ISSN-2583-2476

SHARDA UNIVERSITY
Beyond Boundaries

SHARDA LAW REVIEW

A DOUBLE BLIND BIANNUAL PEER REVIEWED JOURNAL

PUBLISHED BY

SHARDA SCHOOL OF LAW

SHARDA UNIVERSITY

GREATER NOIDA

UTTAR PRADESH

Vol.2| Issue: II| December 2022

FOREWORD MESSAGE

Law as a discipline of study has arrived and is subject of choice for last 10 years. Students have been seen preferring 5 years LL.B. course, particularly B.A. LL.B. and BB.A. LL.B. course. The third generation reforms in legal education mostly introduced through National Law Schools are available to only few percentage of the total number of students. Hence, Sharda University – School of Law (SSOL) is providing a great opportunity for the student to join the better opportunitythan the other Law Schools in India. Sharda University has made it possible of tremendous savings through both the courses of 5 years B.A. LL.B. and BB.A. LL.B. SUSOL is also offering LL.M. and Ph.D. courses and hence contributing to the nation through better research and learning facilities. We had the zeal that a people's version of National Law Universities could be contributed. We have to know how and convinced the Government to contribute resources whichthey provide for higher education.

It is duty of all stakeholders in the university or as a Professor or Law teacher that each one shoulddo one's bit, and say so or admit if one remains dissatisfied with the outcome. If you don't, you are conspiring to stall the growth of your institution and, as a result, of the whole society and nation.

How we can Contribute National Law Schools and other advanced Law schools should contribute to transference of legal knowledge to society. Law teachers, advocates and law students are not applying the 'clinically parroted' legal knowledge in their conduct or to situational realities. Mostly, they do not analyze impact of law teaching at all.

We are coming out with this journal done amateur way. We would do it in appropriate way soon.Anything doable or achievable on their part for the society is sorely missing. It is the job of the legal academics or the Bar Council of India regulating law schools in discharge of the responsibility of standards, but treating it as a power. This small mention should be sufficient to discerning. Aim of this journal is to bring home this discussion to the participants and to set a highbenchmark for the legal education. We wish best of luck to the publisher and looking forward fortheir future association.

Prof. (Dr.) Komal Vig
Dean, Sharda School of Law
Chief-Editor, Sharda Law Review

Sharda Law Review

ISSN: 2583-2476
A Double-Blind Biannual Peer Reviewed Online Journal

Sharda Law Review [SLR] is a double-blind biannual online peer-reviewed journal published by the Sharda School of Law - Sharda University, Greater Noida. The Journal consists of editorial advisors of the highest repute legal luminaries and dignitaries. The first edition of the journal was published in the month of August, 2021 and now this is the second edition of publication.

In the contemporary world of the knowledge society, understanding the legal dimensions of an individual's life constitutes the major crux and thrust of social science research. Against this backdrop, the Sharda Law Review (SLR) stands to serve as a mirror to all these conflicting currentsof Law & Society. It publishes research writings, book reviews and case-comments in the Socio- Legal field that seek to explain different aspects of individual in relation to their society, polity, economy, culture, and psychological well-being. The journal covers a wide variety of sub-fields in the area of social science research mainly focusing on the conflicting currents of socio-cultural- economic, psychological, and political aspects of human life in a contemporary globalized society.

The aim of Sharda Law Review is to avail platform to intellectuals and academicians for expression of their original ideas and creations whether in the form of Research Paper, Article, Case Comments or Book Reviews, etc. The journal is published twice in a year during the 6th and12th Month of every Calendar year.

Submission Guidelines

- Submissions are accepted only in the English language.
- All articles/papers must be accompanied by abstract not exceeding 300-500 words. Case Comments and Book Reviews do not need to be accompanied by abstracts.
- The abstract must expressly include the originality and usefulness of the idea that the author wishes to put forth and must categorically mention the specific contribution of the article beyond the existing available literature.
- Co-authorship (with no cap on authors) is permitted for all articles.
- The manuscript should not contain any reference to the identity of the authors. However, authors are allowed to cite their previous published works.
- The body of the manuscript should be in Times New Roman, Font Size 12, and 1.5-line spacing.
- The paper references should be in APA format.
- There must not be footnoting, only endnote/references.

- Content taken from online sources must be referred with the title/caption of the literature along with the name/s of authors following the APA style referencing of online-data base literature.
- The first page should be of Abstract wherein below the title of the paper, author/s name should be mentioned along with their institutional affiliation.
- At the end of the Abstract, there must be Key Words.
- Starting from introduction to conclusion & suggestions, each topic, sub-topics must be properly indexed without underling.
- Only the first letter of each words used for topic and sub-topics should be in Capital.
- Except the case-name, no content should be in italics.

How to Submit

(For the rolling submissions) Kindly send your manuscript in MS Word (.docx) without anyformatting like bordering and page numbering etc. to the email:

journal.law@sharda.ac.in.

The subject of the email should be "Submission for SLR Volume No…..Issue No… ..... "

The submissions can be sent anytime as SLR accepts manuscripts on a rolling basis. Manuscripts received after the submission deadline shall be considered for publication in the next edition/ issuesof the journal.

The submission should be accompanied by a Covering Letter, which must include the following details:

- Name of Author(s)
- Email:
- Contact No.
- Institutional Affiliations (if any)
- Academic Qualifications

In case of any queries, kindly drop an email to **journal.law@sharda.ac.in**

TERMS AND CONDITIONS:

Read Terms and Conditions Carefully

The following Terms and Conditions outline the rules and regulations for the use of our Journal/Website, SLR, products, and services offered by us, as it applies to all writers, publishers, students, teachers, and others who access or use this journal/website. Please read them carefully.

Access to or use of the "SLR" journal/website signifies your acceptance of the following terms and conditions. If you are accepting these terms on behalf of a journal entity, you hereby

represent that you have the authority to do so. If you do not agree to these terms and conditions, do not access or use the journal/website. Also, if a term does not make sense to you, please let us know by contacting us through support at journal.law@sharda.ac.in.

COPYRIGHTS

The contents and journal listed on this website are the intellectual property of SLR publishers and are protected by copyrights, trademarks, and/or other proprietary rights under state and international laws. The journal does not warrant any individual or organization the right to copy its content or trademarks. However, if you feel that our content is violating any copyright issues or intellectual property rights, you are free to contact us anytime. Furthermore, any individual or organization is not allowed to use the content for commercial purposes without prior permission of SLR.

SOFTWARE USAGE

The "SLR" website has been developed to comply with the needs of writers, publishers, teachers, researchers and students. The website offered at the moment is not for a particular duration and can be used for an indefinite time. SLR is for those users who wish to use the basic functionality of the journal or to use it for their own research purpose and make sure whether it is suitable for them or not, to their specific needs. Furthermore, stakeholders may opt for monthly or yearly subscriptions in the future, based on their individual needs.

REDISTRIBUTION

Only the SLR publisher is entitled to redistribution, under the condition that the service is not re- transformed or any amendments are made.

DISCLAIMER

The journal is provided on an "as is" basis. SLR makes no representations or warranties of any kind, express or implied, including without limitation any implied warranty or merchantability. It will not be liable for any consequential, indirect, or incidental damages related to the use of its journal/website. Without limitation, you assume sole responsibility for selecting the journal to achieve your intended results, use, and results obtained from the journal/website. The journal has employed its best efforts to ensure the accuracy of information provided to its stakeholders, to thevery best of its knowledge. There are chances of unintentional errors and omissions; however, the journal makes no warranty that the journal/website will be error-free or free from interruptions orother failures but welcomes you to report or suggest if you find any issue.

CHANGES TO THE POLICY

SLR publisher has all reserved rights to make changes in its user policies, as well as, in its journal/website at any given time with or without prior notification. We encourage you to periodically review our policy statements to stay up-to-date with any changes.

FROM EDITOR-IN-CHIEF……!

As we embark on another volume of our esteemed law journal, I am pleased to introduce this year's collection of insightful and thought-provoking articles where we delve into some of the most pressing legal issues of our time. The legal landscape is constantly evolving. Hence, it is crucial to have a forum that promotes intellectual discourse and encourages scholarly exchange. Our journal strives to provide a platform for rigorous academic research and practical commentary on important legal issues, and this year's volume is no exception.

The School of Law, Sharda University (SSOL) presents an excellent prospect for students seeking superior education in law compared to other law schools in India. Sharda University offers 5-year B.A. LL.B. and BB.A. LL.B. programs. Additionally, SUSOL provides LL.M. and Ph.D. courses, promoting enhanced research and learning opportunities, which contribute to the country's progress.

The articles in this journal offer a diverse range of perspectives on topics that are relevant to both the legal profession and society at large. They cover a wide range of legal areas, including corporate law, intellectual property, criminal law, human rights, and international law, among others.

The contributions from the authors, who are leading legal scholars, practitioners, and experts, provide thought-provoking discussions on current issues, debates, and emerging trends in the legal arena. Their thoughtful analyses provide valuable insights into the latest legal developments and offer fresh perspectives on the application of legal principles.

I hope that this edition of the journal will stimulate discussion and encourage debate on the various topics covered. I believe that it will be a valuable resource for students, academics, and practitioners alike who seek to engage with the legal issues of our time. I encourage readers to engage with the ideas presented in these pages and to continue the important conversations that our authors have started. It is through this kind of dialogue that we can advance the law and ensure that it serves the needs of society in a just and equitable manner.

Finally, I would like to express my gratitude to the authors for their valuable contributions and to the editorial team for their tireless effort in bringing this edition to fruition. I hope that you find this journal informative and engaging and that it inspires further research and exploration into the fascinating world of law. We look forward to your feedback, and to the continued growth and development of our legal community.

Prof. (Dr.) Komal Vig
Editor-in-Chief,
Sharda Law Review

CHIEF PATRONS

Hon'ble Shri P.K. Gupta
Chancellor, Sharda University

Hon'ble Shri Y. K. Gupta
Pro-Chancellor, Sharda University

Mr. Prashant Gupta
Executive Director

PATRONS

Prof. Sibaram Khara
Vice-Chancellor, Sharda University

Prof. P.K. Malhotra
Former Law Secretary, Union Ministry of Law & Justice, New Delhi

EDITORIAL BOARD

Editor-in-Chief:
Prof. (Dr.) Komal Vig
Dean, Sharda School of Law, Sharda University

EDITORS

MANAGING EDITOR

ASSISTANT EDITOR

DIGITAL EDITOR

S.NO.	ADVISORY BOARD		Contact Details
1.	**Hon'ble Mr. Justice Dipak Misra**	45th Chief Justice of India	justicedmisra@gmail.com
2.	**Prof. S.K. Bhatnagar**	Vice-chancellor, Vice-Chancellor – RMLNLU	vc@rmlnlu.ac.in
3.	**Prof. Manoj Kr Sinha**	Director, Indian Law Institute, New Delhi	manojkumarsinha5@gmail.com
4.	**Prof. Balraj Chauhan**	Former Vice-Chancellor, Dharmashastra National Law University	vc@mpdnlu.ac.in
5.	**Dr. Viney Kapoor Mehra**	Former Vice-Chancellor, National Law University, Sonepat.	vc.dbranlurai@gmail.com; vineykapoor2002@yahoo.co.in
6.	**Prof. S. C. Srivastava**	Secretary-General at National Labour Law Association, India, Former Director, Institute of Legal Relations and Personnel Management, New Delhi, Former Professor & Dean, Indian Law Institute University and Kurukshetra University	sc2003srivastava@yahoo.co.in

SHARDA LAW REVIEW

[ISSN 2583-2476]

Sharda Law Review is an online double blind biannual peer-reviewed research publication published by the Sharda School of Law, Sharda University, Greater Noida. This publication is anhonest effort to serve as a medium for the promotion and circulation of original or/and views, ideasor research on contemporary legal issues among members of the legal profession such as academicians, scholars, researchers or students. The Sharda Law Review aims at legal research centres, policymakers and government organizations. The views expressed in this publication arethose of the authors and not necessarily those of the Editorial Board of the Law Review.

CONTENTS

103rd Constitutional Amendment: A Low Blow to Social Justice

Ilampari. M*
Varsha. M**
Hemeena Wise Christy. M.H***

Abstract:

India has a long standing history of intra national oppression. This oppression on certain community of people has resulted in them being educationally and socially backward. To bring about the change in this, and for the purpose for correcting the past injustice, Reservation- An Affirmative State Action was introduced in our Constitution. It is fair to say that it has been effective in uplifting the downtrodden and providing opportunities to the oppressed. It aims to level the playing field for the oppressed community. But, in recent times, in the disguise of affirmative state action, there is a certain policy by government which tries to re-route the benefit of reservation to the undeserved. The policy is none other than 103rd Constitutional Amendment which seeks to provide for economy based reservation. This amendment aims to provide reservation based on the economic status of people rather than their social and educational backwardness. The amendment when first introduced has caused a huge uproar and consequently was challenged in the apex court. To the surprise of everyone, the amendment was upheld by the supreme court.

In this article, we are going to discuss reservation in general, constitutional validity of economy based reservation, implications created by such a kind of reservation and what is it that can be done to protect the genuinely oppressed communities. This article also provides specific contributions towards citing the issues in upholding the EWS scheme. This article is made on doctrinal research methodology with the help of textbooks, articles, statutes, constitutional debates, case laws, journals, etc.

Keywords: Constitution, Reservation, Parliament, Injustice, EWS

I. Introduction

India is a country with a murky past. The country has been divided by various factors like religion, language, caste, creed etc. The oppression of certain communities in various fields of society was persistent on the basis of caste. Even to this day, we can see that several atrocities have been committed against the so-called "lower caste". The need was felt to uplift the downtrodden sect of society and provide them an equal opportunity with that of the privileged. So, affirmative state action was taken in the form of reservation, to provide an opportunity to the socially and

* LL.M, Dr.Ambedkar Law University, Tamilnadu
** LL.M, Dr.Ambedkar Law University, Tamilnadu
*** LL.M, Dr.Ambedkar Law University, Tamilnadu

educationally backward class of people in matters of admissions in educational institutions and in matters of public employment.

II. Historical Background for Reservation Policy In India

As originally enacted, the Constitution of India didn't have the provisions dealing with reservation. It was brought in by the 1st amendment act in the year 1951. The amendment was brought in to negate the judgment rendered in the case of *ChampakamDorairajan v. State of Madras*[1]. In that case, The government of Madras has issued a G.O allotting seats in medical college community wise. This order was held unconstitutional for classifying the students solely on the basis of caste, instead of merit. Moreover, it was held that the order is invalid because, Art.15 of the constitution, doesn't have a provision similar to that of Art.16(4) which enables the state to make special provision for reservation in the matter of employment in favour of backward class citizens.[2]

So, now to overcome this judgment, a constitutional amendment was made. This amendment enabled the government to make special provision for the advancement of any socially and educationally backward class of citizen or for scheduled caste and scheduled tribes.

III. Scheme of Reservation

Presently, we follow the scheme of reservation pronounced in the case of *Indra Sawhney v. Union of India*[3], where it was held that, the total percentage of reservation should not go over 50%. This is also the case, where the concept of Creamy Layer has originated. The creamy layer was created to prevent the more privileged section of the backward classes from enjoying the fruit of reservation. Central government tend to fix a ceiling limit on income which will be considered a creamy layer.

But, the restriction on quantum of reservation is not followed in all the states for instance, Tamil Nādu provides for 69% reservation which is over the limit mentioned in *Indra Sawhney.* This was made possible by placing the Government's act providing reservation in the Ninth-Schedule, so that it cannot be challenged before any court.

This scheme of reservation was further extended to private educational institutions whether aided or unaided by the state, other than the minority educational institutions referred to in Art.30(1). Again, this was introduced via amendment act of 2005 to override the judiciary's decision in the case of *T.M. Pai v. State of Karnataka*[4]where it was held that the state cannot implement the reservation policy in private run institutions.

[1] 1951 SCR 525
[2] M.P. Jain, Indian Constitutional Law with Constitutional Documents 1306(Kamal Law House, Volume 1, 6th Edition)
[3] AIR 1993 SC 477
[4] AIR 1993 4 SCC 276

Currently, after the 103rd constitutional amendment, which paved the way for 10% reservation to economically weaker sections. The scheme stands at 27% for OBC, 15% for SC , 7.5% for ST and 10% for economically weaker sections.

IV. Economy Based Reservation

The Constitution (one hundred and third amendment) act was passed in 2019. This provided for 10% reservation to economically weaker sections in the matters of admission in central government run educational institutions and for the matter of employment in central government jobs. The amendment act introduced a new clause under Art.15 and 16, which enables the state to make a special provision for the advancement of economically weaker sections of citizens who are excluded from 15(4) and 15(5). The amendment act also provides that the scope of term for the economically weaker section has to be fixed by the state on the basis of family income and other economic disadvantages.[5] The ceiling fixed under this EWS scheme is independent of existing reservation. This amendment act was challenged in the case of *JanhitAbhiyan v. Union of India* where it was challenged on various grounds. But the Supreme Court on 3-2 majority held that the amendment act was constitutionally valid.

V. Issues In Economy Based Reservation

There are several blatant issues in this economy based reservation and subsequently the apex court's judgment that followed it. They are

(i) Arbitrary Ceiling Limit:

Apparently, the aim of this economy based reservation is to provide opportunity to economically disadvantaged class of citizens who don't belong to SC,ST and OBC. Since they are supposed to be an economically disadvantaged group, the criteria on who will fall under such a category should also reflect the same. But that is not the case here. The criteria fixed for EWS coverage is baffling. As per the memorandum released by the Government, If a person does not fall under SC, ST & OBC and his gross annual income is below Rs.8 lakh, then such person will be eligible to claim benefit under EWS reservation. Apart from this, the order also provides certain things which when possessed by a person, will make him ineligible for availing EWS reservation. Those criteria are as follows:

i. 5 acres of agriculture land or above
ii. Residential flat of 1000 Sq. Ft and above
iii. Residential Plot of 200 Sq. yards and above
iv. Residential plot of 200 Sq. yards and above in areas other than the notified municipalities.

So, under this scheme a person who owns 4 acres of land, and has an annual income of Rs.7 lakh will be considered as a person belonging to the economically weaker section. It must be noted that

[5] The Constitution (One Hundred and Third Amendment)Act, 2019, Art. 2

the government has not conducted any study whatsoever to arrive at these numbers. It was basically the numbers they pulled out of thin air. This arbitrary fixation of the ceiling becomes much more absurd when we consider the fact that the ceiling limit for various other schemes to help the economically weaker section is much lower than the ceiling set for this reservation scheme.

