation and intense debates on human rights jurisprudence. Indian criminal justice system does not subscribe to the view of abolition of death penalty but has extremely minimised its use since 1980 by evolving the “rarest of rare doctrine”. Since death penalty is inseparably connected to life and awarding capital punishment takes away only when the elimination of convict from society becomes necessary to protect the right to life of others. The present chapter, therefore, covers the issues of enormous discretion of trial judges, persistent disparities concerns etc. it also involves discussion on the position of USA on death penalty.

Chapter 7 entitled as “Judicial Exploration of “rarest of rare” doctrine in India,” this chapter covers the discussion on judicial exploration and examination of the “rarest of rare” doctrine. The author mentioned that as the death penalty is inseparably connected to life and awarding capital punishment irretrievably takes away the most precious fundamental right of the convict, it may be taken away only when the elimination of convict from society becomes necessary and the other option is completely foreclosed. The present chapter covers the areas of enormous discretion of trial judges in the context of capital punishment in the light of the leading judgements of Apex court during last more than four decades.

Chapter 8 entitled as “Death Sentence commuted to life imprisonment”, places the focus on those situations where the Supreme Court has indicated the cases which don’t fall within what is termed as “rarest of rare” case.

Chapter 9 entitled as “Murder, Circumstantial evidence and theory of residual doubts”, explores into punishment for murder of the convict based on circumstantial evidence. The rule of the proof of guilt on the touchstone of “absolute certainty” is not applicable in India rather the rule of proof of guilt “beyond reasonable doubt”, a theory has emerged which is known as the “theory of residual doubts” and it has been discussed in this chapter at length in the light of the judicial pronouncement of the Federal Supreme Court of US, and the Supreme Court of India. The discussion made here would make it crystal clear that the “theory of residual doubts” is neither applied in USA, nor in India till date.

Chapter 10 entitled as “Sentencing approach in other heinous offences”, covers sentencing approach in heinous offences other than murder and includes discussion on culpable homicide not amounting to murder, dowry death, attempt to murder, abetment of suicide and socio-economic offences. The discussion in this chapter also relates to the co-relation between economic offences and white-collar crime. It will also look into the issue of *mens rea* application in economic offences.

Part III ‘Youth Justice: Sentencing the child sexual offender, Reform & Rehabilitation of Juveniles’ of the book of which Chapter 11 entitled as “Welfare of the Child, Child Sexual Abuse and Sentencing Justice in POCSO Cases”, begins by enquiring the deep-rooted reasons behind the increasing crimes against women and children. It will highlight the manner in which the rights of the child got recognised under law and policy both in global and domestic law context and involves extensive discussion on increasing crimes against children in India during last 10 years, the effect of Special POCSO legislation of 2012, special procedure in the Act, competency of child to testify, the concept of child friendly court atmosphere. The chapter in the book emphasises that while the child or the family cannot be compensated for the trauma of the incident, the amount received as victim compensation can be critical for a child’s welfare and rehabilitation and covers the judicial approach to be adopted by trial courts as evolved through the judgements of Allahabad High Court on sentencing in Protection of Children from Sexual Offences cases. Finally, it covers the issue of medical termination of pregnancy of the child

victim as it may be crucial for dignity and preventing social stigmatisation of the victim of child rape.

Chapter 12 entitled as “Some Reflections on UK, and Indian Law in matters of Juvenile in Conflict with Law”, deals with the judicial approach to be adopted in cases relating to special issues of juvenile where the traditional and purely judicial approach to judging doesn’t apply as the object is not to “punish” but to “reform and rehabilitate” the juvenile in conflict with law. It covers in detail the rationale behind the departure from the traditional perspective to criminality as the unfortunate juvenile might himself be a victim of vulnerable socio-economic circumstances. Discussion in this chapter also includes international legal regime. Furthermore, it deals with “Youth Justice” in United Kingdom. An elaborate discussion is carried on sentencing young offenders, including the important judicial pronouncements laying down the legal landscape and the “compassionate atmosphere” in which the legal philosophy on juvenile deviance operates in modern times.

As a reader, I express my appreciation to this book for several reasons. First and foremost, significant aspect is its well- structured framework, beginning with an outline, delves into the historical domain of law, and explains the concept of crime, punishment and sentencing across the globe. The book aptly addresses criminal system, judicial discretion, and delicacy in delivering harsh or lenient justice leading imbalance in the absence of uniform system of law and seeks to discuss potential solutions. Indeed, the book is immensely beneficial for students, researchers, academicians, judicial aspirants, officers, legislators, field practitioners, police administration. The content presented are designed to support inquisitive minds craving for learning and finding best solutions to establish justice. The book will be significant in facilitating multitude of readers to navigate the complexities of the field of law and foster a conducive work culture and a peaceful society to live in. I highly recommend reading this book. This comprehensive piece of knowledge not only enlighten the pathways to judicial practices and equips with the knowledge to encourage informed decisions contributing to a just and fair criminal justice system.