(ii) Exclusion of other communities

The very object of the reservation is to provide opportunity to the backward class. But the term backward class has not been defined anywhere in the constitution. This was even deliberated in the constitutional debates. It was even suggested to remove the term 'Backward' from Art.10 (currently Art.16) altogether, so that the state can provide reservation based on necessity that arises from time to time. But this was vehemently opposed by Shri Chandrika Ram, who opined that those who think that there is no backward class in the society is blind to the history of facts in our country.[6] It is indeed true because most of the higher posts in all spheres are occupied by the privileged communities. But this concept of EWS aims to eliminate the already established socially and educationally backward communities from the purview of economically weaker sections.

It makes the scheme look like it is basically built on the premise that the economically weaker section of people only belong to the communities other than SC,ST and OBC. But that is simply not the case. Even in *Indra Sawhney,* it was held that the Government Order providing 10% reservation to economically weaker sections excluding those who fall under other schemes of reservation is constitutionally invalid because it discriminates against the people from other communities from the opportunity on the basis of their income or economic status.[7] So it is fair to conclude that there is no reason to exclude other communities from the purview of the EWS scheme, if the intention is really to provide reservation to economically weaker sections of society.

(iii) Using economy as sole determining factor

From analysing various judicial pronouncements since the advent of the constitution, we can find that the very purpose of the reservation is to provide equal opportunity to the socially and educationally backward classes. In the case of *M.R. Balaji v. State of Mysore*[8]*It* was observed that in Indian society, there were other classes of citizens who were equally or maybe somewhat less, backward than the scheduled caste and scheduled tribes and it was thought that some special provision ought to be made even for them. Similarly, in the case of *Janki Prasad Parimoo v. State of Jammu and Kashmir*[9]*It* was held that poverty alone cannot be the sole basis for considering backwardness in India. This is because if poverty is considered, then a large section of the population will fall under the backward category and the whole object of the reservation will be frustrated.

[6] Constitutional Assembly Debate, Volume VII, 30th November ,1948
[7] Durga Das Basu, Constitution of India 1807 (Wadhwa Nagpur, volume 2, 8th Edition)
[8] AIR 1963 SC 469
[9] AIR 1973 SC 930

Further in the case of *K.S. Jayashree v. State of Kerala*[10], where the government order excluded people belonging to socially and educationally backward class from claiming reservation if the annual family income exceeds Rs.10,000 is challenged, it was held that social backwardness is the result of caste and poverty and thus poverty or economic standards is only a relevant consideration in determining backwardness but cannot be a sole criteria. This was reiterated in the case of *State of Uttar Pradesh v. Pradip Tandon*[11], where it was held that poverty is widespread in India and if it is taken as an exclusive test then it would mean that a large population in India will be held backward. In the case of *Janaki Prasad v. State of Jammu and Kashmir*[12]*The* court went one step further and held that classification based on economic backwardness will amount to formation of artificial groups.

(iv) Against the Social Reality

The supporters and beneficiaries of the present EWS reservation are generally those sections of people who used to take a stand against the reservation. They have always felt that the perpetuity of reservation is one of the major issues and the reservation is not necessary anymore as the socially and educationally backward classes are not in fact backward anymore. But this cannot be farther from the truth. Even if a person belonging to the backward caste makes his way to a respectable position, he is still made a victim of caste discrimination. There are various instances to support this claim. For instance, recently it came into light that the employees of silicon valley, California were subjected to caste discrimination. 30 women Dalit engineers from Silicon Valley allege that they routinely face caste discrimination. In their letter, the women have urged the American companies to adopt caste as a protected category to eradicate caste-based discrimination in the US tech industry.[13] It was also alleged that the Indian Managers in these companies used to make jokes about the reservation practice in India. This shows how the person cannot escape the evil of caste even if he goes abroad and gets himself a high paying job.

(v) Violates the ceiling Limit

As discussed earlier, *the Indra Sawhney* case has fixed the ceiling limit for reservation at 50%. But now EWS strives to provide an additional 10% to the existing reservations. So , now states like Andhra Pradesh, Assam, Bihar, Chattisgarh etc have gone beyond the fixed ceiling limit of 50%. For some states like Tamil Nadu, the percentage of reservation will skyrocket to new height if another 10% of reservation is added to the existing 69%. Moreover, there is also a possibility for some states to alter the amount of reservation given to OBC to accommodate the reservation for EWS. This violation of ceiling limit could also be considered as the violation of basic structure.

[10] AIR 1976 SC 2381
[11] AIR 1975 SC 563
[12] AIR 1973 SC 930
[13] *Explosive report reveals caste discrimination in Silicon Valley, 30 Dalit engineers call out Indian bosses* https://www.indiatoday.in/technology/news/story/explosive-report-reveals-caste-discrimination-in-silicon-valley-30-dalit-engineers-call-out-indian-bosses-1735792-2020-10-28 (Last accessed on 12.12.22)

VI. Constitutionality Of EWS Reservation

So, as foreseen by everyone since the amendment was made to the constitution, the 103rd amendment Act's constitutionality was challenged before the Supreme Court. The supreme court has upheld the constitutionality of the amendment on the ratio of 3-2. But there are several criticisms which can be laid against this decision of the Apex Court. They are:

(i) Economy cannot be sole criterion

On the point whether economy can be sole criterion for providing reservation, the five bench court has unanimously held in affirmative. The court has cited that the directive principles of State Policies has put an obligation on the state to address economic inequalities. It is granted that the state should strive to put an end to economic inequality, but using reservation for that purpose is not a ideal way of doing it. Because, as we have seen earlier, the purpose of reservation is to be against discrimination and not against depravation. The economically weaker section to whom this reservation serves for is always on the highest plane of the society irrespective of their financial status. So , it is unfair to take economy as a sole criteria to provide reservation.

(ii) Exclusion of SEBC cannot be considered proper

On the ratio of 3-2, the court has agreed that exclusion of SEBC from the purview of EWS is fair as it targets specific group to provide benefits. It was also said that if EWS is extended to SEBC, it will result in extra and excessive advantage. But this is absurd when the whole objective of EWS is to eliminate the economic inequality and uplift the depraved. So, if the objective is to be achieved then the economically weaker section from all the community should be considered for reservation , not just the class of society which is already socially and educationally forward.

(iii) Violating Indra Sawhney's Ceiling Limit

Moreover, this judgement ostensibly allows for the violation of limit set by Indra Sawhney case. This will set a very bad precedent and might lead to more kinds of reservation targeting various specific sections of society. Moreover, the purpose of the ceiling limit is to make sure that the reservation doesn't go over and above the meritorious admission. But if EWS is allowed, it will outweigh the admission based on merit.

(iv) Lack of data to support the claim

The supreme court has upheld the validity of this amendment without scrutinizing on what basis the income limit, ceiling limit and target group were fixed. It must also be noted , in a similar reservation issue recently, the lack of data has played a huge role. In the case of *Pattali Makkal Katchi v. Mayilerumperumal*[14], the act of Tamandu's state government in providing 10.5% reservation for Vanniyar community within the Most Backward Class was challenged. In this case,

[14] 2022 SCC Online SC 386

the court held that such reservation was invalid. The decision was taken on the ground that the data submitted by the government to support the internal reservation is inadequate and doesn't necessarily prove that the vanniyar community is unable to compete with the remaining MBCs and other denotified Caste. The court also emphasized on the fact that unlike other 115 MBC communities, Vanniyars saw higher representation in public employment and educational Institutions.

This same reasoning can be applied to an extent with respect to EWS. The court should have scrutinized whether there was any specific data to support the claim that people who are excluded from the existing reservation deserves a reservation based on economic criteria which is again fixed arbitrarily.

VII. Conclusion

After going through all the issues involved in providing Economy based reservation, we can see that it attacks the very base of the social justice and the purpose of reservation. On one hand, it backhands the luxury of reservation to an already socially and educationally forward community and on the other hand it reduce the space available for merit based admissions. The absurdity of the economy based reservation can be explained with a simple analogy. Caste discrimination in India can be compared to the racial discrimination United States. They too had a form of affirmative action and in the case of *Regents of University of California v. Bakke*[15] it was held that racial quotas are illegal but race can be used as a factor in admission for the purpose of establishing a diverse student body. Now, if this kind of privilege is allowed for the white students who are of economically weaker background, it will be unfair as the whole purpose of providing affirmative action is to promote diversity based on race but not based on economic status.[16]

This is what exactly happening in India at present. The affirmative action which was introduced to benefit the backward class as a way of comeuppance for past injustice, has now been usurped by the very community which has committed those injustice and oppressed the backward societies in the past. Schemes like these and Judgments like these are a direct attack on the constitution and if left unchecked will cause an irreparable amount of damage to the society in no time.

[15] 438 U.S. 265(1978),

[16] M. Varn Chandola, " State Action in India and United States: The Untouchable and Black Experience" Vol.3,Indian International Law and Comparative Law Review,112

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

A Critical Analysis of The Liability For Necrophilia Under The Indian Legal System

Nidhi D Murthy*

Abstract

The criminal system of India has been evolving over time to adapt to new changes in accordance to the crimes in the country. But necrophilia is one such crime that has not yet been addressed or defined by the Indian statutes. Necrophilia is the fascination to engage in sexual intercourse with a corpse and this may or may not be a result of psychological conditions or unsoundness. Through this research paper, the author attempts to critically analyse the laws present in India to address the issue of necrophilia with the help of secondary sources by going through statutes governing necrophilia and related crimes such as the Indian Penal Code. The purpose of this research paper is to critically analyse the laws in India to address the issue of necrophilia, its efficiency, adequacy and effectiveness in delivering justice. Furthermore, the author also attempts to analyse the development of laws within the legal system of India with respect to inclusion of acts that are part of necrophilia by examining and understanding various cases of necrophilia in the past to determine their psychological, societal and legal impacts. Through detailed research, it has been found that the laws present in the country are inadequate and indefinite to punish necrophilia. The dearth of laws to govern a crime like necrophilia gives scope for the perpetrators to escape the liability by taking excuse of the loopholes in the currents laws that punish the act of necrophilia. The rising cases of necrophilia accompanied by the dearth of laws to punish the act make it necessary to demand for conclusive laws to deal with necrophilia.

Keywords – Necrophilia, Indian Penal Code, Legal impacts, Criminal system, Justice.

I. Introduction

The term Necrophilia is used to describe the morbid fascination of an individual toward dead or deceased people which is usually accompanied by a strong sense of desire to voluntarily partake in sexual intercourse with the corpse of the dead person with the intention to achieve sexual gratification and longing. Necrophilia is a kind of paraphilia which involves sexual attraction to inanimate objects and activities, non-consenting adults, children or arousal from the sufferings and humiliation of oneself or one's partner that has the potential to cause harm either physically or psychologically. The term Necrophilia, which was introduced by the Belgium physician Joseph Guislain, finds its roots in the terms 'nekrós' meaning dead and 'philia' meaning attraction, used to denote the sexual attraction of an individual to engage in intercourse with the dead. It is often described as a psychological disorder and is not restricted to mere sexual attraction. Necrophilia can be of various types, including sexual attraction toward a corpse, of a romantic nature, a sadistic nature, etc. Necrophilia is often associated

* Nidhi D Murthy, Second year law student; BBA.LLB (Hons.), School of Law, Christ (Deemed to be University), Bangalore

with the psychological condition of denial of acceptance of the death of a deceased, usually, a loved one, which results in an individual preserving the body by the way of mummification in order to live in the belief of survival, presence and longing.

In order to address a prevalent issue and impose punishments for a crime, it is important to understand the intention and reason for the occurrence of such an act. Necrophilia is the result of an individual's low self-esteem and the irrational fear of rejection which inspires them to engage in intercourse with a corpse as a dead body cannot offer any kind of resistance or rejection and is often viewed as physically and emotionally non-threatening and would naturally submit to the necrophile. Poor esteem that a necrophile develops either due to the loss of a loved one or due to the external conditions to which he/ she has been exposed results in developing an urge to engage in sexual intercourse with a corpse in order to exert dominance and overcome the grief of the loss of a loved one by convincing oneself of the deceased still being alive in the mummified corpse[1]. Necrophilia varies from delusional romantic engagement with a corpse to sexual obsession depending on the intensity of loss experienced by the necrophile or the psychological condition the individual has developed as a result of the said loss. Necrophiliacs are classified into ten different categories ranging from fantasizing necrophiliacs who merely fantasize about necrophilia but do not engage in intercourse with a corpse, to regular necrophiliacs who prefer to have intercourse with a corpse, to homicidal necrophiliacs who commit murder to satisfy their needs of intercourse with the dead.

Despite the disturbing and appalling incidents of necrophilia in the past, there have not been laws devised to address the problem of necrophilia. Several countries do not consider necrophilia as an offence under their respective criminal justice system which adds to the problem of imposing sanctions on the offenders of a dreadful crime like necrophilia. Necrophilia, as a crime and psychological condition, affects not just the society but also one's individual rights as a deceased. Necrophilia is considered to be a rare occurrence and this infrequency in occurrence could be attributed as one of the major reasons for the act of necrophilia not being given much importance in the criminal justice system to impose sanctions on the offenders. Actual necrophilia is said to be a rare occurrence whereas pseudo necrophilia is more frequent[2]. Currently, the prevalence of necrophilia is ranging from 0-5% of the total population; out of which 92% were male and only 8% were female[3]. Most cases of necrophilia were found to be prevalent in people who had occupational access to corpses, such as cemetery employees, morgue attendants, etc. which added to the exposure and fantasy of sexual attraction and role-play with a corpse. Exposure and easy access to dead bodies has been one of the major reasons for necrophiliacs to develop an intense urge to engage in sexual intercourse with the dead. However, despite the disturbing occurrences of necrophilia, no definite laws have been formed to address this issue in India.

[1] Kumar P., Rathee S., & Gupta R. "Necrophilia: An Understanding" 7 *The International Journal of Indian Psychology* (2019).
[2] Tyler T. Ochoa & Christine Jones, "Defiling the Dead: Necrophilia and the Law" 18 *Whittier L. Rev*. 539 (1997).
[3] J. Rosman & P. Resnick, "Sexual attraction to corpses: A psychiatric review of necrophilia" *The Bulletin of the American Academy of Psychiatry and the Law* (1989).

II. Laws Related to Necrophilia in India

As an offence, Necrophilia often goes unnoticed in several countries. Only a few countries recognise necrophilia as a punishable offence. For example, Countries like the UK impose 2-year imprisonment on offenders of necrophilia[4] and South Africa has laws governing the act of necrophilia, making it a punishable offence[5]. New Zealand imposes a strict 2 years imprisonment for any offender who engages in the misconduct of human remains by committing an act that causes harm to the dignity of a dead person, whether buried or not[6], whereas Canada imposes a punishment of not more than 5 years for a person guilty to inflicting harm to the dignity of the dead[7]. Whereas in countries like the USA, there is an absence of federal laws that recognize necrophilia as a punishable offence. However, some states in the US, such as Washington and Nevada treat necrophilia as a felony.

Necrophilia is not considered an offence in itself under the Indian criminal system. There are no exclusive and definite laws that classify the act of necrophilia as a crime. However, an individual engaging in necrophilism is often charged under different sections of the Indian Penal Code, 1860. The Indian laws are also silent on the legal status of a dead person. It does not clarify whether an individual can be considered as a legal person after death. The maxim, 'Action personalis moritur cum persona' states that the personal right to an action dies with the death of a man which means that a person ceases to have any legal rights, duties or legal personality upon death. A dead person under the Indian law becomes devoid of the rights and duties conferred upon him/her by the Constitution as Fundamental rights. Salmond's concept of life, death, and the rights of an individual, states that a person acquires rights and duties upon birth and surrenders the same upon death. The personality of a person ceases to exist upon death. A dead man is not viewed as a person in the eyes of law. Only persons, including human and non-human entities, having rights and duties are said to be legal persons. A dead person neither has rights nor duties. Upon death, a person becomes devoid of his legal rights and duties. They cannot be said to possess rights as the interest to advocate these rights are absent in dead persons[8]. However, Salmond mentions three things which are considered as exceptions to the maxim of action personalis moritur cum persona, that extend beyond death, namely the rights of – reputation, will and a decent burial[9].

The rights of a dead person, although not defined explicitly in the Constitution, are interpreted by the Courts in various cases as part of Article 21. Article 21 states that "No person shall be deprived of his life or personal liberty except according to procedure established by Law[10]." In the case of *Parmanand Katara v. Union of India*[11], it was held by the Supreme Court that Article 21 which recognises and guarantees the right to life, fair treatment, and dignity extends to a human beyond death as well. Every person has the right to be treated with dignity even after death; this includes the right to die in a dignified manner, the right to a dignified burial,

[4] Sexual Offences Act, 2003 (2003 c. 42), s. 70.
[5] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), s. 14.
[6] Crimes Act, 1961 (Act No. 43 of 1961), s. 150.
[7] Criminal Code of Canada, 1985 (RSC 1985, c C-46), s. 182.
[8] V.D.Mahajan, *Jurisprudence and Legal Theory* 380-38 (Eastern Book Company, Lucknow, 5th edn., 1993).
[9] Salmond, Jurisprudence (12th Ed.), p.301.
[10] The Constitution of India.
[11] Parmanand Katara vs. Union of India, (1989) AIR SC 2039.

etc. In the case of *Ashray Adhikar Abhiyan vs. Union of India*[12], the Supreme Court stressed on the importance of treating the dead with dignity and stated that a homeless or unidentified person also has the right to a decent burial in accordance with the religious faith he/she belonged to. In the case of *Ramji Singh and Mujeeb Bhai vs. State of U.P*[13], it was held by the Court that the rights under Article 21 extended to dead persons as well and they are to be treated with the same respect and dignity they would be treated with had they been alive. These cases laid down the right to a decent burial and protection of the dignity of the dead.

Section 297 of the India Penal Code protects the rights of the dead by providing them with the right against trespass of burial sites, places of funeral rites, etc. This guarantees the protection of the dignity to the dead as well as ensures their right of dignified burial and funeral. Trespassing of burial or funeral sites and cemeteries with the intention to cause disturbance is punishable with imprisonment of a term of up to 1 year and/or a fine. If a person digs up a graveyard and removes the buried corpse to engage in sexual intercourse with the corpse or inflict any harm to the corpse buried will constitute trespass to burial sites under Section 297 of the IPC. In cases where there is no trespass to obtain a corpse, this section would not apply. A morgue attendant or a security guard who engages in necrophilia with a corpse in the morgue would not be charged under Section 297 even if they are caught because the pre-requisite for this section to apply is the necessity for the dead body to be buried and the perpetrator committing trespass to gain access to the corpse. This section does not apply even in cases where the body is stranded or unidentified and thus not buried. This section does not treat bodily injury to the corpse as a sufficient ground to be convicted for trespass to the burial site and/or sexual assault on a corpse restricting the scope of this section to only cases of trespass to funeral sites.