The Silent Crisis: Examining the Legal Invisibility of Cyber Gender Abuse in India

Dr. Vipul Vinod¹

Abstract

Cyber gender abuse, a pervasive form of digital violence targeting individuals based on their gender, represents a significant and growing concern in India. This article explores the intricate dynamics of cyber gender abuse, examining how it exacerbates existing gender inequalities and reflects broader societal prejudices, including misogyny, racism, and homophobia. The phenomenon of cyber gender abuse in India is characterized by various abusive practices, including cyberstalking, revenge porn, and online harassment. These practices are often intensified by the cultural and social contexts that influence online behavior, leading to a unique form of violence that is both deeply personal and widely public. The article argues that the legal, social, and technological frameworks currently in place are insufficient to address the scale and severity of this abuse. This article explores the ongoing challenges in the recognition of cyber gender abuse within Indian society and the legal framework. Despite the severity of the issue, cyber gender abuse is frequently downplayed or attributed to the actions of the victims themselves. The fact that this form of abuse occurs in the digital realm often leads to further dismissal by authorities and institutions. Law enforcement agencies sometimes argue that because cyber gender abuse consists of online words and images, it is less serious than similar actions in physical spaces. As a result, victims are often advised to ignore the abusive content as a solution.

The article hypothesizes that the trivialization and nonrecognition of cyber gender abuse in India are rooted in historical patterns of minimizing gendered harms. This minimization, coupled with inadequate legal protections and the lack of accountability for content platforms, perpetuates a cycle of abuse that disproportionately affects women. It further posits that a comprehensive and targeted approach, involving legal reforms, public awareness campaigns, and stronger enforcement mechanisms, is essential to effectively combat cyber gender abuse and to empower victims in the digital age.

Keywords: Cyber Gender Abuse, Digital Violence, Legal Framework, Gender Inequality, Online Harassment

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1. UNSEEN AND UNHEARD: THE DIGITAL SHADOWS

In India, the challenges faced by individuals tackling misinformation were starkly illustrated by the experience of Navneet Rana, an independent Member of Parliament (MP) from Amravati. Rana's situation in April 2022 highlights the severe scrutiny and backlash that public figures can encounter when they engage in politically sensitive issues or criticize government practices. Navneet Rana, known for her outspoken nature and activism, had been vocal about alleged mismanagement and corruption in the ruling party's governance. Her criticisms, combined with her independent stance, attracted significant media and political attention. The backlash against Rana was swift and intense, with right-wing media outlets and political opponents launching a coordinated attack against her.

Prominent news channels aired multiple segments that questioned Rana's credibility and motives. These segments accused her of undermining national interests and spreading misinformation. The situation was exacerbated by the circulation of doctored videos and misleading content online, falsely portraying Rana in a negative light. Her personal information, including her home address and phone number, was publicly exposed, leading to a deluge of threatening messages and abusive comments. The online harassment Rana faced was severe and multifaceted. Inappropriate and manipulated content featuring her image circulated widely, adding to the psychological strain of the situation. This harassment occurred while Rana was dealing with personal challenges, further compounding her stress.

Despite the gravity of the situation, Rana's political career and personal life were deeply affected. The lack of substantial support from political allies or institutions meant that she had to confront the crisis largely on her own. Her ability to express her views freely was constrained by the ongoing harassment and public vilification. Navneet Rana's experience underscores the broader issue of how public figures in India who address contentious issues or criticize government practices can face severe backlash and personal attacks. It highlights the urgent need for improved mechanisms to protect individuals from online harassment and to support those who stand up against misinformation and disinformation in today's digital landscape.

2. OVERLOOKED REALITY OF CYBER GENDER ABUSE

Cyber gender abuse, a form of digital violence targeted primarily at individuals based on their gender, is a growing concern in India. This phenomenon encompasses various abusive practices, including cyberstalking, revenge porn, and online harassment. In India, where gender disparities are prevalent, such abuse exacerbates existing inequalities and highlights significant

gaps in legal, social, and technological frameworks. Cyber gender abuse involves harmful online behaviors that exploit gender biases and power imbalances.

3. REVENGE PORN CASE: THE STORY OF A DELHI UNIVERSITY STUDENT

“In 2020, a Delhi University student’s life was turned upside down when her ex-boyfriend circulated intimate photographs of her without consent. The photos were shared across various social media platforms, leading to severe emotional distress and social stigma for the victim. Despite legal recourse under Section 66E of the Information Technology Act, 2000, and other relevant laws, the victim faced numerous challenges in seeking justice. The case highlighted the inadequacy of legal mechanisms in providing immediate relief and protection for victims of revenge porn.”²

4. THE HARASSMENT OF ACTRESS SWARA BHASKAR

“Actress Swara Bhaskar has been a target of extensive cyberstalking due to her outspoken nature on social and political issues. In 2021, Bhaskar reported receiving numerous threatening messages and intrusive online contact from anonymous stalkers. This harassment included persistent online following and derogatory comments aimed at intimidating her. The psychological impact of such sustained abuse, combined with the lack of effective law enforcement response, underscores the challenges faced by individuals who are publicly vocal.”³

5. ONLINE HARASSMENT OF ACTIVIST RUPAL GHIYA

“Rupal Ghiya, a social media activist known for her critiques of various societal issues, faced severe online harassment in 2022. Following her comments on gender inequality and caste discrimination, she was subjected to a coordinated attack involving abusive comments, threats of sexual violence, and the spreading of doctored content aimed at discrediting her. The harassment included exposure of her personal details, leading to threats and intimidation aimed at silencing her activism. The case reflects how online abuse can be used as a tool to suppress dissent and intimidate those challenging societal norms.”⁴

² "Delhi University Student’s Revenge Porn Case Highlights Gaps in Legal Protections," TOI, February 15, 2020

³ "Actress Swara Bhaskar’s Experience with Cyberstalking: A Case Study," The Hindu, March 22, 2021

⁴ "Online Harassment of Activist Rupal Ghiya: An Analysis," IE, July 10, 2022

6. UNPACKING THE LEGAL NEGLECT OF CYBER GENDER ABUSE

Cyber gender abuse is not limited to public figures; ordinary individuals also face significant risks. In India, the issue of online abuse has expanded with various disturbing trends. For instance, “in May 2023, it was revealed that a Telegram channel named ‘Project Mayhem,’ with around 1,500 followers, was involved in organized campaigns of harassment. The channel, managed by a prominent extremist, orchestrated attacks against marginalized communities, including students from minority backgrounds and individuals identifying as transgender. The tactics employed included mobilizing followers to target victims with threats, offensive content, and personal information leaks.”⁵

In India, the phenomenon of cyber gender abuse extends beyond interactions involving public figures to encompass the contentious battles among influencers and their supporters. These online conflicts often escalate into severe harassment and abuse. For example, “in 2022, a high-profile clash between two popular YouTubers, who were both females, led to a significant cyber abuse incident. The influencers, known for their opposing views on social issues, became embroiled in a bitter online feud. Their supporters launched coordinated attacks on each other, flooding social media with derogatory comments, threats, and personal information leaks.”⁶ Similarly, “in 2023, the controversy surrounding a prominent Instagram influencer and a well-known Bollywood actress brought to light the aggressive nature of online disputes. The actress, who had criticized the influencer's brand, faced a barrage of abusive messages and threats from the influencer’s fanbase. These attacks included targeted trolling, doxxing (revealing private information), and the spread of defamatory content aimed at discrediting her and damaging her reputation.”⁷ These instances illustrate how the competitive and often hostile environment among influencers and their supporters can lead to severe forms of cyber gender abuse, affecting not only the individuals involved but also their wider audience.

This example highlights a disturbing trend in the evolution of cyber abuse. “Traditional forms of online harassment, such as cyberstalking, have become more sophisticated and pervasive. Cyberstalking involves the repeated targeting of individuals through a series of harmful online actions, such as defamation, impersonation, threats, and the non-consensual sharing of private information. In India, there have been numerous instances where individuals have faced such

⁵ “Exposed: The ‘Project Mayhem’ Telegram Channel and Its Online Harassment Campaigns,” TOI, May 15, 2023.

⁶ “Online Feud Between YouTubers Leads to Severe Cyber Harassment,” The Hindu, September 10, 2022.

⁷ “Bollywood Actress Targeted by Instagram Influencer’s Fanbase in Online Abuse Controversy,” TOI, March 8, 2023.

abuse, reflecting a broader issue of how networked technologies can intensify and complicate abusive behaviors.”⁸ Moreover, the scope of cyber abuse has broadened to include new and alarming practices. For instance, “victims are now encountering sexual harassment and exploitation in virtual reality environments, a new frontier in digital interactions. This form of abuse highlights the evolving nature of cyber harassment, where traditional concepts of privacy and safety are increasingly challenged by emerging technologies.”⁹

The issue of cyber gender abuse is particularly significant given the social and cultural contexts that influence online behavior. A national survey revealed that approximately one in eight adult social media users had been threatened with or experienced the non-consensual sharing of private, sexually explicit content. “Women were found to be 1.7 times more likely than men to be victims of this form of abuse, with men predominantly identified as the perpetrators. Such incidents often involve abusive language and behavior that reflect broader societal prejudices, including misogyny, racism, and homophobia.”¹⁰ In the Indian context, these forms of abuse are often intensified by existing social attitudes towards gender and sexuality. The nature of cyber abuse in India frequently involves the use of gender stereotypes. Women are sometimes portrayed as sexual objects or as deserving of harassment. They may be labeled with derogatory terms and advised to avoid online spaces, reinforcing the perception that these digital environments are male dominated. Public reactions to such incidents often downplay the severity of the abuse, with victims being dismissed as overly sensitive or emotionally fragile. This minimization of the impact of cyber gender abuse reflects a broader societal reluctance to acknowledge the seriousness of these issues.

Where traditional gender roles and cultural norms play a significant role in shaping social interactions, the effects of cyber gender abuse can be profound. Women who experience online harassment often report long-lasting psychological effects, including fear and anxiety. Additionally, the threat of online abuse can lead women to self-censor, limiting their participation in digital spaces. This self-censorship is not only a personal response to discomfort but also represents a barrier to women's full engagement in public discourse, both online and offline. The evidence underscores the damaging impact of cyber gender abuse, yet there is still a lack of widespread recognition of its seriousness in Indian society. A report by

⁸ Shashank Mittal, *Legal Challenges of Cyberbullying and Online Harassment: A Comparative Analysis*, 6 *IJFMR*, 1, 6-8 (2024)

⁹ A. Shaji George, *Virtual Violence: Legal and Psychological Ramifications of Sexual Assault in Virtual Reality Environments*, Research Gate, (Feb. 02, 2024, 10:00 AM), <https://www.researchgate.net/publication/378150588>

¹⁰ Data & Society Research Institute, "Online Harassment, Digital Abuse, and Cyberstalking in America," 21 Nov 2016, <https://datasociety.net/pubs/ia/DataAndSociety/>

Data and Society in 2016 found that “younger women are particularly likely to engage in self-censorship to avoid potential harassment, with 41% of women aged 15 to 29 reporting such behavior, compared to 33% of men in the same age group and 24% of internet users aged 30 and older.”¹¹ In India, this trend is similarly observed, with women from various backgrounds facing a disproportionate risk of online abuse. The fear of being targeted online not only restricts women's freedom of expression but also perpetuates existing gender inequalities.