Section 377 of the Indian Penal Code makes voluntary intercourse against the order of nature with a man, woman and an animal a punishable offence[14]. This Section considers only voluntary sexual intercourse with a man, woman or an animal and the same is subject to interpretation. The law defines a person as a human being or a non-human being who has certain legal rights and duties. The Indian laws are silent on the status of a dead person, whether they have legal rights or not to be considered as a 'person' according to the law. A dead person is not a 'living' person or entity anymore and thus cannot be included in a 'man, woman or an animal' since they are limited to living beings. Voluntary intercourse is also subject to criticism as unequivocal consent from both parties is necessary to constitute a voluntary act. In the cases of necrophilia, the perpetrator may or may not consent, but the dead person's consent is assumed to be absent since a dead person cannot give or withhold consent. The act of necrophilia is also considered to be against the order of nature as it does not result in procreation and is limited to sexual pleasure and intercourse. Section 377 was partly decriminalized in the case of *Navtej Singh Johar v. Union of India*[15] in which consensual homosexual intercourse was decriminalized. This section remains in force with respect to the rest of the section which deals with unnatural sexual intercourse and bestiality. This section is however the last resort to

[12] Ashray Adhikar Abhiyan vs. Union of India, (2002) 2 SCC 27.
[13] Ramji Singh and Mujeeb Bhai vs. State of U.P, (2009) 5 ALJ 376.
[14] The Indian Penal Code, 1860.
[15] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

punish the offenders of necrophilia as there are no conclusive and definite laws present to deal with sexual assault against a dead person.

Sexual intercourse with a dead person does not constitute rape according to the criminal justice system laws. For a person to be convicted of the offence of rape, there are certain conditions that need to be fulfilled. Firstly, the elements of the absence of 'will' and 'consent' are considered important to consider any sexual intercourse as rape. According to Section 375[16], for a sexual intercourse to be considered as rape, it is important for it to be against the will and the consent of the woman is subject to the assault. It is important for the victim of rape to prove unsoundness of mind, intoxication, mistake of identity or expressly exhibit reluctance to engage in sexual intercourse for such an act to constitute the offence of rape, none of which is possible in case of a dead body. Consent is considered significant only when one has the capacity to withhold it[17]. A dead person is incapable of giving consent or expressing the will to engage in sexual intercourse. The question of 'Consent' becomes prominent in cases of necrophilia. When a person does not want to engage in intercourse with another, they have the right and capacity to withhold consent and refrain from continuing with the act of intercourse against their will. And despite this, if they are being forced or coerced into sexual intercourse, it constitutes rape. A living person's consent is mindful and willing and they are assumed to have the knowledge of what they undergo. The same cannot be said about a dead person. A dead person does not have the capacity to withhold or provide consent and hence cannot consent to the things it undergoes. Section 377 covers acts that are voluntary in nature. If sexual assault of the dead is considered an involuntary act then it removes the act from the ambit of section 377 as it would then constitute rape under section 375. Furthermore, sex with a dead, non-consenting spouse or partner can be considered a form of domestic rape which has not been addressed as a form of domestic rape or abuse under Indian laws[18]. But rape is considered as be offence against living human beings and the dead are not considered persons under section 375 as people become quasi-subjects before the law upon death. This makes it difficult to determine which section to punish the perpetrators of necrophilia. Secondly, the Indian Penal Code, 1860 recognizes rape committed by a 'man' on a woman. If the perpetrator of necrophilia is a woman, then this section does not apply as it covers acts of sexual assault done only by a man against a woman.

Section 377 expressly states 'voluntary carnal intercourse against the order of nature' to be a punishable offence. In the case of *Kamal v. State*[19], the court defined carnal intercourse against the order of nature and stated three essentials which are subject to the requirement for an act to constitute carnal intercourse, namely – It must have to do with flesh and sensuality, presence of two individuals not restricted to human-human intercourse, and lastly, it must involve penetration other than penile-vaginal penetration since it refers to unnatural acts. Only if these three requirements are fulfilled, the act would be considered as carnal intercourse against the order of nature. This section makes it essential for at least some slight penetration to the body.

[16] The Indian Penal Code, 1860.
[17] Wisnewski, J. Jeremy, "When the Dead Do Not Consent: A Defense of Non-Consensual Organ Use*."* 22 *Public Affairs Quarterly* (2008).
[18] Supra note 1 at 609.
[19] Kamal v. State, CRL.A. 37/2020.

In the case of necrophilia, if there is no penetration and mere sexual engagement with the corpse, such as masturbation in the presence of the dead body, etc., then such an act would not be considered as carnal intercourse which would not be subject to punishment under Section 377. The scope of carnal intercourse has been expanded by the Courts in the recent times which make it possible to include acts of necrophilia to be covered under carnal intercourse against the order of nature. Only carnal intercourse with a corpse is punishable under Section 377 and there is no provision or section in the Indian Penal Code that punishes general abuse of a corpse and acts of sexual abuse not involving carnal intercourse or penetration.

Section 376[20] provides the punishment for rape as a sentence of imprisonment for a term no less than ten years which could be extended to life imprisonment depending on the grievousness of the offence. The current Section under which necrophiliacs are punished under is Section 377 which imposes a punishment for a term which may be extended to ten years or life imprisonment. Under the Indian laws, necrophiliac perpetrators are likely to be sentenced to imprisonment for a term less than ten years under Section 377 whereas the punishment for rape under Section 375 is a minimum of ten years, irrespective of the fact that the act committed in both the situations are the same with the only difference being the state of 'existence' of the person. In both cases, there is harm inflicted upon the dignity of a person which is a violation of the fundamental right to protection of life and dignity guaranteed by Article 21 of the Indian Constitution. The punishment for trespass to burial sites under Section 297 is an imprisonment for a term of 1 year and a fine. But the punishment for necrophilia is comparatively less considering the nature of the offence. The Indian Penal Code is silent on the right of a dead person against a sexual assault which leaves scope for the perpetrators to take the defence of the act not constituting the offence of rape. A person who engages in non-penetrative sexual assault of a dead body that has not been buried or dug out of the grave through trespass to burial sites is not likely to be punished under either section 297 or section 377 as the essentials under both sections are not fulfilled. Such an offender would be acquitted irrespective of the kind of act committed due to the lacuna in the laws to deal with the sexual assault of a corpse in India.

III. Prominent cases of necrophilia

One of the very first cases of necrophilia reported was that of Sergeant François Bertrand. Infamously known as the Vampire of Montparnasse, he served as a sergeant in the French Army. He admitted to having exhumed and dismembered several corpses that were buried in the cemetery to derive sexual pleasure after which he was sentenced to 1-year imprisonment. Bertrand's confession prompted Joseph Guislain to coin the term 'necrophilia' which was later discussed by several theorists.

Necrophilia may be a result of psychological conditions developed over a period of time due to exposure to certain undesirable incidents[21]. One of the most astonishing cases related to necrophilia is that of Ted Bundy. He was a well-known serial killer, kidnapper and necrophiliac. Ted Bundy confessed to having brutally raped and killed women and once they

[20] The Indian Penal Code, 1860.
[21] Aggrawal, A, "A new classification of necrophilia" 16(6) *Journal of forensic and legal medicine*, (2009).

were dead, he spent time with their corpses by decapitating them, washing their hair, dressing them up and then having sexual intercourse with their corpses. He also admitted that once he killed his victims and sexually assaulted them, he kept their body parts including provocative and sexualized photos and severed heads as souvenirs to serve as a memory. Ted Bundy's series of murders and necrophilia were said to be a result of his longing for sexual and emotional intimacy with the victims due to the idealization of his past relationship with Diane Edwards in 1973. Several theories suggest that he could not face the emotional breakdown after his relationship fell apart which was also the cause for his choosing his victims and limiting his preference for interaction with women similar to Diane's appearance. He admitted to having faced remorse and rejection from Diane and their relationship due to which he developed feelings of revenge. Necrophilia gave him the power to exercise his freedom and power over the dead bodies without the fear of rejection or remorse, which suggested the patterns for motivation to engage in necrophilia formed in his mind in order to achieve emotional and sexual intimacy.

One of the most famous cases of homicidal necrophiliacs is the case of Jeffery Dahmer. Dahmer was known as a paedophile, cannibal and necrophiliac. Fascinated by the dead since his childhood, Dahmer used to cut open animals to examine their insides and on his 18th birthday, he celebrated by committing a murder by bludgeoning a man to death using a sledgehammer. Dahmer preserved the bodies of his victims after murdering them to engage in cannibalism. He dismembered 17 people in a span of 13 years between 1978 and 1991. He would sexually assault his victims once they died and kept parts of their bodies as souvenirs. He took pictures of his victims during the course of the commission of murder and after they dies to recollect those memories and relive the experience later for sexual gratification. The polaroids taken by Dalmer had the victims in different, suggestive positions with their backs arched, which indicated he dismembered and manipulated the bodies of his victims once he killed them, to have intercourse with them. Dahmer was convicted of murder, cannibalism and necrophilia and was sentenced to 16 life terms, which added up to 957 years of imprisonment.

Necrophilia is prominent among men, but Karen Greenlee was one of the few women to be convicted of necrophilia. Karen, who worked at a funeral home, called herself a 'morgue rat' and admitted to having sexually assaulted over 40 corpses as she found the smell of death, the cold bodies of the dead and the blood oozing out of their mouths very erotic[22].

India has witnessed several disturbing cases of necrophilia. The most prominent case in India was the Nithari case in 2006. A huge number of missing reports of women and children were filed in Nithari, Noida and was later revealed that Surinder Koli who was hired as domestic help by Moninder Singh Pandher was luring his victims in the name of securing employment opportunities and were killing them instead. After killing them, he had sexual intercourse with the bodies and cut them into pieces to consume the human meat and dumped the rest in plastic bags in the drain behind the house. A total of 9 female children, 2 male children and 5 adult women were murdered and assaulted by Koli. Despite having the knowledge of such a heinous crime, four people, a domestic servant, a gardener and two drivers who were aware of his crimes, and who lived in the same house as Surinder and Moninder were neither arrested nor

[22] Interview with Karen Greenlee, *The Apocalypse Culture*, 1987.

tried as witnesses for the crime. After the investigation, Surinder and Moninder were both arrested for committing the crime and the later for acting as his accomplice during the crime. Koli was awarded the death sentence and Moninder was awarded seven years of imprisonment and a fine[23].

The most recent incident of necrophilia took place in Palghar, Maharashtra. A shopkeeper, Shiva Choudhary, murdered a woman after an altercation with her while she was making a few household purchases. He confessed to having murdered her and having had sexual intercourse with her after killing her as he could not control his urge since he was away from his wife for over a year. He was charged with rape and murder. He was arrested and placed under investigation to ascertain any mental unsoundness[24]. Apart from these cases, there have been various other instances of necrophilia in India such as the case of Akan Saikia wherein he was arrested for sexually assaulting the corpse of a fourteen-year-old girl who was buried. Due to the dearth of laws to regulate and punish the act of necrophilia, such crimes are often unaddressed.

IV. Impact on the society

The society suffers the most harm as a result of an act like necrophilia. Necrophilia, even though does not cause harm to a living entity, is still considered to be morally derogative of the societal values, customary beliefs and traditional and emotional sentiments that the society associates with the dead. Most religions share a common practise of a funeral system to honour or value the dead and are mostly based on the belief that the existence of the dead has not yet ceased to live despite the death[25]. A crime like necrophilia is considered to be defiling the dead as the bodies are engaged in sexual intercourse after death, without consent. Regular necrophilia does not attract much liability as people merely engage in sexual intercourse with the corpse. But homicidal necrophilia, wherein the perpetrator willingly murder people in order to engage in intercourse with them, is viewed as a crime with the potential of affecting public morality due to its impact on the society.

In the absence of legal status associated to dead people, they are treated as quasi-subjects before the law. This result in the corpse being viewed by the family as a holding with a level of sacredness associated with the dead. The dead are a loved one that deserves a dignified burial. But in eyes of law for cases dealing with necrophilia, the dead become the property of the next-of-kin which would make necrophilia an act of vandalism rather than sexual assault against a person. The social stigma of sin attached to sexual intercourse with a dead person result in the act being viewed as immoral and frowned upon by the society. It is the collective conscience of the society that has resulted in necrophilia being treated as a punishment because otherwise in the eyes of law, a dead person has no legal personality and is incapable of being pain or being violated. The association of the dignity of the dead with the moral principles and cultural beliefs of existence after death has resulted in the development of the notion violation of the

[23] Express News Service, "Nithari killings: Special CBI court awards death penalty to main accused Surinder Koli" *The Indian Express*, 20th May, 2022.
[24] "Palghar stunned by necrophilia, a man raped woman's corpse" *The Tribune*, 4th July, 2020.
[25] Supra note 2 at 542.

rights of a dignified burial that dead person is entitled to have. It was not considered as a right until the courts intervened, as a representation of the public, to grant such a right to protect the dignity of a dead person.

V. Conclusion

Despite the gruesome cases of necrophilia in India, it still remains an unaddressed crime to a large extent. Necrophilia is not defined in the Indian laws or statutes and the act of necrophilia is charged under various sections of the IPC. The law makes little to no efforts in differentiating mere sexual intercourse with a corpse from dismembering the corpse to derive sexual gratification. The punishment for necrophilia for perpetrators with mental or psychological conditions has not been prescribed.

In the light of the recent cases of Necrophilia, it is brought to notice that there is an inadequacy with respect to laws in the statue dealing with the act of necrophilia. The number of cases relating to necrophilia has been on a rise in the past decade which makes it necessary to device laws to address the crime of necrophilia or to broaden the scope of the existing laws in order to include necrophilia as a distinct offence to prevent loopholes and inadequacies.

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

A Critique of the social media and Cyber Security Laws in the Modern Era

Garima Oberoi*

Ankush Garg**

Abstract

Nowadays, it's hard to picture a life where there is no mobile phone or internet or social networking sites. The rapid proliferation of information from mobile phones and social networking has made internet content indispensable to modern life, providing not just knowledge but also a means of instantaneous global connection. However, despite its numerous benefits, technology often offers risks to users; for instance, excess amount of data shared has made social media a hub for thieves to steal personal information. Being easily accessible, everyone gets its benefits. If sheading a light away from its numerous benefits, privacy invasions are becoming widespread, especially with regards to women's identities. Cyber violence has become a worldwide concern as a result of the anonymity and fakeness of social media and jurisdictional difficulties. When it comes to an individual's safety, privacy, and self-respect, social media presents clear and present dangers.

The article explores the effects of social media on young people and the factors contributing to the explosion of cybercrime on these platforms. The study also analyses the law's ability to recognize and deter cybercrime using social media and describes the typical forms of cybercrime committed on these platforms. The document also includes recommendations for raising awareness among the nation's young about the repercussions of cybercrime in a comprehensive and effective manner.

Keywords: Social media, Cybercrime, Privacy, Dignity, Security.

I. Introduction

The advent of social media has made it impossible for any organization, whether public or private, to function without some type of social media presence. Users may easily disseminate their thoughts to a wide audience without having to resort to more traditional media channels thanks to this service. The influence of social media on people's thoughts and beliefs has grown significantly in recent years. Information gleaned from social media platforms may be used as a key component in a more thorough examination of how ideas spread. Discovering how often information is shared, who is doing the sharing, and what is being discussed is incredibly valuable. This can be useful in a variety of contexts, such as when communicating with a large population in the event of an emergency, such as communicating lockdown orders during the covid epidemic, etc. Despite the

* LLM, Amity University, Noida
** LLM, Amity University, Noida

fact that most people don't use social media to discuss news or public issues, these platforms have emerged as key resources for political reporting.

If social media is used for good, it may raise people's awareness of events all around the world. As far as software adoption rates are concerned, social media has been the success story of the decade. Facebook's monthly user base is projected to grow from 2.45 billion in 2019 to 270 billion in June 2020, a rise of 12 percent year over year[1], providing a glimpse into the growing popularity of social media platforms generally. Because of their widespread use, these platforms are magnets for cybercrime, much like honey is to a wasp. One of the most powerful and widely used channels of communication has devolved into a criminal hub. Since the majority of people now have access to the internet, cybercrime has also increased dramatically.[2] In other words, any illegal activity that takes place on a computer or online is considered a cybercrime. Criminals can use sophisticated tools like malware to steal our identities on social media, or they can gain access to our personal information through social media and e-commerce sites. It can also take the form of using a false identity on a social networking platform to smear a person's reputation or steal personal information that can be easily accessed via online retailers. Gender-based and child-targeted assaults are other categories to look upon. Because of the anonymity of the internet, child pornography thrives there, and women and children are the primary targets. Adolescents are also easy targets for cybercriminals who use deceptive tactics like creating false profiles and sending texts to them.

Every sixth cybercrime in India is done through social media, said Alok Mittal, chief of India's National Investigation Agency (NIA). In 2016, there were about 150 reported occurrences of cybercrime on social media in our nation; this number climbed to over 300 in 2017.[3] Also, there have been 43% more reports of fraud on social media in 2018 than in 2017.

II. Social Media's Impact

The internet, voice and video calls, chat rooms, and other features made available by social media give a means to users to communicate with others all across the globe. It's simple and hassle-free for kids to sign up for any social networking site. A user must first sign up for a social media platform with his or her personal information before having access to the site's content or being able to exchange information, photos, or other material with other users of the platform. FB

[1] Menlo Park, Facebook Reports Second Quarter 2020 Results, FACEBOOK INVESTOR RELATIONS (July 30,2020), https://investor.fb.com/investor-news/press-release-details/2020/Facebook-Reports-Second-Quarter2020-Results/default.aspx.

[2] Tariq Rahim Sumro & Mumtaz Hussain, Social Media-Related Cybercrimes and Techniques for Their Prevention, RESEARCHGate(May2019), https://www.researchgate.net/publication/333944511_Social_MediaRelated_Cybercrimes_and_Techniques_for_Their_P

[3] 6 Casey Crane, 33 Alarming Cybercrime Statistics You Should Know in 2019, HASHED OUT (Nov. 14, 2019), https://www.thesslstore.com/blog/33-alarming-cybercrime-statistics-you-should-know/.

(Facebook), Twitter, IG (Instagram), WhatsApp, Snap or Snapchat, etc. are of the many popular social media sites among today's youth.