Given the specific ways in which women are targeted online, the term "cyber gender abuse" is used to describe these forms of harassment. In India, “this type of abuse is often a reflection of broader societal issues related to gender and violence. Addressing cyber gender abuse requires not only legal interventions but also cultural and societal changes that challenge the underlying attitudes and power dynamics that allow such abuse to persist.”¹²

7. SILENCED ONLINE

“Technology companies, while adopting a different stance, often align with the notion that regulation of online behavior is problematic. They argue that online speech is vital to public discourse and that imposing regulations on cyber abuse could potentially threaten free speech. However, this perspective does not consider that legal protections could actually empower victims, enabling them to engage in public discussions without fear of harassment.”¹³ In India, victims of cyber gender abuse face significant challenges when seeking legal recourse against the platforms where the abuse occurs. “Current legal frameworks provide limited accountability for these platforms, even when they could play a role in mitigating the abuse. Indian laws, such as the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, attempt to address some aspects of platform liability, but challenges remain in holding platforms accountable for harmful content. The situation is compounded by legal precedents that provide platforms with broad immunity from liability, similar to protections seen in other jurisdictions. This legal environment has led to a situation where platforms may not take sufficient measures to prevent or address abusive behavior, leaving victims with few options for redress.”¹⁴ The original intent behind such legal protections was to encourage platforms to self-regulate and monitor content in good faith. However, “the broad

¹¹ Pew Research Center, "Online Harassment 2020," Pew Research Center, (Jan. 13, 2020, 10:00 AM) <https://www.pewresearch.org/internet/2020/01/13/online-harassment-2020/>

¹² Aditi Panda, AI Tools and Applications for Women's Safety, 36-37 (IGI Global) 2024

¹³ Ahiza García, Big Tech has big power over online speech. Should it be reined in? NBC NEWS, (Jan. 21, 2021, 10:30 PM), <https://www.nbcnews.com/tech/tech-news/>

¹⁴ Divij Joshi, Beyond Intermediary Liability: Platform Responsibility for Harmful Speech in India, ORF, (Nov 03, 2018, 10:00 AM), <https://www.orfonline.org/expert-speak/>

interpretation of these laws has, in some cases, resulted in limited accountability for platforms, thereby allowing abusive behavior to persist. This situation highlights the need for a more balanced approach that protects both free speech and the rights of victims of cyber gender abuse.”¹⁵

In India, these issues are exacerbated by various factors, including gaps in legal protections, limited resources for victims, and challenges in enforcing existing laws. The pervasive nature of online abuse, combined with inadequate support systems and slow responses from law enforcement, underscores the urgent need for comprehensive measures to address cyber gender abuse effectively.

8. FROM MARGINALIZATION TO ACCOUNTABILITY

“The trivialization of harms that disproportionately affect women is a persistent issue, deeply rooted in history and manifesting in various forms, including the nonrecognition of cyber gender abuse. In India, where traditional gender roles and societal norms often undermine the seriousness of gender-based violence, this problem is particularly pronounced in the digital realm.”¹⁶ The lack of adequate response from law enforcement, content platforms, and legal frameworks only exacerbates the issue, leaving victims of cyber gender abuse with little recourse. Historically, gendered harms have been minimized or dismissed, often seen as private matters or mere inconveniences rather than serious violations of rights. This pattern of trivialization extends to the digital space, where cyber gender abuse is frequently downplayed. In India, this manifests in the underreporting and under-prosecution of online harassment and abuse cases. According to the “National Crime Records Bureau (NCRB), cybercrimes against women in India have been on the rise, with a significant number of cases involving online harassment, stalking, and the non-consensual sharing of intimate images. Despite this, many cases go unreported due to the stigma attached to being a victim of such abuse and the perception that online abuse is less serious than physical violence.”¹⁷

9. FROM WORKPLACE TO CYBERSPACE

Historically, society has consistently downplayed the suffering of women, “often dismissing

¹⁵ Ong, B., Toh, D.J. Digital Dominance and Social Media Platforms: Are Competition Authorities Up to the Task?. IIC 54, 527–572 (2023)

¹⁶ S. Arya, Trivialization of Aggression Against Women in India: An Exploration of Life Writings and Societal Perception, NIH, (Jul 7 2022, 10:30 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9301204/>

¹⁷ Sonali Verma, India records 51 cases of crime against women every hour over 4.4 lakh cases in 2022: NCRB Report, TOI, Apr 3, 2024, 16

their experiences as trivial or self-inflicted. In the context of workplace sexual harassment, such behavior was frequently brushed aside as harmless flirtation. Women who faced harassment were often told by employers to either change supervisors or find new jobs if they found the environment intolerable. For many men, engaging in sexual harassment was seen as a "perk" of their position."¹⁸ Additionally, societal narratives frequently shifted the blame onto women, suggesting that they were responsible for their own suffering. "Critics of anti-harassment laws argued that such regulations would stifle workplace camaraderie and hinder male bonding. Similarly, in cases of domestic violence, judges and caseworkers often viewed battered women as responsible for their circumstances rather than holding their abusers accountable. Courts and police were reluctant to intervene in cases of domestic violence, often citing the sanctity of the home and the need to preserve marriages."¹⁹

These patterns of trivialization have persisted and adapted in the digital age, particularly in the context of cyber gender abuse. "Law enforcement agencies in India often minimize the seriousness of the abuse that women face online, much like how society historically dismissed gendered abuse in the workplace and at home. Police officers may accuse female victims of overreacting or advise them to simply ignore the harassment. This dismissal is especially prevalent on websites dedicated to the nonconsensual sharing of intimate images, where abuse is not merely tolerated but often seen as a core feature."²⁰ Even mainstream content platforms sometimes defend cyber gender abuse as part of the "rough and tumble" of online environments. Meanwhile, tech lobbyists argue that regulating such behavior would infringe on free speech, neglecting the fact that the abuse itself silences and harms victims.

The trivialization of cyber gender abuse today, while echoing the past, carries unique aspects due to the online nature of the abuse. The digital environment provides additional justifications for dismissing the severity of the abuse. "There is a prevailing belief that online harassment is less harmful than physical assault or face-to-face intimidation. The adage "sticks and stones may break my bones, but words will never hurt me" is often invoked, ignoring the reality that networked technologies can amplify, rather than diminish, the impact of abusive words and images. Unlike the transient and localized taunts of a schoolyard, online harassment can be viewed, searched, and spread by anyone, anywhere, allowing the abuse to persist and escalate

¹⁸ National Commission for Women, "Report on the Gender Dimensions of Cyber Crimes in India," 2020, <https://ncw.nic.in/sites/default/>

¹⁹ National Crime Records Bureau, "Crime in India 2020: Statistics," Ministry of Home Affairs, Government of India, <https://ncrb.gov.in/sites/default/>

²⁰ Madhavi Goradia Divan, *Facets of Media Law*, 2nd ed. (Lucknow: Eastern Book Company, 2018).

indefinitely.”²¹

The gendered impact of cyber abuse, combined with the magnifying effect of digital technologies, underscores the urgent need to address societal nonrecognition of cyber gender abuse in a comprehensive and specific manner. The necessity for a targeted strategy is further compounded by the differential treatment of content platforms and physical workplaces under the law. “In India, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, offers some degree of regulation, but challenges remain in effectively holding platforms accountable for their role in perpetuating abuse. The current legal framework often fails to adequately protect victims, leaving them vulnerable to ongoing harm while granting significant leeway to the platforms that facilitate the abuse.”²²

10. FROM IGNORANCE TO PROFIT

In both the past and present, key institutions have consistently failed to address abuses that disproportionately affect women. “Law enforcement has often dismissed cyber abuse as unworthy of serious attention, mirroring the historical trivialization of gendered violence. The tech industry's response to cyber gender abuse is equally problematic and represents a significant part of society's broader nonresponse. To highlight this, it is important to note that thousands of websites do not merely ignore cyber gender abuse; they actively profit from the distribution of nonconsensual intimate images.”²³ While some major tech companies have begun to take meaningful steps to ban cyberstalking and intimate privacy violations, many others continue to repeat the early pattern of neglect, particularly in their response to virtual sexual assaults. “This ongoing lack of recognition and inadequate response from both law enforcement and the tech industry exacerbate the problem, leaving victims with little recourse and perpetuating a culture of impunity for perpetrators.”²⁴

In India, as in many parts of the world, “the societal nonrecognition of cyber gender abuse as a serious issue is deeply troubling. This lack of recognition is starkly evident in the operation of numerous websites that host and promote nonconsensual intimate images. These platforms, which exist within a broader ecosystem of cyber exploitation, encourage users to upload and share intimate images of individuals without their consent, treating the violation of privacy as

²¹ Rituparna Bhattacharyya, *Cyber Harassment in India: A Study on the Victimization of Females*, 16 Asian J. Criminology 59 (2021).

²² The Economic Times, “Why India’s IT Act Needs to Change to Safeguard Online Speech,” ET (Feb 18 2022, 10:00AM) <https://economictimes.indiatimes.com/tech/internet/>

²³ Hija Kamran, *Feminist Principles of the Internet: Advocacy Brief on Violence*, GenderIT.org, (Jan 9 2023, 10:30 AM) <https://genderit.org/>

²⁴ Vidushi Marda, *Facial recognition is an invasive and inefficient tool*, TH, Jul 19, 2023, 16

a form of entertainment.”²⁵

“Site operators often frame the posting of nonconsensual intimate images as a game, where the victims are blamed for their misfortune. These platforms explicitly suggest that the individuals depicted in the images are at fault, claiming that their poor choices are what led to the public display of their private moments.”²⁶ Such narratives not only shift the blame onto the victims but also trivialize the serious harm caused by cyber gender abuse. This approach sends a dangerous message to perpetrators: that their actions are not only acceptable but also devoid of consequences. The issue is further compounded by the lack of adequate attention and action from law enforcement agencies in India. “Despite the growing prevalence of cybercrimes, including those targeting women, law enforcement often dismisses these incidents as minor or not worthy of serious investigation. This apathy creates an environment where perpetrators feel emboldened to continue their abusive behavior, knowing that the likelihood of facing legal repercussions is slim.”²⁷