Despite its widespread use in facilitating communication, social media has been linked to increased feelings of loneliness and isolation. These online communities have reduced the need for personal contact. Multiple studies have found that young people who experience social isolation often suffer from a range of mental, emotional, physical, and psychological health problems. Cyberbullying and theft are widespread problems among young people, and social media is a typical place for them to occur. The increased problem of a third individual exploiting a personal information of a person is directly related to the fact that social media platforms do not provide enough protection from prying eyes. Another aspect of this is the youth population's propensity to spend time unproductively engaged in online discussion across all these channels. Prey for cybercriminals increasingly includes not just kids but also younger teenagers.

A major source of disquiet is the prevalence with which individuals believe incorrect information that has been spread mostly through WhatsApp. The purpose of propagating such information might be to incite hostilities amongst communities. The younger generation is both susceptible to and receptive to the influences of internet media. According to recent data, the number of cybercrimes perpetrated during the COVID period has increased.[4]

The reality is that most people's daily routines now involve a large part spent on social networking.

III. Types of Cyber Crimes and Social Media

Cybercrimes are recognized on the National Cyber Crime Reporting Portal[5], where they are reported.

- **Phishing and Scams:** The term "phishing" refers to a specific sort of cybercrime in which a fake email purporting to have come from a legitimate company tricks its targets into giving information, such as passwords and bank account details. As a result, the user is being duped into giving over their personal details, which will subsequently be used for financial advantage. In May of 2020, the country's official cybersecurity office detected a phishing email campaign that demanded payment in bitcoin for not sharing private videos he claimed of having.
- **Identity theft:** It is a growing problem in the world of social media. This crime is committed when the person committing the crime gets access to the victim's private information via the victim's social media accounts. They used this personal information to

[4] 8 AFP, Interpol warns of 'alarming' rise in cybercrime cases during Covid-19 pandemic, DECCAN HERALD (Aug. 04 2020, 18:00 IST), https://www.deccanherald.com/international/interpol-warns-of-alarming-rise-in-cybercrim e-cases-during-covid-19-pandemic-869489.html.
[5] National Cyber Crime Reporting Portal, Ministry Of Home Affairs, https://cybercrime.gov.in/Webform/More

receive credit, loans, or other forms of financial aid. In addition, identity theft encompasses the theft of personal information for the purposes of committing fraud or other crimes under the victim's identity by acquiring access to their bank profile or other sensitive data.

- **Content of obscene nature:** Sharing or distribution of obscene material is illegal and subject to penalties as per section 67 of the IT (Information Technology) Act. To be obscene, according to the SC (Supreme Court), in one of the major cases[6], is to be "offensive to modesty or decency; vulgar, dirty, and unpleasant.". Offenders also use photo-editing tools to alter publicly-available images, then post or share the altered versions of those images online. According to the Hindustan Times, an individual was detained for using social media to draw and discuss images of Hindu deities.[7]
- **Frauds and Scams:** Today, more than ever, people are on the lookout for signs of fraud or scams committed online because of the prevalence of such activities in the era of the internet. Internet fraud also takes the form of account cloning, in which a victim's account is duplicated in order to steal their personal data. Offenders create a new account using stolen photos and images, luring their friends and family into handing over sensitive information such as bank account numbers or other personal data, and occasionally sending filthy messages to further alienate them. Over half (55.2%) of all cybercrimes reported in 2018 had fraud as their motivation, with 1,501 incidents reported to the National Crime Reporting Bureau.
- **Cyber-bullying:** One sort of harassment that has become increasingly common in the digital age is cyberbullying, in which a person is coerced into engaging in behaviour that is contrary to their will. Teenagers and young adults experience this quite frequently. The occurrence of such a phenomenon is now very common. Some examples of cyberbullying are making derogatory comments or publishing embarrassing messages about another person, uploading irrelevant photos or videos of another person, or making up whole false websites about another person.
- **Cybercrime:** As a broad category, cybercrime encompasses any illegal activity that takes place online or with the use of a computer. The frequency of cybercrime has skyrocketed in recent years. Defamation, morphing, phishing, fraud, and other forms of cybercrime all find their way into the social media realm. Defamation is both a crime and a tort, and its commission on social media platforms like Facebook, Instagram, etc. is becoming widespread. The sole reason being that the person committing such crimes get to remain anonyms.

[6] Ranjit D. Udeshi vs. State of Maharashtra, AIR 1965 SC 881, Para 7, p. 885

[7] GOI, Crime in India 2018, NATIONAL CRIME RECORDS BUREAU (MINISTRY OF HOME AFFAIRS), https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf. 17 Rhea Maheshwari, In one year alone, cyberbullying of Indian women and teenagers rose by 36%, SCROLL.IN (Mar.16, 2020 · 09:30 pm), https://scroll.in/article/956085/in-one-year-alone-cyberbullying-of-indian-womenand-teenagers-rose-by-36.

IV. Indian Legislature: Legal Provisions

One in six cybercrimes in India takes place via social media, according to the head of India's National Investigation Agency (NIA). India is well-known for being the first country to implement a law regulating the use of information technologies in the workplace, the Information and Technology Act of 2000. Offenses and crimes are the focus of Chapter XI of this Act, coupled with additional provisions spread throughout the law. No law or regulation defines "cyber-crimes" in any meaningful way. Cyber is shorthand for "cyberspace," a catchall term covering the realms of computers, IT, the web, and video games. That's why it makes sense to call crimes committed by digital means (such as the internet, computers, and VR) "cyber-crimes."

Multiple regulations and judgements established by various authorities contain provisions intended to deter and punish cybercrimes. Several types of cybercrime are punishable by both the Information Technology Act of 2000 (the "IT Act") and the IPC (Indian Penal Code), 1860 and it must be no shocker that several of the sections of the two laws overlap. The Information Technology Act, passed in 2000 to manage, control, and address issues coming from IT, also governs social media legislation in India. Thus, social networking sites in India bear accountability for a wide range of offences that are illegal in the country.

The various cybercrime laws available in Indian are as follows: [8]

IV.I Information Technology Act, 2000

Also known as the IT Act, it had been the first ever law of cyber nature to reachive an approval from thr Parliament of India. The IT Act plays a significant role in India's legal system since it regulates cybercrime investigations and provides guidelines for their conduct. The relevant parts are as follows:

Section 43: Individuals who commit cybercrimes, such as harming the victim's devices, without the victim's consent are subject to the penalties outlined in Section 43 of the IT Act. And in such situations when the device being affected, he is to get all the refund to all the damages

Section 66: As per Section 66, any dishonest or fraudulent behaviour falling within the aforementioned Section 43 is subject to the penalties outlined therein. As an alternative to a fine of up to Rs. 5 lakh, a jail sentence of up to three years may be imposed. They other important sections are Section 66B, 66C, 66D, 66E and 66F.

[8] Anubhav Pandey, Cybercrime and social media websites, I PLEADERS (June 3, 2017), https://blog.ipleaders.in/cyber-crime-social-media/.

Section 67: It involves the dissemination of profanity by electronic publication. A fine of up to Rs 10 lakh and a jail sentence of up to five years are possible consequences of a conviction.

IV.II Indian Penal Code, 1840

The important sections talking about cyberlaws are as follows:

Section 292[9]: The original intent of Section 292 was to prohibit the distribution of pornographic content, but it has now been expanded to cover other forms of cybercrime as well. This law also addresses the electronic publication and transmission of pornographic content and child sexual abuse images and videos. If convicted, offenders face up to two years in jail and a Rs. 2,000 fine. The offenders, in any of the above crimes faces a maximum of one year in jail and a maximum fine of Rs. 5000; repeat offenders face up to 5 years in prison and at max fine of Rs. 5,000.

Section 379: The maximum term of imprisonment for theft is for three years, in addition to any monetary penalties that may be imposed. Many cybercrimes include stolen computers, data, or electronic equipment, which brings into play the IPC Section.

Section 420: Dishonestly inducing the handover of property or engaging in any other form of deceit is addressed in Section 420. Under this provision, those who commit cybercrimes including building bogus websites or cyber frauds are subject to a seven-year jail sentence added to a fine. Password theft for malicious purposes or the development of fake sites fall under this provision of the IPC.

Section 463: It refers to the electronic forgery of official records or papers. Depending on the circumstances, anyone found guilty of email spoofing might face up to seven years or fine.

V. Landmark Cases

i. Shamsher Singh Verma v. State of Haryana[10]

After the High Court denied the accused's request to present the defense's CD and have it proven by the Forensic Science Laboratory, the accused opted to take the matter to the Supreme Court.

It has been decided by the Supreme Court that a CD can be considered legal evidence. It further noted that personal testimony coming from the one who had been accused, or one who was witnessing or complaining, is not required to gain an admittance or rejection regarding a documentation as per Section 294 (1) of the Criminal Procedure Code.

[9] Indian Pen. Code. § 292 - Sale, etc., of obscene books, etc.
[10] (2013) 12 SCC 73.

ii. Shankar v. State Rep[11]

Facts: The petitioner sought to have the charge sheet against him thrown out by going to court under Section 482, CrPC. The petitioner was charged with violating Sections 66, 70, and 72 of the IT Act for breaking into the secure network of the Legal Advisor of Directorate of Vigilance and Anti-Corruption (DVAC).

Decision: The Court reached a decision, stating that the petitioner's charge sheet cannot be invalidated due to Section 72 of the IT Act, which deals with the non-granting of permission of prosecution.

iii. State of Tamil Nadu v. Suhas Katti[12]

The accused was a close friend of the victim's family and had hoped to marry her before she made the disastrous decision to engage with another guy. She had previously been married, but the accused tried to get her to marry him again after her divorce, and when she refused, he resorted to online harassment to get her to change her mind. The defendant created a fake email ID in the victim's name and used it to send and receive offensive and damaging messages about the victim.

The Add. Chief Metropolitan Magistrate in Egmore reached a decision finding the defendant guilty on all counts before him under Sections 469, 509, and 67 of the Indian Penal Code and the Information Technology Act. The defendant was sentenced to 2 years in jail and a penalty of Rs. 500 as per Section 469 of the Indian Penal Code, 1 year in prison and a penalty of Rs. 500 as in Section 509 of the IPC, and 2 years in imprisonment and a payment of Rs. 4,000 under Section 67 of the IT Act.

VI. Suggestions & Conclusion

The power of social media has been demonstrated in a variety of contexts, such as the mobilization of the people in an uprising against our government and the narrowing of the gap between space travelers and the general public interested in science. A recent Aljazeera article reveals the extent to which protest organizers rely on social media. Given the abundance of data made available on social media platforms, its application in a wide range of fields is likely. Marketers may learn about customer habits on social media and utilize this information to create more targeted advertisements. The government of the United Kingdom has begun monitoring users' activities across platforms, including Facebook, Instagram, Twitter, and blogs.[13]

[11] Crl. O.P. No. 6628 of 2010
[12] CC No. 4680 of 2004
[13] Tariq Rahim Sumro and Mumtaz Hussain, Social Media-Related Cybercrimes and Techniques for Their Prevention, RESEARCHGATE(May2019),

The lack of universally applicable legislation is a fundamental problem in the fight against cybercrime. The situation is made worse by the exponential expansion of legislation dealing with the internet and cyberspace. Though the Information Technology Act and the changes are important first steps, challenges and issues with cybercrime still exist. The void in people's understanding of the internet should be closed by legislation as well as education.

With the expansion of cyberspace, physical borders no longer appear to matter as much as they once did. As a result, alternatives to territorial jurisdiction, as described in Section 16 of the Criminal Procedure Code, 1973 and Section 2 of the Indian Penal Code,1860, will have to be developed. As all the data is frequently erased, losing evidence may be a common and expected concern. In addition, the crime investigation system is rendered ineffective when information is gathered from sources outside of the country's borders. It's also crucial to employ highly technical personnel on the opposite end of the spectrum to construct a technological crime and investigation infrastructure. Judicial officers who are well learned with cyberspace and modern technologies are urgently needed.[14] The function of the judiciary in ensuring the law is in line with current norms is crucial.

Motivating the research needed to figure out how to spot cyber evidence is essential. Further, for the Information and Technology Act, 2000 to be effective in controlling and preventing cybercrimes, Indian law and statutes need to be amended and changed so that they are consistent with the Act.

*****

https://www.researchgate.net/publication/333944511_Social_MediaRelated_Cybercrimes_and_Techniques_for_Their_Prevention

[14] Dr. Rekha Pahuja, Impact of Social Networking On Cybercrimes: A study, 4 Epitome: IJMR 4 (2018).

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

Doctrine of Good Faith and Fair Dealing & Liability in Case of Fraud in a Limited Liability Partnership: Comparative Analysis Between India and U.S.A.

Boivob Majumder*

Abstract

The topic of this essay is contract law. The notions of good faith and fair dealing and responsibility in circumstances of fraud are compared and contrasted in this essay on limited liability partnerships between India and the United States of America. Both US law and Indian law were discussed in this essay. This article examined the limited liability partnership scam. Both nations have this legislation, but the ways in which it is applied and how it is expressed varies somewhat. These distinctions are ignored in this study. The laws of both nations are therefore examined in this essay. On paper, we discuss the events, people, and circumstances of both nations. The topic of Good and Dealing is introduced. Then the next two chapters go over how "limited liability partnerships" are governed by Indian law and US law. Chapter 4 is the last chapter.

Key Words: Limited Liability partnership, Partnership, Corporate Fraud.

I. Introduction

In the last twenty to thirty years, a new kind of corporate organisation called a limited liability partnership (or "LLP") has begun to take shape. These organisations provide its partners the freedom to carry out their duties and participate in the firm's operations while while limiting their responsibility. The entire goal of such entities is to make sure that the partners working for the firm are given sufficient authority to carry out their duties and, at the same time, to prevent them from being held accountable for the actions in which they had no role, by limiting the extent of their liability. It is defined as "a partnership in which a partner is not liable for a negligent act committed by another partner or by an employee not under the partner's supervision."[1] This promotes economic activity and protects the innocent partners from being held entirely responsible for partnership company activities over which they had no direct or indirect influence.

Texas House Bill 278 from the year 1991 was the first piece of legislation to create this idea in the United States of America (U.S.A.). Since then, several large governments throughout the globe have embraced the concept of developing such corporations. The Limited Liability Partnership Act, 2008 establishes and governs limited liability partnerships (LLPs) in India. Despite the fact that LLPs were created with the intention of the potential for the service sector to expand, the need to give small businesses the flexibility to participate in joint ventures and agreements that allow them to access technology, create business synergies, and to contend with the growing global

* II Year, B.A.LLB(Hons), National Law University Delhi

[1] Black's Law Dictionary 1230 (9th ed.2009)

competition, are just a few of the factors that need to be taken into account, according to a study.[2] The degree to which a partner's responsibility in such organisations would be restricted has long been up for debate.

The notion of good faith and fair dealing is another important consideration for determining how far a partner's liability may be restricted. Particularly, this occurs when parties enter into relational contracts that need confidence, which is "not in the dutiful subordination by one party of its own interests to those of another, but in the other party's honesty."

This is true in an LLP, [3]" and in the spirit of collaboration. While creating a contract, some nations have decided to codify the concept of "good faith and fair dealing," making it mandatory for partners in an LLP to operate in accordance with it. In other countries, however, this concept is not codified, even if it may be inferred from court judgments. The responsibilities and duties of a partner in an LLP are therefore sometimes unclear. This article will examine how the implicit covenant of good faith and fair dealing is applied in limited liability partnerships in the United States and India, as well as the legal ramifications of an LLP fraud in each nation.

II. Goals of the Research

To comprehend how the principles of good faith and fair dealing in a limited liability partnership are applied in the U.S. and India.

Awareness of one's obligations should an LLP in India or the USA commit fraud.

III. Study Questions

Does the notion of good faith and fair dealing in a limited liability partnership vary between the legal systems in the United States and India?

Is there a difference between India and the United States in terms of the partners' culpability in the event of fraud in a limited liability partnership?

IV. Hypothesis

In the United States, a Limited Liability Partnership is required by law to abide by the covenant of good faith and fair dealing, which makes the obligations of participants in such a partnership clearer than they would be in India and simplifies the process for dissolving an LLP there.

V. Result Analysis Methods

The author has employed both descriptive and doctrinal research to complete the job. The study project's approach included primary and secondary sources, including a variety of journal articles, books, blogs, law commission reports, comments, many international and national case laws, and ultimately other library resources.

[2] Ministry of Finance & Company Affairs Govt. of India, Dr. Jamshed J. Irani (May 2005) para 18.1

[3] Yam Seng Pte Ltd v International Trade Corp [2013] EWHC 111 (QB), at [142]

VI. Reading Review

The Naresh Chandra Committee recommended that an LLP be reviewed and regulated by the Central Government in order to ensure uniform standards of application. The same report also [4]recommended that a partner's liability in an LLP be restricted to the extent of their involvement in the business. Paul M. Altman and Srinivasan [5] the duties of the partners are clearly emphasised when fair dealing and good faith are applied, according to M. Raju, who has argued that t[6]he purpose of enacting good faith is to include certain circumstances that could not have been anticipated at[7] the time of contract signing.6 TriBar Opinion Committee has also suggested that the degree to which a li[8]mited liability partner can be held liable should depend on the extent to which he has control over the affidavit. [9]

VII. Proposed Chapter Form

An outline of the doctrine of good faith and fraud would be provided in the first chapter. The LLPs in India will be the main topic of the second chapter. The third chapter would concentrate on LLPs in the United States, and the last chapter would contain the conclusion, analysis, and recommendations.

VII.I. Overview in Chapter 1

In the last two to three decades, limited liability partnerships (LLPs) have become a common kind of arrangement. Being a commercial agreement between partners with the intention of limiting their obligations, it abides by the fundamental principles and doctrines of contract.

VII.I.i. The Doctrine Of Good Faith And Fair Dealing Is Coming Of Age

The notion of good faith and fair dealing is one of the fundamental contract principles that is vital in the contemporary society. A contract's enforcement by the parties is governed by a principle of this kind. This theory is essential in the situation of a limited liability partnership (LLP), since it clarifies the obligations of partners whose liabilities are restricted and the degree to which they may escape their obligations are unclear.

The judiciary has been crucial in the development of this concept as well as in clarifying its intent when it was established as a contractual necessity. Every jurisdiction's court has contributed

[4] Naresh Chandra Committee Report, Ministry of Finance Govt. of India (July 2003) at 31
[5] Ibid, 32
[6] Paul M. Altman and Srinivas M. Raju, "Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair" (2005) 60 The Business Lawyer 1469
[7] TriBar Opinion Committee, "Third Party Closing Opinion: Limited Liability Partnership" (2018) 73 The Business Lawyer 1107
[8] Elisa Feldman, "Your Partner's Keeper: The Duty of Good Faith and Fair Dealing air Dealing under the Revised Uniform Partnership Act" (1995) 48 SMU Law Review 1932
[9] Report of The Company Law Committee on Decriminalization of The Limited Liability Partnership Act, 2008, Ministry of Corporate Affairs Govt. of India (January 2021)

differently to upholding this vow. a few nations, including the U.S. and the U.K. have taken deliberate measures to put this principle into practise, both in ordinary contracts and, more recently, in the alternative types of partnerships like LLPs. In a historic decision, the England and Wales High Court (Chancery Division) clarified the significance of good faith in business and commercial contracts as well as agreements between partners. The judge noted that in addition to requiring fidelity to the parties' agreed-upon shared aim and consistency, acting in good faith puts a requirement on the parties to adhere to acceptable commercial standards of fair dealing in line with their activities relating to the agreement.[10]

This decision laid the foundation for requiring good faith in partnership agreements as well. The limited liability partners engage into an agreement with the explicit intent of carrying out business-related tasks and making a profit; but, in order to accomplish this specific intent, the cause of action also entails acting responsibly toward other partners. The limited liability agreement includes a provision prohibiting the use of the limited liability to obtain an unfair advantage and superiority over competing mates. In several countries throughout the globe, nevertheless, this is not the case. Depending on the method taken by the court and the legislation, good faith and fair dealing in an LLP contract might be implemented in different ways.

The phrase "good faith" is polysemous, a chameleon whose meaning drastically varies depending on the circumstances, according to Emeritus Professor of Law Daniel S. Kleinberger. This means that when determining the liability of a partner in an LLP, the standard of good faith that has to be (if) imposed would depend on how the jurisdictions have approached the idea. The term "the term indicates a test that is either entirely subjective or has both subjective and objective aspects[11]" The U.S.A. has shown a strong propensity to ensure that, even if the partners have a limited responsibility, their obligation to fairly manage the company' operations and their duty to stay faithful to the firm's aim is preserved. On the other hand, India's contribution to putting the theory of LLPs into practise has been little, and the way the principle has been construed leaves room for improvement.

Both the Fiduciary Duty of Good Faith and the Covenant of Good Faith and Fair Dealing are tools for clarifying the position of a limited liability partner in an LLP and the scope of that partner's responsibilities. These are many methods for holding partners accountable for their obligations and preventing them from taking unfair advantage. While the covenant of good faith and fair

[10] Berkeley Community Villages Ltd and another v Pullen and others [2007] EWHC 1330 (Ch) [97]

[11] Daniel S. Kleinberger, FROM THE UNIFORM LAW COMMISSION: In the World of Alternative Entities What Does "Good Faith" Mean? American Bar Association (2017) https://www.americanbar.org/groups/business_law/publications/blt/2017/03/ulc/

dealing is enforced as a legislative obligation, making it a more effective mechanism, the fiduciary responsibility of good faith requires the existence of a fiduciary relationship between the entities[12]. The implicit covenant of good faith and fair dealing has been declared a legislative requirement in the United States because it is deemed essential in limited liability partnership arrangements.

In many civil law systems, including the United States, which has been at the vanguard, the contractual interactions comprising and upholding the theory of good faith and fair dealing are found. The persistent significance that nations have assigned to this theory, particularly when discussing limited liability partners, also seems to be a result of the fact that even
The importance of this idea has been acknowledged by several international accords. Both the Vienna Convention on International Sales Contracts[13] and the Principles of European Contract Law14 place emphasis on the idea that good faith and fair dealing are necessary for the purposes of commercial contracts and that their application cannot be eliminated by a contract, either explicitly or implicitly.

The primary theories have mostly assimilated into the LLPs, a more recent kind of partnership. These well-known principles are not disregarded by LLPs. However, various countries apply these concepts in different ways. The adaptation of these contractual concepts in the setting of an LLP depends critically on factors like the legislative and national court rulings. Another issue that has grown over the years is the fraud by an LLP. Understanding incidents of fraud involving an LLP that involve the legislative purpose is crucial. The typical notion of an LLP and its ideas, such as the culpability of the partners, is an exception in cases like fraud. In the chapters that follow, we'll try to compare and contrast these two key issues—the doctrine[14] of good faith and fair dealing and fraud—between India and the U.S.A. in the context of an LLP.

VII.II. Chapter 2 Limited Liability Partnerships in India

A legislation particularly addressing the creation and operation of Limited Liability Partnerships exists in India. The Limited Liability Partnership Act, 2008 was passed to encourage the formation and regulation of LLPs[15]because the country needed to make doing business easier in the first decade of the twenty-first century. India decided to adopt the same mechanism after studying the positions of LLP in several other countries, including the United States. The Indian Partnership Statute has sometimes been used to get a better knowledge of LLPs since it is a relatively new act and LLP principles are not as well established as those in the U.S.A. The obligations placed on the

[12] Peter Lubin, Difference Between Implied Covenant of Good Faith and Fair Dealing and the Fiduciary Duty of Good Faith The Business Litigators (2016) https://www.thebusinesslitigators.com/difference-between-implied-covenant-of-good-faith-and-fair-deali.html

[13] Final Act of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18, Annex I (1981)

[14]Principles of European Contract Law 2002, Article 1:201

[15] Limited Liability Partnership Act 2008, Preamble

partners and their liabilities, however, are the primary distinction between the two actions. LLPs are still a relatively new idea in India, and there are a number of instances where examples from other countries might be used as inspiration.

VII.II.i. Use of Good Faith And Equal Dealing

The good faith and fair dealing theory is not as well-established in India as it is in the USA. That is due to the United States and a number of other things. There is no formal need for the parties to include good faith and fair dealing in their contracts, and the Indian Contract Act of 1872 places no particular stress on the notion. The Indian Partnership Act restricts the application of the term "good faith" to the partner's dismissal. In accordance with the provision, "A partner may not be expelled from a firm by any majority of the partners, except in the exercise of powers conferred by contract between the partners."16 The ambiguous definition of "good faith" under this section further muddies the picture of the partners' obligations.

There is no specific mention of good faith and fair conduct in the Limited Liability Partnership Act, 2008 However, the legislature has emphasised via a number of the act's clauses that even while the partners' liabilities [16]are limited, they shouldn't conduct in a way that is at odds with the firm's goals and the partnership's other partners. The duties of a limited liability partner are sometimes left unclear in LLP agreements since the concept is not explicitly mentioned in them, leaving them room to avoid fulfilling their obligations and perhaps treating the other partners and the partnership unfairly as a result.

VII.II.ii. The 2008 Limited Liability Partnership Act

The Limited Liability Partnership Act, 2008's Chapter IV goes into great detail on the relationships and responsibilities of the partners. The partnership agreement between the partners has been emphasised in order to determine the respective duties and responsibilities. A partner's autonomy is also upheld by the fact that he is permitted to transfer his ownership interest in the LLP's profits and losses without the approval of the other partners[17]. The first schedule of the act contains detailed instructions on the rights and obligations that apply to all LLP partners. The reciprocal rights and obligations established by the schedule sustain the moral standards of honesty and fairness. A positive responsibility is placed on the partners by clauses like "indemnification of each partner in case of any personal liabilities incurred," "providing correct accounts and complete information pertaining to the LLP," and "not carrying on any activity of the same sort without the agreement of the LLP."

However, in the absence of any such agreement between the partners, such requirements shall apply. This once again reduces the influence of statutory responsibilities and increases the significance of the partnership agreement in determining the duties. Good faith extends beyond

[16] Indian Partnership Act 1932, s 33(1)
[17] LLP Act (n 15), s 42(1)

the period in which a person is a partner in the company and continues even after that person has ceased to be a partner (or former partner) of the LLP. Since the LLP formed has perpetual succession and is a different entity from that of the partners20, quitting the role of a limited liability partner is prohibited by the act, which states that the former partner still owes obligations to other partners that were incurred earlier during the period as partners, even after cessation.[18] This is to prevent a partner who has a limited liability from eluding his duties and treating the other partners unfairly.[19]

Sometimes one partner is in a better position than the other, which puts the other partner at a disadvantage. [20]The legislature has made an effort to guarantee fair treatment by forgiving partners who have committed no fault of their own. Since only the offending partner may be held accountable for misconduct and not the other partners, good faith and fair dealing are nevertheless required under certain circumstances, even if the LLP Act of 2008 doesn't explicitly mention them. This philosophy attempts to be supported by the legislative requirements that the legislation imposes. However, because the partnership agreement is of primary importance and this philosophy is not expressly specified, there is still room for the partners to shirk their duties and behave in a way that would not be consistent wi[21]th "good faith and fair dealing," encouraging arbitrary acts.

VII.II.iii Importance of Courts in India

The Indian courts have been instrumental in demonstrating the applicability of the theory of good faith and fair dealing in the context of partnerships and LLPs, in addition to the statutory requirements. The court outlined the significance of the theory and its application in respect to a partnership agreement in the case of *Santiram Mullick v. Hiranmony Bagechi*. Through this judgement, the imperative nature of a partnership agreement's contents were made clear, and the application of good faith in terms of expulsion of a partner was understood. The court observed that the majority partners can only expel a partner in cases where it is done in good faith and is authorised under the contract[22].

In recent times, even the Madras High Court has endorsed the Calcutta High Court's strategy. In the instance of S., the court. In the case of *Vel Aravind (Dr.) v. Dr. Radhakrishnan*, it was noted that even though a partner is expelled by the majority of partners, where this is done in good faith, it must be expressly stated in the partnership agreement. The defence of good faith cannot be used to circumvent the terms of the partnership agreement or carry out actions that are not permitted by the agreement, the court said. [23]

[18] Ibid, s 24(4)
[19] Ibid, s 3(2)
[20] Ibid, s 3(1)
[21] Ibid, s 28 (1)
[22] Santiram Mullick v. Hiranmony Bagechi (1991) 2 CALLT 399 HC
[23] S. Vel Aravind (Dr.) v. Dr. Radhakrishnan, 2018 SCC OnLine Mad 1037

If the court determines that the partnership agreement gave the majority of the partners the authority to kick out a partner, it must nevertheless determine whether or not this was done in good faith. However, if the partnership agreement does not provide for expulsion, no partner may approach the court in order to have a partner removed from the partnership firm on the grounds that the accused partner had broken the partnership agreement[24].

In the *Mahendra N. Thakkar v. Yogendra N. Thakkar* case, the Bombay High Court emphasised the value of acting in good faith while working as a team. The court looked on
That the ability to kick out a partner must expressly be used in good faith; otherwise, doing so would go against both the legislative objective and the partnership's best interests. The court has recognised that the partners' statutory obligations cannot be waived by an agreement, and even if the partnership agreement is silent about the application of this theory, it will be assumed.[25]
In the case of *Kunda Madhukar Shetye v. Shaila Subrao Shetye*, the High Court of Bombay clarified its opinion on how the concept should be applied[26]. In this instance, the court ruled that while determining whether an action was taken in good faith or not, the firm's welfare must be taken into account. These rulings clearly affect the partners of an LLP, as well as the success of the company. When taking a decision, the interest of the partner must also be considered. The duty of good trust is much more crucial in such situation. Although the courts have attempted to defend this notion, the actual goal of an LLP cannot be achieved until a statutory responsibility is placed on the partners in all commercial transactions.

VII.II.iv Partners' Liability In The Event Of a LLP Fraud

In a limited liability partnership business, the partners' culpability varies depending on whether fraud is involved. Normally, only the spouse who committed the wrong would be held accountable in the event of a wrong. A partner cannot be held vicariously accountable for the errors of the LLP, nor is the culpability of the partners in an LLP dependent upon the acts or inactions of the other partners. A partner cannot be held responsible for an LLP obligation, according to the LLP Act, which also states that "a partner shall not be personally liable for the wrongful act or omission of any other partner of the limited liability partnership." [27]The goal of this rule is to preserve the independence of the LLP partners and prevent them from being [28]held responsible for actions in which they had no part.

The sole caveat to this rule, however, is that in cases of fraud, the partners' responsibility is not kept in check. The culpability of the partners becomes unlimited29 in the event of fraud, and both these partners and the LLP firm may be held personally accountable for any damages incurred as

[24] Ibid, at 35
[25] Mahendra N. Thakkar v. Yogendra N. Thakkar, 2008 SCC OnLine Bom 772
[26] Kunda Madhukar Shetye v. Shaila Subrao Shetye, 2015 SCC OnLine Bom 828
[27] LLP Act (n 15), s 28(2)
[28] Ibid, s 28(1)

a result of the conduct. The LLP firm may be held accountable for the fraudulent behaviour under the LLP Act.

If the firm knew about the conduct or the partner received permission from the firm, it must have been committed by the partner in the same way as the partner. In this scenario, there would be infinite culpability for all partners who participated in the scam. Every partner who is knowingly a part of an LLP that conducts business in India with the "intent to mislead creditors of the limited liability partnership or any other person, or for any fraudulent purpose"30 would be subject to limitless responsibility.

This demonstrates the intention of the Indian legislature to restrict the autonomy and liberty of the partners in an LLP. [29]The fact that these actions are punishable by law proves that an LLP's partners' responsibility cannot be completely restricted and should be subject to restrictions. As a result, in the event of fraud, the partners in an LLP are completely liable. [30]

VII.III. Chapter 3 Limited Liability Partnerships in the United States

VII.III.i Good Faith And Fair Dealing Doctrine

The idea of a limited liability partnership first began to take form in the United States of America. In a developing country where limiting the liability of those involved in the business was crucial, it was quick to recognise the significance of this type of partnership. Giving the partners in a partnership business the maximum freedom possible would be beneficial, but it would also enhance the potential for mischief and put the innocent partners through hardship as a result of the activities of the accused partner. This made it essential to control both the behaviour of an LLP's partners and their conduct inside the company as a whole since doing so would limit the potential for abuse. In the framework of a limited liability partnership, the United States became one of the few states to codify the notion of good faith and fair dealing[31]. According to the UCC, "good faith... signifies actual truthfulness and adherence to acceptable business norms of fair dealing. [32]"32 Later, The Uniform Partnership Act was the legislation that served as the focal point for policing the behaviour of the partners, partnership companies, and LLPs.

Relation of fiduciary trust between the partners: -

The presence of a fiduciary relationship between the partners initially served as a guidance for their conduct. According to Section 21 of the Uniform Partnership Act, Every partner shall account to the partnership for any advantage and keep as trustee for it any gains earned by him from any transaction associated with the creation, conduct, or liquidation of the partnership or from any use by him of its property.[33]

[29] Ibid, s 30
[30] Ibid, s 30(1)
[31] Uniform Commercial Code 1990, §1-§203
[32] Ibid
[33] Uniform Partnership Act 1914, §21

The presence of such a relationship between the couples suggested the idea of good faith. The partners were obligated to operate honestly and in good faith because of their fiduciary responsibility. According to the court's definition of "utmost good faith, fairness, and loyalty" in the case of *Newburger, Loeb & Co v. Gross*[34], the partners' core fiduciary obligations included upholding these principles.

Unless specifically changed by the cooperation agreement. *In Latta v. Kilbourn*, the court outlined a number of general guidelines governing the partners' fiduciary obligations.[35] The court stated that a partner cannot unfairly benefit from the partnership's affairs, must be loyal to the partnership, and "he cannot avail himself of knowledge or information which may properly be regarded as the partnership's property, in the sense that it is available or useful to the firm for any purpose withi The purpose of the partners' fiduciary obligations[36] was that -
The participants owed each other some basic responsibilities of behaviour simply because they were partners: "The responsibility of each partner to exert toward the others the utmost integrity and good faith is the fundamental foundation of their reciprocal rights in all partnership matters[37]".
The idea of behaving in good faith as a result of a fiduciary responsibility is not new; it has been developing for a number of years. The American courts have recognised the need of this theory and have applied an interpretation that serves the intended goal. In the case of *Libby v. L.J.* The court acknowledged Corp:
"The connection between joint adventurers gives rise to several quite clear-cut fiduciary responsibilities. The obligation imposed is fundamentally one of good faith, ethical behaviour, and complete openness and transparency to all parties. The parties are required by the relationship to be loyal to the joint venture and to act with the greatest good faith, fairness, and honesty in their interactions with one another over the matter[38].

Justice Cardozo clearly stated the fiduciary obligation of a partner as that of a trustee even in *Meinhard v. Salmon* "Not only honesty, but the most delicate punctilio of an honour, is thus the standard of behaviour, which is held to something harsher than the morality of the market place.[39]
A crucial point to note is that, with the relationship between the partners changing due to the presence of limited liability partnerships, [40]the essence of these observations become even more important as without this, the scope of misuse of the liberties [41]granted to the partners increases

[34] Newburger, Loeb & Co v. Gross 563 F.2d 1057 (2d Cir. 1977)
[35] Latta v Kilbourn 150 U.S. 524 (1893)
[36] Ibid
[37] Allan W. Vestal, Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992 (1993) 73 B.U. L. Rev. 523, 523
[38] Libby v. L.J. Corp 247 F.2d 78 (D.C. Cir. 1957)
[39] Meinhard v. Salmon 164 N.E. 545 (N.Y. 1928)
[40] Roper v. Thomas, 298 S.E.2d 424, 427 (N.C. Ct. App. 1982)
[41] Klein v. Weiss, 395 A.2d 126 (Md. 1978)

significantly. The courts in the U.S.A. have acknowledged that these judgments well-defined the duties of the partners while keeping in mind the doctrine of good faith[42].

VII.III.ii The Doctrines' Codification

The fiduciary relationship between the partners changed when the Revised Uniform Partnership Act (RUPA) was passed in 1992; it became a contractual relationship where the partnership agreement would govern the partners' behavior.43 One of the most significant provisions of the RUPA was Section 404, which specifically required the partners to act with good faith and fair dealing. [43]

The court upheld the limited partners' right to "engage in or own an interest in other business ventures engaged in the same or similar business as the Partnership" in the *Exxon Corp. v. Burglin* case, explaining the contractarian approach envisioned under the RUPA[44].This meant that as long as the limited liability partners are not acting in bad faith and their actions do [45]not harm the interest of their LLP, owning an interest in another firm is not harmful "a collaboration Section 404(requirement)'s for good faith and fair dealing may not be repealed by agreement. [46]

The government's persistent focus on the duty to act in good faith shows that it recognises the significance and applicability of the notion. The usage of LLPs has increased recently despite the fact that this theory has been interpreted by American courts for the last century. Such rules assist in defining the obligations of the partners in the lack of clearly defined tasks for each, preventing limited liability partners from abusing their positions in immoral ways. However, in the case of an LLP, this good faith obligation applies to both the general partners and the limited liability partners as well. Given that they have more authority over corporate matters, the general partners also have a duty to ensure that they do not abuse their position. The official comment to RUPA Section 103 reads as follows:

The RUPA makes an effort to establish a benchmark that partnerships may depend on when creating exculpatory agreements and that courts will recognise when upholding them. It is hoped that the possibility of court rejection to uphold clearly inappropriate exculpatory provisions would deter unethical behaviour while satisfying the parties' legitimate interests to structure their partnership. [47]

[42] Ibid
[43] Revised Uniform Partnership Act 1992, §404
[44] Exxon Corp. v. Burglin 4 F.3d 1294 (5th Cir. 1993) at 1299 (quoting § 4.03 of the parties' Partnership Agreement
[45] Ibid, at 1298
[46] Revised Uniform Partnership Act 1992, §103(b)(5)
[47] Revised Uniform Partnership Act 1992, § 103 comment 2

Simply put, the goal of this legislation was to protect the relationship between the partners and guarantee that the partners do not engage in improper behaviour. These fall within the purview of the partners' obligations to uphold the standards of good faith imposed upon them, and it would be the court's job to uphold the agreements while bearing in mind the purpose for which they were entered into. However, since there is no clear definition of LLPs, the concept is interpreted differently by various courts, which eventually creates uncertainty.