The ecosystem of sites that solicit and profit from cyber gender abuse is vast and troubling. According to reports, “there are thousands of websites, many of which are easily accessible from India, that host user-provided nonconsensual intimate images. These include images captured without consent, such as upskirt and down-blouse photos, as well as deepfake sex videos and authentic intimate images. Disturbingly, these sites often pair explicit photographs with personal information, such as the names of the women depicted, their college affiliations, and details about their friends and classmates.”²⁸ This practice not only violates the privacy of the individuals involved but also subjects them to further harassment and abuse, both online and offline. Unlike mainstream pornography, the appeal of these sites lies in the nonconsensual nature of the content. “The women featured are often everyday individuals rather than celebrities, and the images, while explicit, are not necessarily pornographic in nature. The draw for users is the knowledge that the individuals depicted did not consent to the sharing of their images, adding a layer of exploitation to the already harmful practice.”²⁹

In the Indian context, this issue is particularly concerning given the country’s vast and growing

²⁵ Jurgita Peciuriene, Cyber violence is a growing threat, especially for women and girls, EIGE, (Jun 19, 2022 5:00 PM) <https://eige.europa.eu/newsroom/news/>

²⁶ Danielle Keats Citrone & Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345, 353 (2014)

²⁷ Gargi Sarkar, Behavioral analysis of cybercrime: Paving the way for effective policing strategies, 2 JEC, 100034,

²⁸ R Mendiratta, Non-consensual sharing of intimate images online: Solutions in Criminal, Media & Technology Laws, SLR (Oct 19 2020, 10:00 AM), <https://www.sociolegalreview.com/post/>

²⁹ Daskalopoulou, A., & Zquette, M. C. (2020). Women’s Consumption of Pornography: Pleasure, Contestation, and Empowerment. *Sociology*, 54(5), 969-986.

internet user base. The rapid expansion of digital platforms has outpaced the development of robust legal frameworks and enforcement mechanisms to protect individuals from cyber abuse. Although laws such as the Information Technology Act, 2000, and various provisions of the Indian Penal Code are intended to address cybercrimes, they often fall short in effectively combating the specific challenges posed by cyber gender abuse. Moreover, the cultural stigmatization of victims in India further exacerbates the problem. Women who come forward to report cyber abuse often face societal backlash, with their reputations and personal lives being scrutinized and judged. This discourages many from seeking legal recourse, thereby perpetuating the cycle of abuse and impunity.

Addressing cyber gender abuse in India requires a multifaceted approach that includes stronger legal protections, proactive law enforcement, and public awareness campaigns to challenge the prevailing narratives that blame victims and trivialize the harm caused by such abuse. Only through a concerted effort can society begin to dismantle the ecosystem that allows cyber gender abuse to thrive.

11. TRIVIALIZATION AND NONRECOGNITION

Connecting the historical trivialization of gendered harms to the current nonrecognition of cyber gender abuse highlights enduring challenges in getting the public's attention on these issues. In India, where digital literacy is still growing and societal attitudes towards women's rights are evolving, there is a tendency to view online abuse as a lesser harm. "This perception is further reinforced by the inadequate response from law enforcement agencies, which often fail to take cyber gender abuse seriously. Victims are sometimes told to simply block the abuser or avoid using the internet, ignoring the significant impact that such abuse can have on their mental health, reputation, and safety. Content platforms, which play a crucial role in either preventing or perpetuating cyber gender abuse, often fail to address the problem effectively. While platforms like Facebook, Twitter, and Instagram have policies against harassment and abuse, enforcement is inconsistent. In many cases, harmful content remains online, further victimizing those targeted."³⁰ The anonymity provided by the internet allows perpetrators to harass without fear of consequence, and the platforms' algorithms can sometimes even promote abusive content, making it more visible.

Worse still, "some platforms inadvertently encourage cyber gender abuse by failing to

³⁰ National Crime Records Bureau, "Crime in India 2020: Statistics," Ministry of Home Affairs, Government of India, <https://ncrb.gov.in/sites/default/files/>

implement robust mechanisms for reporting and removing harmful content. In India, where online platforms are widely used for social and political discourse, the lack of effective content moderation can lead to the amplification of gender-based abuse. This is particularly concerning in a country where gender inequality is already a significant issue, and where women, especially those from marginalized communities, are more vulnerable to online attacks.”³¹

The legal framework in India has also struggled to keep pace with the rapidly evolving nature of cyber gender abuse. “While the Information Technology Act, 2000, provides some protections against online harassment and abuse, the law is often inadequate in addressing the complexities of cyber gender abuse. Additionally, the immunity granted to intermediaries under Section 79 of the IT Act has been criticized for allowing platforms to escape liability for content posted by users, even when that content is harmful or abusive.”³²

This immunity, “intended to encourage free speech and innovation, has instead contributed to a culture where platforms may prioritize profit over the safety and well-being of their users. The broad interpretation of these legal protections has resulted in a situation where victims of cyber gender abuse have limited legal recourse against the companies that host abusive content. In the Indian context, where legal processes can be slow and cumbersome, this lack of accountability is a significant barrier to justice.”³³ To effectively address cyber gender abuse in India, there needs to be a concerted effort to change societal attitudes, strengthen legal protections, and hold content platforms accountable. Public awareness campaigns, better training for law enforcement, and stronger regulatory oversight of online platforms are essential steps in ensuring that cyber gender abuse is recognized and treated as the serious issue it is.

11.1 The Legal Invisibility of Cyber Gender Abuse

In the digital age, gender-based violence has transcended the physical realm, manifesting itself in new and insidious forms online. In India, “the phenomenon of cyber gender abuse ranging from cyberstalking to the non-consensual dissemination of intimate images remains inadequately addressed by the legal framework, rendering it effectively invisible. Despite the growing prevalence of these abuses, several legal loopholes hinder effective prosecution and

³¹ Information Technology Act, 2000, Ministry of Electronics and Information Technology, Government of India, <https://www.meity.gov.in/>

³² The Economic Times, “Why India’s IT Act Needs to Change to Safeguard Online Speech,” Feb, 18 2022, 10.30 AM, <https://economictimes.indiatimes.com/tech/internet/>

³³ John Samples, Why the Government Should Not Regulate Content Moderation of Social Media, CATO, April 9, 2019, 10.30 AM, <https://www.cato.org/>

protection for victims, perpetuating a cycle of silence and impunity.”³⁴

One of the most glaring issues in addressing cyber gender abuse in India is the absence of specific legislative provisions tailored to this form of violence. The Information Technology Act, 2000 (IT Act), which serves as the primary law governing cybercrimes in India, lacks explicit provisions addressing gendered forms of online abuse. While Sections 66E and 67 of the IT Act criminalize the violation of privacy and the transmission of obscene material, respectively, these provisions are too broad and fail to capture the specific nuances of cyber gender abuse, such as cyberstalking or the non-consensual sharing of intimate images. This legislative gap allows perpetrators to exploit ambiguities in the law, often escaping prosecution due to the lack of clear legal definitions and provisions targeting these crimes.

The *Bhartiya Nyaya Sanhita* attempts to address cyber gender abuse through Section 78, which criminalizes stalking, including cyberstalking. “However, the definitions provided are vague, and the law does not clearly delineate what constitutes cyber harassment. This ambiguity leads to inconsistent enforcement, where the burden of proof often falls disproportionately on the victim to demonstrate the severity and impact of the harassment.”³⁵ Moreover, the law's emphasis on physical stalking often results in the minimization of online stalking, which is viewed as less harmful despite its potential to cause severe psychological trauma.

“Another significant legal loophole lies in Section 79 of the IT Act, which grants immunity to intermediaries, such as social media platforms and internet service providers from liability for third-party content hosted on their platforms. While the intent behind this "safe harbor" provision was to foster the growth of the internet, it has inadvertently allowed these platforms to avoid accountability for hosting content that constitutes cyber gender abuse.”³⁶ Even though the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 mandate intermediaries to act on harmful content when notified, enforcement remains weak. Victims often face significant delays or inadequate responses from platforms, which may dispute what constitutes "harmful" content, thereby allowing abusive material to remain online for extended periods.

The inefficacy of law enforcement in dealing with cyber gender abuse is another critical issue.

“Despite the establishment of cybercrime cells across various states, many police officers lack

³⁴ Bansal, V., Rezwan, M., Iyer, M., Leasure, E., Roth, C., Pal, P., & Hinson, L. (2024). A Scoping Review of Technology-Facilitated Gender-Based Violence in Low- and Middle-Income Countries Across Asia. *Clinical Rehabilitation*, 25(1), 512-520.

³⁵ Shashank Mittal, *Legal Challenges of Cyberbullying and Online Harassment: A Comparative Analysis*, 26IJFMR, 9,11 (2024)

³⁶ Gautam Bhatia, *Intermediary Liability in the United States – the Third Circuit's Tik-Tok Decision*, *Constitutional Law and Philosophy*, Sep 16, 2024, 10 AM, <https://indconlawphil.wordpress.com/>

the specialized training needed to handle the complexities of cybercrimes, particularly those with a gendered dimension. As a result, victims are often advised to "ignore" the abuse, reflecting a broader societal tendency to trivialize online harassment compared to physical violence. This dismissive attitude not only discourages victims from pursuing legal action but also perpetuates a culture of impunity for offenders."³⁷

Cyber gender abuse often involves cross-border jurisdictional issues, especially when the platforms hosting abusive content are based outside India. "The Mutual Legal Assistance Treaties (MLATs) that govern international cooperation in cybercrime investigations are often slow and cumbersome, delaying justice for victims. The global nature of the internet complicates legal actions against foreign entities, leading to a significant gap in enforcement."³⁸ This jurisdictional challenge is exacerbated by the lack of a robust legal mechanism within Indian law to address the complexities of international cybercrime.

"Despite the introduction of grievance redressal mechanisms under the IT Rules of 2021, the implementation of these mechanisms has been inconsistent. Victims of cyber gender abuse often struggle to get content removed swiftly, and the bureaucratic process involved in filing complaints further deters them from seeking redress."³⁹ The prolonged presence of abusive content online can lead to long-lasting psychological and reputational harm for victims, highlighting the need for more efficient and victim-centric redressal processes.

Finally, "the lack of widespread public discourse and advocacy around cyber gender abuse contributes to its legal invisibility. Without significant public pressure, legal reforms are slow to materialize, and existing laws remain under-enforced. The societal stigma associated with gender-based violence, coupled with a lack of awareness about the severity of cyber gender abuse, further hinders victims from coming forward and seeking justice."⁴⁰

"Addressing these legal loopholes requires not only legislative reform but also a cultural shift in how cyber gender abuse is perceived and treated. A comprehensive approach that includes improved law enforcement training, stricter regulation of content platforms, and greater public awareness is essential to ensure that cyber gender abuse is recognized as a serious crime and that victims have access to timely and effective justice."⁴¹

³⁷ Curtis, J., & Oxburgh, G. (2023). Understanding cybercrime in 'real world' policing and law enforcement. *The Police Journal*, 96(4), 573-592.