In the matter of *Policemen's Annuity & Ben v. DV Realty Advisors LLC*. This implied that the definition of good faith may vary in different contexts and would depend upon the agreement between the parties as well as the discretion of the courts. In Fund of Chicago, the Delaware Supreme Court stated that "This Court has never held that the UCC definition of good faith applies to limited partnership agreements[48]." The Delaware Supreme Court clarified the key stance on the limited liability partners' obligations in the case of *Gerber v. Enter*. Holdings for Products. The court in this case stated, "the implied covenant seeks to enforce the parties' contractual bargain by implying only those terms the parties would have agreed to during their initial negotiations had they thought to address them. [49]" In the same judgement, the court even stated, "the implied covenant seeks to prevent the parties from breaching their contractual bargain."

"Fair dealing is not the same as the fair procedure component of overall fairness, that is, whether the fiduciary behaved fairly while participating in the contested transaction as judged by responsibilities of loyalty and care. . . Instead, it is a promise to act "fairly" in accordance with the terms of the parties' agreement and its intended outcome. Similarly, "good faith" refers to fidelity to the words, intent, and provisions of the parties' contract rather than allegiance to the contractual counterparty. Both depend on the terms of the contract and what the parties would have decided had the matter come up during their initial negotiations[50].

This was recently held by the Delaware Supreme Court in the case of *Dieckman v. Regency*, which involved a limited liability partnership. Any agreement between the partners that eliminates the duty of good faith and fair dealing would be struck down by the court as such a duty is non-negotiable and needs to be a part of the contract[51]. The court said in the same ruling that even if a limited liability partnership agreement's "safe harbour" provisions are followed to the letter, the agreement cannot be regarded as legally binding unless the requirements of good faith and fair dealing are met.[52]

In a different decision, the Supreme Court explained how the theory of good faith and fair dealing should be applied and declared that every contractual duty, even those requiring the use of

[48] DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago 5 A.3d 101(Del. 2013)

[49] Gerber v. Enter. Products Holdings, LLC, 67 A.3d 400, 418-19 (Del. 2013)

[50] Ibid

[51] Dieckman v. Regency GP LLP, et al., No. 208, 2016 (Del. Jan. 20, 2017)

[52] Ibid

discretion, must be carried out in a way that upholds the doctrine. The judge defined good faith as "Faithfulness to an agreed-upon shared aim and compliance with the justifiable expectations of the other party; it precludes a number of behaviour types defined as exhibiting poor faith because they contravene and it also demands honesty in practise in the performance of the transaction in question, as well as decency, justice, or reasonableness[53]

VII.III.iii Partners' Liability In The Event Of Fraud

There is no special law in the USA that addresses fraud in the context of an LLP. Even the Uniform Partnership Act lacks a clause governing the partners' or the partnership firm's behaviour in the event of fraud. The absence of this provision for an LLP demonstrates that the legislature did not see it essential to add such a provision and that managing such situations would be handled appropriately by the broader regulations pertaining to fraud. Due to the unique freedoms granted to the participants in a limited liability partnership, this situation completely eliminates the prospect of a fraud being perpetrated.

The basic laws pertaining to contract fraud are included in the Uniform Commercial Code. These clauses would generally apply to fraud perpetrated by an LLP and its partners. Additionally, the Delaware Uniform Partnership Conduct has referred to fraud perpetrated by partners, where the key to holding the partners accountable is their knowledge of the fraudulent act. This holds true when dealing with an LLP. Fraud and forgery are particularly mentioned in Section 5-109. Even the 4211 states that if a fraud is committed, the contract would be deemed invalid, and this also holds true for partnership contracts. These statutes don't have any clauses outlining the precise partners' obligation under such circumstances. The responsibility would need to be established in the same way as other fraud prosecutions. This is a quite different posture from what prevailed in India. There was a simpler way of resolving these difficulties in India than there is in American legislation. As a result, even in situations involving fraud by them, the partners in an LLP would still have a great deal of authority and freedom.

VII.IV. Chapter 4: Conclusion and Recommendations

Although the Limited Liability Partnerships have been formed in both India and the United States, there are differences in how the fundamental principles of the contracts are implemented in the two nations. India borrowed the idea of an LLP from the United States, but it neglected to include the crucial notion of good faith and fair dealing. While this notion is explicitly mentioned in U.S. laws, India does not follow it. A absence of this doctrine in the partnership agreement of an LLP is an irrefutable possibility, even if the legislature may have meant to include such a concept, which is apparent via certain implicit provisions in the LLP Act. As a result, the partners of an LLP in India are granted more independence and autonomy, which broadens the potential for abuse of the limited liability.

[53] Hanaway v. Parkersburg Group, L.P. 132 A.3d. 461 (Pa. Super. 2015)

There is no need for the limited liability partners to do this in India, unlike the United States, where such a concept must be included in the partnership agreement. Therefore, it is essential for the government to include the concept of good faith and fair dealing in the LLP Act in order to fulfil the general theory of a contract and to have greater regulation of the partners in an LLP while still respecting autonomy. The partners would avoid abusing their restricted responsibility as a result of this action, and they would also be cognizant of their relationships with the other partners. Additionally, it would reinforce an LLP similar to the one in the USA.

In India, the provisions for fraud by an LLP and its partners are also comparatively well-established. In this case, an LLP's partners must be subject to unlimited responsibility in order to prevent any wrongdoing on their behalf. While properly preventing employees from taking any acts that would be harmful to the LLP as well as the wider public, such a measure does not limit their liberty. As this demonstrates the legislature's earnest intention to prevent such a scenario, this is the sole circumstance in which partners may be held accountable for the actions of other partners. On the other side, since there is no particular law in the United States of America that addresses fraud by an LLP, there is a likelihood that the partners may abuse the authority given to them and a chance that the fraud by an LLP will go unpunished. It is essential for the United States of America to draught a strong legislation in this context since relying just on the general laws of fraud for such a case would not be adequate to curtail these actions.

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

In-Depth Analysis into The RERA Implementation: Marching Towards an Uncompromising Regimen

Rita Pandey[1*]

Abstract

India is a rapidly progressing nation with a robust real estate sector, where the growth rate is approximated to be US$ 1 trillion by 2030, proving to be a significant contribution to the country's GDP. To capitalize on the immense growth opportunities of the real estate sector, the challenge here is the lack of any regulator for this sector, unlike regulatory authorities in the form of SEBI, IRDAI, TRAI, etc. The absence of a regulator body results in a situation where the property buyers could not generate trust in the real estate developers. They were made to suffer a lot mentally, physically, and financially due to the failure of builders to timely deliver the property. This is due to the dearth of regulation on such reluctant acts of the builders. In this situation, the only option buyers must approach either the civil courts or the consumer forums, which are overburdened with other types of cases. This resulted in a never-ending litigation process.

The government intervened and made some efforts by passing the Real Estate (Regulation and Development) Act, 2016, as the armour to buyers. The Act brought significant changes like compulsory registration of real estate projects, depositing 70% of the amount collected in an independent escrow account for the construction of a particular project, and accepting an advance of only 10% of the property cost in case there is no agreement between the parties, etc. On the other hand, the law has some limitations in implementation. Being a subject of a concurrent list, many states are reluctant even though the state government is empowered to frame rules under it. There is not enough participation by the conditions resulting in a tussle between the states and Centre for execution of the Act. This paper is based on the analysis of the Act's enactment in the last five years. It proposes possible solutions to improve its efficacy that further intensify its implementation.

Keywords-RERA, escrow account, GDP, Regulator, real estate, developers, registration

I. Introduction

"A house is made with walls and beams: a home is built with love and dreams."-**Ralph Waldo Emerson.**

Once in a lifetime, owning a house is a dream of many. A person works hard throughout his life, earns money, and invests all his earnings in buying a home—a home where he could nurture his life and cherish his dreams. Owning a home is advantageous in all respects. But at the same time, it is not as easy as it appears. It's a tiring affair. One must take a long route before settling in a house, predominantly when it depends on the Real Estate industry.

[1*] Asstt. Prof., Deptt. of Law, D.A.V.(P.G.) College, Dehradun

The real estate industry is engrossed in developing real estate properties. It can be an individual, a company, a project owner, a developer, or a contractor. It is tasked to construct the properties after taking the government's approvals and handing them over to the buyer within the stipulated timeframe. While developing properties, the assistance of other stakeholders like engineers, surveyors, architects, etc., are also taken. Real estate properties include land, houses, buildings, factories, etc., which can be of commercial or residential nature.

Evidencing how India is exploring various growth opportunities and positioning itself as a global leader, India is attracting investments worldwide. This is expected to give an impulse upsurge to the real estate sector, the result of which the growth rate in 2030 is approximated to be US$ 1 trillion[2], which further contributes to the country's GDP. The significant increase is due to rapid urbanization and the government's supportive schemes. The various innovative smart city projects, 100% FDI on township projects, and the government's "housing for all" scheme have further elevated the sector to an extent where it has become the second-largest sector after agriculture in India.
The benefits of this sector are many, but its criticality can't be ignored when disputes occur between a home buyer and the developer. Looking at the pre-RERA period, the industry lacked professionalism. It was disorganized and unregulated. A buyer invests his lifetime earnings on a project trusting the promise made by the developer, and the result is that the buyer ends up getting fake promises. The buyers were made to suffer mentally, physically, and financially due to the failure of developers to keep up their assurances.

Failing timely delivery of the possession of the property and information asymmetry are some of the prevailing malpractices of the developers. The buyers would not share the information about the property they would be investing upon, thus leading to a chaotic situation for the buyers. Funds diversion by the developers was another issue of concern. The money collected for one project was diverted into another, thus ultimately leading to an increase in the buyer's suffering. There was no check on such reluctant acts. The aggrieved buyers have the only option to approach either the civil courts or the consumer forums, which were already burdened with other types of cases. This resulted in a never-ending litigation process. Hence, there was a strong need to establish a body in the form of a regulator that could resolve the disputes and govern the sector. It was then that the government intervened and enacted the Real Estate (Regulation and Development) Act, 2016, as the armour of buyers. The Act aims at boosting the real estate sector by protecting home buyers from malicious acts of builders. The Act came into force on 1st May 2016. It has been almost five years since the Act was enacted, and as such, when we look back upon its execution, we get an insight that it has helped build mutual trust between the buyers and developers. While several challenges pose impediments to its execution, these can be tackled by understanding its goals and objectives.

II. Fundamental Goals of REA, 2016: Implementation By States

REA, 2016 has been implemented to disseminate answerability, efficacy, and clearness. Answerability of developers towards buyers, the effectiveness of RERA authorities, and transparency of the real estate segment. Overall, this is an Act with a broad ambit. The Act mandates registration of all the construction projects, with some exceptions. The developers are under a legal obligation to

[2] www.ibef.org last visited on November 3, 2021

keep buyers well informed. They must sell the apartment based on the carpet area and prevent the diversion of funds. An escrow account must be opened for a particular project wherein 70% of the funds of allottees are to be deposited. A developer can accept only 10% earnest money for a specific property followed by a written agreement with the buyer. No amendment can be done to the approved structural plans except with the prior permission of the buyers. Failing to deliver the possession on time, the developer shall be liable to return the money received and compensation. The most important part of this Act is that all all-ongoing incomplete construction projects are also supposed to be registered under this Act.

The retroactivity of this Act was challenged in New tech Promoters and Developers Pvt. Ltd. V. State of UP[3], which was answered at length by the Hon'ble supreme court of India in the words that "the ongoing projects which were incomplete in respect of which the completion certificate has not been granted are to be treated at par with the new projects." RERA can be applied to re-development projects to ensure the rehabilitation of homeowners. The Act further postulates grievance redressal mechanisms and penalties in case of default. The authorities established under the Act exercise tripartite functions, i.e., the administrative tasks by registering the projects, quasi-judicial functions by redressing the grievances, and advisory functions by advising the government on real estate matters. The Act also provides grievance redressal through conciliation forums as an alternative mechanism.

REA, 2016 is a beneficial piece of legislation that is flawless if implemented in letter and spirit. It mandated every state to implement its provisions within one year of its enactment. Still, many states have not implemented it entirely. Being a subject of concurrent lists, the state government is empowered to frame rules under it, but many states have shown reluctance. The primary concern is not enough participation by the states resulting in a tussle between the states and centre for its execution. Some notified the rules and didn't set up regulatory authorities, whereas others established authorities and did not appoint adjudicating officers. At present, Nagaland is the state which has not even notified the rules under the Act. Jammu & Kashmir, Ladakh, Meghalaya, Sikkim, and West Bengal are establishing regulatory authorities.[4] The states which have not yet framed rules will not be able to register the new projects under the Act to meet their regular business under Act[5]. Another concern is that state notified rules are fabricated to their convenience, and hence the Act has been diluted to a great extent. It is said that the state formulates the more favorable regulations for the developers. This ultimately leads to a halt in a fully operational structure, positioning the final beneficiaries in a destitute position. Ironically only a few states have done little to realize the Act on a full scale.

III.Five Years of Realization of REA, 2016

The Act came into effect to regulate the real estate sector but was vaulted at the beginning itself. It was challenged as soon as it was enforced. However, its constitutionality was later upheld by the Hon'ble Bombay High court. If we investigate pre-Act status, corruption, malpractices, and false

[3] LL 2021 SC 641

[4] https://mohua.gov.in/upload/uploadfiles/files/RERA_Status_Tracker%20(29-10-2021).pdf last visited on November 3, 2021

[5] COMMITTEE ON SUBORDINATE LEGISLATION, Sixteenth Lok Sabha, Report on Rules/Regulations framed under Real Estate (Regulation and Development) Act, 2016, twenty-First Report, ¶ 2.6 (August 2017).

promises prevailed, and there was no effective remedy for home buyers. This Act has brought significant changes regarding timely delivery of possession and a fast dispute resolution system. The Ministry of Housing and Urban Affairs report states that 70,234 construction projects and 55,350 Real Estate agents have been registered under the Act so far. In terms of transparency and accountability, a significant improvement is witnessed. Most states have websites furnishing information regarding registered projects, total complaints received & resolved, no. of agents registered, etc. However, many are unaware of it, and those who are aware are dissatisfied due to the poor navigability of the portals. Since every state has maintained its website, web portals have no uniformity. Some portals have not displayed sufficient data on ongoing projects, resulting in misunderstandings among buyers, developers and financers.

There is no denying that the Act has brought a substantial transformation in the real estate sector in the past few years, but it is devoid of few provisions that can catapult it. In addition, the Act is not appropriately advertised, because of which a hundred percent awareness among the masses is not achieved yet. The buyers are unaware of the various terms used in the Act. Therefore, they do not fully comprehend the agreements before signing them, which later gives scope for numerous disputes. However, the Act itself provides for a uniform builder-buyer agreement that is supposed to be stringently adhered to. As per the survey conducted by the Omidyar Network India, 76% of the buyers are aware of the Act and wish to purchase RERA-approved properties, but their awareness is minimal. They recognize RERA only as a registering and grievance redressal authority and are unaware that RERA also exercises administrative and quasi-judicial functions.

Another issue that draws attention is the human resources shortage at state-RERAs. The staff needs to assist the authority in its day-to-day functioning, mainly by scrutinizing the application forms of the developers and promoters. Due to this shortage, the applications are not examined timely and effectively, and most often, the information furnished is either incomplete or fake, which ultimately leads to project delays.

The next barrier to the successful execution of the Act is that it does not cover already stalled projects. So, any suits regarding those projects pending before different courts will continue to proceed in those courts without being transferred to the RERA authorities. Though Sec 71 of the Act provides withdrawal of a case pending before any consumer dispute redressal forum after taking due permission and filing a new application before RERA. It can only be done if the developer registers the project under the REA, 2016. Even if the project gets registered, liability can be fixed only for future evasions. So, any delinquency committed before registration is outside the purview of the Act.

Regarding the ongoing projects, it has been observed that states like Haryana, Uttar Pradesh, and Gujarat have precluded them from the ambit of RERA, which was later dealt with heavily. Accordingly, ongoing projects registration measures under RERA were taken. Moreover, the Hon'ble Supreme Court has also now categorically cleared that such ongoing projects fall within the purview of RERA.

Another challenge is the stringent approval process. The buyers and the developers have raised concerns regarding delays in processing their projects due to the rigorous approval process of the government. They assert that they must seek several permissions for project clearances from the

different government bodies, thus leading to a rise in the capital. This affects both the developers and the buyers. Ironically, REA authorities lack the powers to give instructions to such bodies to accord timely sanctions and permissions. However, delay in approvals can't be a ground for a developer to deny possession to homebuyers, as held by Bombay High court in Westin Developers case[6].

IV. An Insight to Dispute Redressal Forums & Mechanism

Providing home buyers with a practical and speedy adjudication mechanism is one of the main objectives of the Act. RERA surfaced as a tool of grievance redressal for home buyers. It seeks to secure the rights by resolving the disputes in a time bound manner. The Act provides two forums for dispute resolution, namely, the Real Estate Regulation Authority and Adjudicating Officer. Sometimes, confusion is created amongst the stakeholders regarding the overlapping jurisdiction of the adjudicating officer and the regulatory authority. Approaching two parallel authorities for a single complaint is cumbersome and time-consuming. However, in Newtech Promoters and Developers Pvt. Ltd. V. State of UP, it was held that the determination of compensation is investigated by the adjudicating authority while a claim for refund by the regulatory authority. Hence, any aggrieved buyer or Association of the buyer can file a complaint on the grounds of non-compliance with the Act and seek remedy for compensation and withdrawal of the whole investment amount simultaneously from the two respective authorities. The buyers can also choose to approach the Consumer Disputes Redressal Commissions through concurrent remedy as held by the Hon'ble supreme court in Imperia Structures Ltd. v. Anil Patni & another[7]. There is another confusion concerning the jurisdiction of other competing Acts like Insolvency Bankruptcy Code, 2016, the SARFAESI Act, 2002, etc., which could be cast away by simply giving precedence to RERA over other Acts. After all, it is a specific Act meant for the real estate sector only.

In Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India[8], the Hon'ble supreme court has directed the recalcitrant states and Union Territories to appoint/establish the authority, adjudicating officers, and the appellate tribunal within a period of three months of the judgment so that complaints could be timely resolved but till today 30 states/UTs have established Real Estate Regulatory Authority. The State of Meghalaya, Jammu & Kashmir, Ladakh, Sikkim, and West Bengal have yet to establish the Authority. Nine states, namely Arunachal Pradesh, Assam, Manipur, Meghalaya, Nagaland, Sikkim, Telangana, Uttarakhand, and West Bengal, have not appointed adjudicating officers so far. Only one UT, i.e., Andaman & Nicobar Island, has appointed the adjudicating officer. Likewise, the Real Estate Appellate Tribunal has been established by 28 states and UTs except for Arunachal Pradesh, Jammu & Kashmir, Mizoram, West Bengal, Sikkim, Meghalaya, and Ladakh.

If we investigate the dispute resolution mechanism, challenges occur in terms of the RERA award remaining unexecuted. The authority constituted under the Act is empowered to pass suitable orders against the errant developers, promoters, or agents. Such orders are required to be executed within 45 days from the date on which it was served upon the defaulters. Still, several incidences have befallen

[6] 2020 SCC Online Bom 3912

[7] (2020) 10 SCC 783

[8] (2019) SCC Online SC 1005

wherein the developers have declined to timely administer the orders delivered. So, the orders are referred to revenue authorities for execution under section 40 of the Act, wherein recovery is made as "arrears of land revenue." Though the RERA is disposing of complaints very impressively, its enforcement status is still unknown. The Act provides a penalty for non-compliance with the orders of RERA, but hardly any defaulter has been coercively treated so far.

As per the assessment report of Omidyar Network India, "5 out of 6 home buyers select redressal through RERA. However, the satisfaction level among the buyers for post-RERA projects is only 30% which is very low mainly due to extended resolution timelines and order execution delays. The position of the developers is also not different in this respect. Most of the developers are unsatisfied with the grievance redressal mechanism".

State RERA's in the whole country have disposed of 77300 complaints in the last five years.[9] The state of Uttar Pradesh, followed by Haryana and Maharashtra, are the three states that have accounted majority of the total disposed cases in the country. Rajasthan RERA has also disposed of 90% of complaints in the year 2021, and as such, it has stood in the third position in dispute resolution. The RERA's of the state of Uttar Pradesh, Delhi, Karnataka, and Maharashtra have established the conciliation forums as required by the Act under sec 32(g), which states that, "The Authority shall take measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations."

These forums are moderated by special officers who negotiate between the home buyers and the developers. Most of the disputes decided by the conciliation benches have seen fruitful resolutions. Still, if no amicable settlement is reached between the two, the dispute is referred to RERA for further proceedings. The Haryana RERA has established a mediation forum for a swift solution to conflicts. The remaining states are still in the process of establishing such conciliation forums.

V.Conclusion & Recommendations

As discussed in the preceding paragraphs, the REA, 2016 was enacted to bring transparency, answerability, and consumer confidence to the real estate sector. The Act is gaining momentum at a different pace as some states have done the needful, while some are in the middle of the route. Various authorities established under the Act are also playing their decisive roles. However, the full potential of the Act is realized only when all the states come together to follow it in letter and spirit without tweaking. There is no denial that challenges with the current execution of the Act exist. Directing efforts can boost the efficiency of the Act.

Sec 33(3) of the Act provides advocacy, awareness, and training on RERA laws. So, driving awareness campaigns online or offline in the form of seminars, workshops, and conferences about the Act's provisions is the main idea that the regulatory authorities should focus on so that all the stakeholders can reap the maximum benefit. RERA rules and the Act must be publicized across all the states through 'Akashwani' and 'Doordarshan'. The Central Advisory Council constituted under sec 41 of the Act can be assigned with the chore of execution of the awareness programs. The housing

[9] Ibid

associations and the builders should also spread awareness[10]. International best practices can be adopted if related to setting up a single reporting system for all the stakeholders or making conciliation a priority than an alternative. A fact-finding body[11] like the one prevailing in America can also be established in India at the state level to examine the issues and facts involved in a dispute to assist the regulatory authority. Based on the report of the fact-finding body, further actions can be taken.

There should be a uniform rollout of the RERAs across all the states, and those states which are lagging should quickly catch up for compliance with the Act. The state RERAs can take specific steps to streamline processes, like uniformity in their web portals that are easily navigable and encompass complete information about the projects, developers, and agents. This will help the buyers in making an informed choice. The state governments should establish a mechanism for all the stakeholders, including the approval granting bodies, to report to a single authority. The licenses, permissions, infrastructures, and investment funds are to be provided to the developers in a time bound manner. After all, it's the buyer who will benefit from it. A forum for discussion and exchange of ideas for all the stakeholders should be organized from time to time to get a better picture of the implementation of the Act. The five-year transition period for the real estate sector post-RERA was full of growth and challenges. The challenges discussed above are some of the exhaustive, but there may be some more which shall continue to scale up in the light of its execution. Hence improvement as per the emerging challenges is the only lasting solution. A revamped model of RERA must be brought wherein the real estate sector and other ancillary sectors are also developed. It is time to pinpoint the policy gaps and adapt to changes in sync with the socio-economic condition of the nation.

[10] Committee on Subordinate Legislation,, Sixteenth Lok Sabha, Report on Rules/Regulations framed under Real Estate (Regulation and Development) Act, 2016, twenty-First Report, 7.1 (August 2017).

[11] https://www.adr.org/sites/default/files/Real%20Estate%20Industry%20Rules%20%28Including%20a%20Mediation%20Alternative%29.pdf last visited on November 5, 2021

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

Keeping Up with Metaverse in Terms of Protection: Trademark & Copyright

Shivani Gupta*

Abstract

It's conceivable that the transition from internet services to the Metaverse will open up new chances for industry players and innovators to provide hardware and software for Augmented Reality (AR) and Virtual Reality (VR) equipment. As they advance, they will work to improve consumer accessibility and make these gadgets more affordable and robust. As more patentable innovations enter the industry, this directly relates to intellectual property rights. Companies offering both tangible and digital services and products as well as hardware will start to appear, leading to the creation of a virtual trademark realm. IP items will exist in both the physical and digital worlds. The system will advance thanks to consumer material. The majority of non-traditional trademarks, such as audio markings, motion picture labels, etc., will be utilized to differentiate companies when it comes to trademarks. There will be a need to create a new class of items & services, such as downloadable digital products, commercial shop services for digital products, and digital entertainment services, because completely product innovations will join the marketplace. It can be fairly comprehended that overall IP problems like territoriality, infringements, licensing, unauthorized use, etc., shall proceed to take place in the metaverse as is the case with existing virtual platforms. In terms of merchandise like eyewear and other equipment are concerned, they will be subordinate to patent rights, whereas software related innovations including games shall be subject to copyright.[1] It is probable that intellectual property violations will occur frequently in the Metaverse due to the complexity of its functioning. Furthermore, it would be challenging to pinpoint the infringers due to the complexity of the transactions. New and sophisticated techniques are thus needed to combat the violation in order to resolve this problem.[2] For instance, there may be real and fraudulent artwork available for purchase when copyrighted NFT artwork is sold in the metaverse. Identical trademark violation can happen when virtual goods are purchased and sold. Creating real or digital apparatus might also result in copyright violations. The most valued item in the Metaverse, proprietary information created or disseminated via online networks, will likewise be vulnerable to theft.

Keywords: Metaverse, Trademark, Copyright, Protection

* BBA.LLB (Hons.), Bennett University, Greater Noida

[1] Nwaeze, Godstime. "NFTs and Metaverse: Exploring the Challenges and Prospects for IP Lawyers in the Digitalized World." *Available at SSRN 4198128* (2022).

[2] Shawaiz Nisar, *India: IP Protection in the Metaverse,* Mondaq, (Oct. 07, 2022), https://www.mondaq.com/india/trademark/1173882/ip-protection-in-the-metaverse

I. Introduction

When a third party uses a trademarked mark that is either identical to or confusingly similar to an existing registered trademark for the same or similar items or services, this is considered an infringement of the first party's trademark. When avatars in a metaverse use real-world virtual products (such virtual clothes) that hold the registered trademark of others, it is reasonable to anticipate that legal issues may arise as a result. The use of a trademark for "real clothes" in Class 25 on "virtual clothing" in the metaverse may lead buyers to assume, erroneously, that the virtual clothing is sold or licensed by the actual clothing company that owns the trademark. This is because the real clothes trademark is in Class 25.

Given that real-world commodities and virtual products are differentiated in meaningful ways, it is another tough matter to evaluate whether or not and how real-world intellectual property rights may be extended or transferred to the virtual world. It is not yet clear whether or not the use of a trademark in connection with a virtual product is equal to the use of a trademark in connection with a physical product. Before launching a virtual product in their metaverse, developers should do a trademark availability check to see whether or not the name they want to use for the product has already been registered or an application for registration has been submitted for it. They will not be able to infringe on the intellectual property of another person as a result of this. Copyright protection is given in addition to trademark registration in the event that the "originality and creativity" criteria for a stylized brand is satisfied. This condition applies to a stylized brand. Unless a "fair use" defense can be shown, illegal copying of a copyright-protected trademark on "virtual products" used by avatars in the metaverse is likely to result in a copyright infringement. This is the case even if the copying is done in good faith. Therefore, before creators invest their time and effort into establishing a metaverse, they should carefully evaluate their intellectual property rights and decide whether or not to obtain permission from the appropriate owner to use a trademark or copyrighted work on virtual items. This should be done before establishing a metaverse.[3]

II. Understanding the Issue

It is possible to obtain legal protection for a company's brand name, logo, slogan, melody (in the form of a sound trademark), visual forms of any recognizable characters in the metaverse, the graphic appearance of virtual goods that can be purchased, the names of avatars, and distinctive color combinations (in the form of color trademarks). As a consequence of this, it is vital to provide trademark protection considerable attention when developing intellectual property (IP) in the metaverse in order to secure the safety of the brand. The third aspect of the connection between the metaverse and trademarks is that products, even those with brands that are unique to the metaverse, may be tokenized and perhaps bought there. This creates a great deal of possible new

[3] Amanda Liu, *Trademark Protection in Metaverse*, Lexology, (Oct. 07, 2022), https://www.lexology.com/library/detail.aspx?g=1be3918e-e0d1-48f0-99da-0b2d113987a2

prospects for company. Companies that do not yet include services, virtual goods, virtual services, software, graphics, etc. related to the metaverse in the classes of goods and services covered by their trademarks will be required to revise the classes of goods and services covered by their trademarks and possibly file new trademark applications in order to protect their brand and trademarks. Companies that do include these types of things in their trademarks will be able to more effectively protect their brand and trademarks. This is something that has previously been done, for example by Victoria's Secret in the United States, which has filed trademarks for its virtual apparel line. Other companies have also done this.

It should go without saying that works of software, visual art, and musical compositions that are a part of the metaverse enjoy the same amount of legal protection under copyright as they have in the physical world. It does not provide any specific challenges in terms of copyright in the context of the current environment. Tokenized works, such as NFTs for digital and virtual works of art that are for sale in the metaverse, are not subject to this restriction, on the other hand. This restriction does not apply to works that have been tokenized. It is vital that the purchaser of the NFT does not give rise to any copyright claims in relation to the tokenized work that serves as the foundation for the NFT. Without the permission of the owners of the underlying copyrights, the holder of the NFT will not be able to use the underlying work in any manner that is different from the lawful uses that have been allowed by copyright law up to this point. The underlying work is a tokenized version of the original work, which is why this is the case. If someone tokenizes a digital work that they did not create, this creates a significant problem: in this scenario, it is possible that copyright infringement may not necessarily be shown for the tokenization itself; however, the online display of the work as a token in the metaverse, even in thumbnail form, may constitute an infringement of copyright. In other words, if someone tokenizes a digital work that they did not create, this creates a significant problem. Additionally, if an avatar were to create a work of authorship inside the metaverse, this would raise the issue of authorship in the framework of copyright law. This is because an avatar is considered to be a person. Because only a real person can be an author and an avatar is a representation of a person, the question that arises is whether or not the actual person who designed the avatar will be allowed copyright on the work that was produced using this method. This is due to the fact that only a real person can be an author. An illustration of this would be the frequent copyright practice of pseudonymous works, in which the real person, rather than the artificially manufactured pseudonymous person, is the owner of the copyright. This is done to protect the author's identity. This is a standard procedure for copyright protection. As a direct result of this, the person who came up with the idea for the avatar will also be the owner of the copyright for any works that are created utilizing the avatar. The challenge here is figuring out how the person who created the art may use their avatar to demonstrate that they are the one who created it.[4]

[4] *Legal issues in the metaverse/Part 2 – Tradenarks and copyright, NFTs and civil law principles in the metaverse,* CMS Law-Now (Oct. 07, 2022), https://www.cms-lawnow.com/ealerts/2022/07/legal-issues-in-the-metaverse-part-2-trademarks-and-copyright-nfts-and-civil-law

However, the investigation and punishment of infringements that occur in the metaverse will be the most difficult component for owners of copyrights and trademarks to manage successfully. In order to overcome this obstacle, the metaverse will need to be outfitted with some kind of artificial intelligence. In its absence, the detection and localization of violations would be laden with a variety of challenging difficulties that need to be resolved. If the action is taken against a user of the metaverse who is hiding behind an avatar rather than the provider of the metaverse, the transnational and cross-border nature of the metaverse will pose issues regarding the applicable legislation, jurisdiction, and competent authorities in the field of enforcement. This is particularly relevant in the case if the action is conducted against a person rather than the supplier of the metaverse.

III. To Register "Meta" Or "Metaverse"-Concern Of Formative Marks

It is not exactly a closely guarded secret that a number of the largest companies in the world, including Alibaba and Tencent, have hurriedly submitted trademark applications for "Mataverse"-forming trademarks in China in order to capitalize on the rapidly expanding technology and legal environment in that nation. However, this is not a secret that is widely known. In addition, the Taiwan Intellectual Property Office (TIPO) has reported that a number of trademark applications in Taiwan have been lodged for marks that use the phrases "Meta" or "Metaverse." These applications were made in Taiwan. Nevertheless, is it legally feasible to trademark terms like "Mataverse"?

According to the first paragraph of Article 29 of the Taiwan Trademark Act, a mark that consists only of a description of the quality, intended purpose, material, place of origin, or significant features of the defined products or services is not registrable because it lacks a characteristic that distinguishes it from other marks. This is because a mark that consists only of a description of the quality, intended purpose, material, or significant features of the defined products or services cannot be used to identify the source of the goods or services This is due to the lack of a distinguishing feature possessed by the mark. It is very doubtful that applications for the registration of such marks will be allowed in Taiwan, at least not for the time being, due to the fact that "Meta" and "Metaverse" are only descriptive of the virtual products and services for which registrations are sought. This is one of the reasons why a registration for "Meta" and "Metaverse" is being pursued.

In situations in which a "Meta" or "Metaverse"-forming mark is sought to be registered in relation to "real world" products that are dissimilar in nature to virtual goods and services, such as cosmetics and perfumery for the care and beauty of the face, the chances of successfully registering a "Metaverse"-formative mark are increased. Examples of such situations include: This is the situation when an application to register a mark that forms a "Meta" or "Metaverse" is being considered.

IV. Mitigation And Risk Management Of Infringement

There is a possibility that it may be more challenging to identify and find infringers in the metaverse; hence, advanced research methods will be necessary. This danger poses a risk to any and all types of intellectual property that exist inside the metaverse. When acquiring or selling things in the metaverse's virtual marketplace, trademark infringement may be a worry. For example, copyrighted NFT artwork that is offered for sale may contain both authentic and counterfeit copies. In virtual conference rooms that host conversations about proprietary information, possible trade secret misappropriation difficulties could emerge, and patent infringement concerns could emerge if the process of creating technology infringes on metaverse-related patents. Both of these issues could arise if metaverse-related patents are infringed upon by the process of creating technology. Businesses may be able to defend themselves against these dangers by proactively registering their trademarks for new products and services, especially for unusual trademarks. The consistent use of a brand in the process of doing business in the metaverse may result in acquired uniqueness, which may be the foundation for trademark registration for a non-traditional trademark. Acquired distinctiveness may be used as the basis for trademark registration. In addition, new strategies for the enforcement of intellectual property may benefit from regular monitoring and searching for evidence, as well as the discovery of patterns of online infraction.[5]

V. Techniques For The Proactive Administration Of Law In The Metaverse

Utilizing contemporary research methods that are well adapted to discovering probable sources of infringement in the metaverse allows owners of copyrights and trademarks to preserve their control over their respective properties. In order to aid them in monitoring and investigating the metaverse for instances of infringement on their intellectual property, owners of IP may need to hire virtual investigators. These investigators may consist of people, automated systems, or artificial intelligence. Due to the fact that the metaverse is composed almost entirely of online services, the country of origin of its most significant providers may not even be in the same region as the location of the infringement. When a host server is located in a country other than the IPR holder's own, online enforcement may be more difficult. As a result, it may be required to evaluate local notice-and-takedown protocols and website-blocking measures on a case-by-case basis. However, this endeavor is made more challenging by the fact that the intellectual property laws and practices of different nations have developed in a variety of distinct ways throughout time. When it comes to intellectual property (IP) enforcement, some countries follow the normal practice of administrative procedures, whereas other countries, particularly those with more established IP

[5] Surana, *IPR Challenges in Metaverse*, Surana and Surana, (Oct. 07, 2022), https://suranaandsurana.com/2022/06/30/ipr-challenges-in-the-metaverse/#:~:text=IPR%20Challenges%20in%20Metaverse,such%20technology%20on%20their%20own

regulations, follow the typical practice of judicial injunctions. Nevertheless, gathering proof of an infringement is an essential first step, and it may be most effective to focus on conducting extensive trademark and patent prosecutions in countries with a significant number of users.[6]

VI. Patents And Other Forms Of Intellectual Property In The Context Of Future Virtual Worlds

Intellectual property (IP) seems to have a bright future in the metaverse, which will bring in new trademarks, new categories of goods and services, and possibly patentable breakthroughs in virtual reality and augmented reality. The growing popularity of virtual reality has the potential to make the challenges that already exist with securing trade secrets much more difficult. Establishing adequate methods to preserve secrecy is one of the essential legal criteria for preserving trade secrets. The other fundamental legal need is having appropriate measures in place. Traditional means of maintaining secrecy, such as signing nondisclosure agreements or controlling access using biometric technologies, will not be adequate in the context of the digital world, however.