³⁸ Gail Kent, *The Mutual Legal Assistance Problem explained*, CIS, February 23, 2015 at 3:06 PM, <https://cyberlaw.stanford.edu/>

³⁹ Tvesha Sippy, *Institutional responses to digital harms*, *Artha Global*, Jan 2023, 56

⁴⁰ Danielle Keats Citron, *The Continued (In)visibility of Cyber Gender Abuse*, 133 *YALE L.J.* (2023)

⁴¹ Rowena Rodrigues, *Legal and human rights issues of AI: Gaps, challenges and vulnerabilities*, 4 *JRT*, 337 (2020)

12. CONCLUSION

The rapid digitization of Indian society, driven by the widespread adoption of the internet and social media platforms, has revolutionized communication, commerce, and social interactions. However, it has also paved the way for new forms of abuse and harassment, particularly targeting women and marginalized communities. Cyber gender abuse, a phenomenon that includes a range of online behaviors such as cyberstalking, doxxing, non-consensual sharing of intimate images, and gendered hate speech, has become increasingly prevalent. Despite its growing incidence, the legal framework in India remains grossly inadequate to address this issue, leaving many victims without recourse to justice.

India's legal response to cybercrime is primarily governed by the Information Technology Act, 2000 (IT Act), and the *Bhartiya Nayaya Sanhita*. While these laws address certain forms of online harassment, they fall short in several critical areas, particularly concerning gender-specific abuses. The IT Act, originally designed to address e-commerce and cybercrime, does not adequately cover the nuanced and often insidious nature of cyber gender abuse. For example, Section 67 of the IT Act, which penalizes the publishing or transmitting of obscene material in electronic form, fails to address the broader spectrum of online abuse that targets individuals based on their gender.

In addition to legal shortcomings, cultural and societal factors play a significant role in the invisibility of cyber gender abuse in India. The deep-rooted patriarchal norms that permeate Indian society often trivialize or dismiss the experiences of women and marginalized communities. Victims of cyber gender abuse frequently face stigma and victim-blaming, deterring them from reporting incidents or seeking legal help. The normalization of online harassment, particularly in the form of sexist and misogynistic comments, further contributes to the lack of recognition and seriousness accorded to these issues. Moreover, the digital divide in India, marked by disparities in internet access and digital literacy, disproportionately affects women and marginalized communities. This divide not only limits their ability to protect themselves online but also exacerbates their vulnerability to cyber gender abuse. The intersection of gender, caste, and class further complicates the issue, as women from lower socio-economic backgrounds or marginalized castes often face more severe forms of abuse with even fewer avenues for recourse.

Addressing the legal invisibility of cyber gender abuse in India requires a multi-faceted approach that includes legal reform, public awareness, and cultural change. First and foremost, there is an urgent need for a comprehensive legal framework that specifically addresses cyber

gender abuse. Such a framework should include clear definitions, stringent penalties, and provisions for victim support and rehabilitation. Law enforcement agencies must be trained to recognize and respond to cyber gender abuse effectively, ensuring that victims receive the protection and justice they deserve. In parallel, efforts must be made to raise public awareness about the seriousness of cyber gender abuse and the importance of reporting it. Educational campaigns, both online and offline, can play a crucial role in changing societal attitudes towards gender-based violence and promoting digital literacy. These campaigns should also focus on empowering women and marginalized communities to navigate the digital world safely and assertively. The digital landscape in India is rapidly evolving, and so must our approach to tackling the challenges that come with it. Cyber gender abuse is not merely a technical issue; it is a reflection of deeper societal inequalities and biases that manifest in the digital space. As we move forward, it is imperative that we recognize the unique challenges posed by cyber gender abuse and address them with the urgency they demand. The invisibility of this abuse in the current legal framework not only undermines the safety and dignity of individuals but also hampers the progress towards a more just and equitable society.

To create a safer digital space for all, especially for women and marginalized communities, India must introduce specific legislation that addresses the complexities of cyber gender abuse. This should include provisions for the protection of victims, swift action against perpetrators, and mechanisms for redressal that are sensitive to the needs of those affected. Law enforcement agencies must be equipped with the necessary tools and training to deal with cyber gender abuse cases effectively. This includes understanding the psychological impact of online harassment and the technical expertise to trace and combat such crimes. There is a need to enhance digital literacy across all sections of society, particularly among women and marginalized groups. Educational programs that teach safe online practices, the importance of privacy, and how to report abuse can empower individuals to protect themselves in the digital world.

A broader cultural change is required to challenge and dismantle the patriarchal norms that contribute to the normalization of gender-based violence, both online and offline. This involves creating a societal environment that supports victims and holds perpetrators accountable. Social media companies and other technology platforms must take a more proactive role in preventing and addressing cyber gender abuse. This includes implementing stricter community guidelines, improving reporting mechanisms, and collaborating with law enforcement when necessary.

In conclusion, the battle against cyber gender abuse in India is one that requires coordinated efforts from all stakeholders, government, law enforcement, civil society, and the technology

sector. By acknowledging the problem and taking concrete steps to address it, India can move towards a future where the digital space is safe and inclusive for everyone. The path forward may be challenging, but it is crucial for ensuring that the rights and dignity of all individuals are upheld in the digital age.