Although the metaverse may provide challenges for intellectual property laws and those who possess IPRs, it will also bring enormous opportunities for intellectual property to advance and adapt so that it can function effectively within the ecosystem of the metaverse. It is essential for the future of intellectual property law to take advantage of the developments that are brought about by the metaverse if it is to be able to keep up with the ever-evolving technological environment.[7]

VII. Conclusion

Because this is a relatively new industry, owners of trademarks may be able to increase the level of protection afforded to their brands by taking preventative measures to educate the general public about the selection, endorsement, and sponsorship roles (including the use of "official" tags) of their trademarks on virtual products. This can be done by educating the general public about the use of their trademarks, including the use of "official" tags. If these actions weren't done, there wouldn't be nearly as much competition in the market for virtual things. When a certain trademark is used in conjunction with a particular digital good, it's probable that a customer won't be "likely to be confused" about what they're buying. However, this is not guaranteed. It is possible that a buyer will not care who developed their digital collectible, which is made up of pixels and code, if they view the trademark as merely aesthetic rather than as a sign of the product's origin or sponsor. This is the case if the buyer views the trademark as merely serving an aesthetic purpose. Toys, which are commonly used as an analogue for virtual goods since they are small, non-functional reproductions of the original object, are occasionally utilized as well. It is possible that

---

[6] Suebsiri Taweepon & Chariyaphon Vachanavuttivong, *Thailand: Immersing Intellectual Property Rights in the Metaverse*, Mondaq, (Oct. 07, 2022), https://www.mondaq.com/trademark/1156298/immersing-intellectual-property-rights-in-the-metaverse

[7] Andy Ramos, *The metaverse, NFTs and IP rights: to regulate or not to regulate?*, World Intellectual Property Organization, (Oct. 07, 2022), https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html

some customers who make purchases are unaware that the same corporation that is responsible for generating the physical goods is also responsible for creating the virtual toy or collection. Toys are often utilized in place of virtual items when people want to make a comparison. It is feasible to argue, as is now happening in the case concerning Nike, that digital products are only symbols or evidence of ownership for the physical thing. This is an argument that may be made. In addition, developers have the opportunity to defend their use of a trademark that belongs to a third party provided the use in issue fits the criteria for fair use, which includes uses such as parody, criticism, or referential usage (as is asserted in the MetaBirkin case[8] and Tata v. Green Peace[9]). Other businesses may create and sell digital products bearing the same or similar trademarks in order to increase their competitiveness in the online market. This is possible so long as there is no chance that buyers would be confused by the presence of many trademarks for the same product.[10]

There is a significant amount of work that needs to be done in order for the Indian Trademarks Registry to bring its administrative policies up to date and become relevant in the modern day. Because there is a lack of proper clarity and efficiency, there will be negative repercussions that accrue for all parties involved. These implications will be unfavorable. Because it won't be clear or offer applicants with advice on how to characterize the items being covered, genuine firms who wish to enter this market would suffer as a consequence of too wide protection. There is a lack of standardization among the descriptions offered by applicants, and a significant number of them are too detailed. On the other hand, several programs have been developed specifically for the open-ended and non-specific category of "virtual products," "digital collectibles," or "digital media files," respectively. Despite the fact that certain apps have effectively and appropriately linked their virtual items to particular classes of commodities, this continues to be the case (clothes, footwear, etc.). To provide one example, some programs have successfully linked their virtual items to certain classes of commodities (clothes, footwear, etc.). When there is the possibility for a virtual marketplace to supply a varied selection of products, it becomes sensible to insist on granularity in application requirements. In addition to this, it seems that there is a significant number of software programs that can be downloaded for both digital products and downloadable media files, and it is very probable that these programs serve the same purposes as the digital objects that they are designed to download.

With respect to the copyright, it can be concluded that the major challenges in the world of metaverse are identifying the owner of the copyright of the content which has been put in metaverse, determining the manner and extend of infringement and to discover out the identity of

[8] *Hermes Sues MetaBirkin for trademark infringement*, HFG, (Oct. 07, 2022), https://www.hfgip.com/news/hermes-sues-metabirkin-trademark-infringement

[9] Tata Sons Ltd. v. Greenpeace International, 2011 SCC OnLine Del 466, (Delhi HC, 2007)

[10] *De-Coding Indian Intellectual Property Law*, SpicyIP, (Oct. 07, 2022), https://spicyip.com/2022/05/trademarks-and-the-metaverse-imaginary-rights-or-real-wrongs.html

the infringer and development of the legal system or forum where these cases can be heard and appropriate remedy to be granted.

The need for precision raises the issue of how to make the most of available resources. As a result of the introduction of brand-new products and services, there has been a rise in the number of applications, which has led to an increase in the administrative load that has to be dealt with. As the online world continues to expand, the TMR will find an increasing number of uses in a range of different disciplines. But how well does it hold up with the additional pressure? The trademark registration system would be placed under a significant degree of strain if every physical firm could also register all of its products and services in the virtual realm.

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

Nature Of Fintech and *Its Relation With Cyber security

Busam Pushyami

Abstract

World has experienced a rampant evil and what got us through it is financial technology (FinTech). Fintech rescued people during pandemic. Though technological advances in the finance industry are not new, these improvements have connected a colossal of people across the world stretching its arms even to the remote places of the world and introducing a new dimension of financial sphere to invent, explore, adopt, experience, enjoy and improve the finances to most of the people. While people are engrossed in the scrutinization of the advanced technology, sometimes it becomes difficult to identify the potential dangers in the form of cyber-attacks underlying in it. In the business market economies, the common notion followed is "caveat emptor", but it is also important for service providers and all others included in the business to reduce the cyber threats, thereby providing a stressless environment to the consumers in entrusting their finances with the FinTech. This paper deals with the cyber threats and potential attacks which gives an insight about the early recognition of those. This paper also deals with the development of FinTech and the economic frictions it has faced since its introduction in the society. This paper gives a deep insight of the role of big techs in FinTech industry and the risks it poses and possess. It clearly explains the steps taken by big techs in identifying and tackling cyber security problems. Now a days financial service organisations hold sensitive information which is more valuable than money. This paper explains the process of identifying cyber risks and thereby maintaining financial stability. This paper provides the insight of adoption of fintech globally and how our lives have intertwined with it on daily activities. The paper provides the importance of cybersecurity in FinTech and the implications of it in various facets of lives of all the people involved in it.

Key Words: FinTech Services, DNA Strategy, Cyber Crimes, Data Integrity, End-user Education

I. Exordium:

Financial Stability Board (FSB) definition of fintech says, FinTech is "technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services."[1]

Financial Technology, also called as Fintech is a wide term which includes within its ambit every function that is connected to financial services. It is the use of technology, particularly a software, for providing financial services to consumers both for business and individual

* BBA LLB(Hons.), SASTRA Deemed University

[1] FinTech, fsb.org, **available at:** https://www.fsb.org/work-of-the-fsb/financial-innovation-and-structural-change/fintech/ (visited on November 16, 2022)

purposes. Fintech covers the areas like banks, e payment, companies, educational institutions, crypto currency etc.

In our daily life we use fintech as:

1. Payment services. Ex: -If you go to shop, buy a book and chocolate then pay using your g-pay or any other payment apps
2. Banking services. Ex: - Transferring money from your account to your children account
3. Retail Banking. Ex: -Using online voucher and buying a product online through prepaid system, mobile recharge, ticket booking, paying bills.
4. Cryptocurrency and blockchain technology
5. Social media payments. Ex: - WhatsApp, Apple Pay
6. Artificial intelligence (AI) and Machine learning (ML)

Previously fintech involved only consumer payment domain i.e., enabling easy, secure and faster way of transferring funds, digitalization of cash. Now it includes within its ambit crowd-funding, data analysis, peer to peer money transfers, digital wallet adoption, cross border transfers, decentralised operations via blockchain like Bitcoins etc.

FinTech services in India include[2]:

1. Banking
2. Professional Advisory
3. Wealth Management
4. Mutual Funds
5. Insurance
6. Stock Market
7. Treasury/Debt Instruments
8. Tax/Audit Consulting
9. Capital Restructuring
10. Portfolio Management

Use of Technology relating to any services attracts cyber-crimes especially when it includes finance aspect in those services then it can be observed that cyber-attacks are obvious. While people are engrossed in the scrutinization of the advanced technology, sometimes it becomes difficult to identify the potential dangers in the form of cyber-attacks underlying in it.

The knowledge of those cyber-crimes and the level of security taken to protect is the sine qua non for anyone who uses technology.

The hacking can be broadly divided into

- **White Hat Hackers**: An ethical hacker, puts their hacking skills in identifying the potential risks and the vulnerabilities of the particular software or network system.

[2] *Available at:* https://nwww.investindia.gov.in/team-india-blogs/10-types-financial-services-offered-india (visited on November 20,2022)

- **Black Hat Hackers**: An unethical hacker who uses his skills to perform criminal acts, inducing malwares in the systems and thereby collecting necessary information, destroying files etc.

1. i. Cyber Attacks

Malwares that are used in cyber-attacks by black hat hackers includes virus, rootkits, botnet, ransomwares, spyware (ex: keylogger),

Trojan horse: deceptive malware disguises itself as legitimate program and downloads into the computer.

Worm: a type of malware that remains active in infected devices and self-replicates in all the other connected devices. Mainly used in companies and software institutes. To combat this, few companies implement bring your own device technique (BYOD) and changes security policies.

2. ii. Cyber-Crimes:

At end-user level cyber-crimes include clickjacking, deepfake, social engineering, Man in the middle attacks, catfishing, piggyback programs

Risks face by companies include operational risks, business resiliency, data breach, money laundering, financial viability, terrorism financing etc.

Companies use technology for combating security threats like Security from spear phishing, pen-testing, DDoS attacks etc.

Cyber security companies like Root9B, Raytheon, Mimecast, IBM Security, Cisco, BAE systems and some others, offer services like threat intelligence, cybersecurity and vulnerability assessments, consumer data security breach, security portfolio, new data protection techniques (cloud security, VPN security, router security) to provide the qualitative cyber security techniques.

3. iii. Potential effects of cybercrimes:

1. Breach of consumers trusts in company
2. Loss in future opportunities due to lack of tackling security problems
3. Loss of reputation of business
4. Cost to be borne by the companies to repair the non-resistible damage occurred.
5. Not only attackers' individual customers but also their social contacts.

II. Traditional Banking and FinTech

The expanding horizons of Fintech affected the traditional banking activities by cutting down the costs connected with each transaction[3]. This is done by providing self-serving technologies, use of Application Programming Interface (API)-backed banking programs, instant pay services, Automated voice bot uses for speedy resolution of customer's difficulties etc.

[3] Akhila Sriram, Financial Technology (aka Fintech) and its Impact on Traditional Banking, OSG analytics, available at: https://osganalytics.com/blog/fintech-and-its-impact-on-traditional-banking/

Dematerialization[4] of financial services can be easily observed at the late 20th century itself. Very few functions required the physical presence like filling applications on paper, the withdrawal of cash from Automated Teller Machines (ATMs) etc. However, these processes were time-taking, risky and expensive which limited the quantity of information storage and exchange.

These problems have been solved with the progression of technology. The significant changes that have augmented the recent use of fintech is first, the magnification of connectivity even to remote places. This has connected various people across the globe and easy interactions between Business to Business (B2B), Customer to customer (C2C), Business to Customer (B2C) and Customer to Business(C2B) markets. This has escalated the confidence levels of customers in business transactions, easy access and quality of services. It has increased the business of mobile network service providers in Emerging market and developing economies (EMDEs). Second, reduction in cost of data storage with the introduction of pen drives and new forms of storing data.

The increase in interconnectivity of people and businesses forms a long chain that encompasses a wide range of intermediaries other than the customers. Information will be spread amongst different players with one having customer details, other having customer funds, other maintaining customer relationship, another analysing the consumer behaviour and type of services that are to be provided or offered to them etc. These links include the service providers, product providers, connecting web providers, middleman, other connected service providers and operational providers etc who are interdependent on each other. Any cyber-attack at one point has the risk of exposing the data of all the other dependants in the chain, thereby posing difficulty in finding the exact location of attack. This vulnerability in a wide range will require coon's age for recovery both in terms of damage due to loss of confidential data and the damage of trust.

Following traditional methods of preventing cyber-crimes may result in high cyber prevention costs and may also frustrate consumers. Therefore, adopting technology to combat technology threats is the best way to tackle the cyber threats. This will also make automated operational processes easy. Ex: robotic Process automation.

- Adopting a technology, that acts as a watch dog, having built-in models of cyber threat behaviours thereby detects the threat at the earliest opportunity.
- Being in contact with the technology team to know the improvements in future of technology and thereby adopting such technology at early stages will also attract more customers on being provided security earlier than other businesses.
- Training and encouraging your employees and professional in detecting the new forms of cyber-attacks and implementation of passive solutions in retaliating it.
- Conducting timely fraud audits helps in knowing the vulnerability of business to cyber-attacks.

[4] Introduction of wire services, ATM networks, automated clearing houses (ACH), data centres, cross-border fund transfers etc.

III. The Evolution

India has become one of the largest digital markets having 87% adoption rate of fintech against the global average of 64%.[5] Currently India's fintech market valued at $31 billion.

Pandemic helped in reducing digital divide and brought the people even closer and tighter to technology. This has also increased expectations of people regarding the fintech services provided for it being easy and convenient to operate. Responsibility has grown to provide services in speed and secured manner as people entrust whole of their income to banks where there is a potential risk of cyber-crimes.

Mode of digital payments include; QR Code Payment technology, Near Field Communication (NFC), Unified Payment Interface (UPI), mobile Wallets, Mobile Money Transfer (Telco based), mobile applications, payment using wearables, payment through biometric authentication.

The **Advantages** of fintech includes

- Exclusion of carrying physical currency everywhere (prevents theft) i.e., Easy Accessibility
- Allows payment be made at any time i.e., Time Optimisation
- Payment directly results in transfer to bank account of the other person
- Increase in confidence level that the payment is genuine and reduces burden of going to bank again to deposit.
- Cost-effective i.e., Fintech services uses low costs than traditional banks.

The Disadvantages of fintech includes:

- No physical branches to approach for any deficiency or problem in services of fintech
- Data Integrity
- Many people still do not have the proper availability of fintech services
- Regulations. Fintech is a developing area and there are no proper formulated principles or authorities formed to regulate the fintech services and find faults in it.

Cyber-attacks and lack of proper laws and the presence of lacunas in existing laws keeps consumers of fintech at vulnerable positions. The personal data is obtained by companies in the process of verification in the forms of identity cards, facial recognition, fingerprint impressions, e-signatures, two-factor verifications etc. Prepaid stored value cards, is a type of electronic bank debit card[6], puts consumer funds at risk. With the recent connection of our personal data for security, it is not only our money that is at risk but our whole identity is at stake.

Recently cyber technology is developing with the new invent of technology. World can see the network shift from 4g to 5g, cyber-attacks are also developing. Along with-it laws relating to

[5] *Available at:* https://pib.gov.in/PressReleasePage.aspx?PRID=1759602 (visited on: December 03, 2022)

[6] The card contains the value of money within it, which is not stored in any bank. Any transaction can be done by paying through that card without using network facilities. This is often used for commission of major crimes which makes it difficult to find the culprit using the transactions he made.

it should also develop to combat the problems where there are lot of loopholes. With the availability of lot of gaps in the existing laws, it is the responsibility and the huge burden is on the companies, finances and all other institutions to escape from the cyber-attacks by securing it rather than crying over the loss for which no proper laws or solutions are not found yet.

In a process to finding out how to be protected and what to be done, technology has also improved software to secure from data leaks. While improving the operational effectiveness of the thing burden is also to deal with the dark web. Dark web can be seen in many fields targeting social media, financial institutions, companies, individuals etc.

For any individual to invest in the financial services that are intertwined with technology and to continue the reliability on their services require the assurance that their data will not be exploited or doesn't expose them to cyber frauds throughout the chain process of payment. Financial industry will always have the risk of unbalance future outcomes and unpredictability of markets, which make the consumers to seek quality services and strong undertaking procedures. Example: linking the activities of lending and money taking provides the asset and liability management. Similarly, linking account management with payment execution function confirms the availability of funds in the account before the persons give fund transfer instructions.

From the words of Joshua Bower Saul, founder of cybertonica[7], cyber fraud or cyber-crimes affect your business indirectly, rather than directly, by attacking the trust and security aspects of relationship of the industry or the business with the customers who are the foremost resources. He explains fraud under five heads such as:

1. Friendly fraud
2. Loyalty fraud
3. Robocalls
4. Deepfake chatbots
5. Skimming

IV. Big techs and the effect of Cyber security in relation to FinTech

Using technology in financial services is not unaccustomed but inclusion of various non-financial sectors[8] in providing financial services[9] is novel. However, the risk of cyber security arises with the services provided anew by the big firms, whose financial services are part of secondary functions, majorly due to lack of experience in tackling cyber-attacks. This often leads to money laundering, data privacy breaches, legal issues etc. thereby facing reputation risks and breach of trust borne by consumers.

The financial services provided by big techs are of two types:

[7] Cybertonica- a fraud prevention company that works as SaaS, hybrid or on-premise cloud solution for the risk management, compliance, fraud detection and cybersecurity for FinTech and Financial Institutions.
[8] Mobile Network Operators (MNO), large technological firms (Amazon, WhatsApp, Google)
[9] Providing insurance, Lending money, Money Management and Payments.

Overlay System: Third-party infrastructures give assurance of payment of money through credit card or retail payments. These include Google Pay, PhonePe etc.

1. Payment is made through the proprietary systems of big techs.

The entry of big techs into offering financial services by availing data-network-activity loops captivates them to be in dominant position in the market by using data privacy issues. It affects not only the parties involved in it but also the public interest which arises a need or data privacy regulations.

Big techs inculcate DNA strategy, i.e., Data analytics, network externalities[10] and interwoven activities in their business models to develop their business after attaining certain recognition of brand name in society. This strategy results in proliferation of customers in using the services provided by the big techs. The publishing of detailed data of the number of users and the ascendance of benefits to the customers entice further people to avail the services provided by big techs thereby perpetuating the life of business.

Big techs partners with non-banking financial companies (NBFCs) as leverage to outreach a wide range of people in providing services. They lower their barriers while providing financial services. Thus, there is a probability of big techs misusing it for an advantage of gaining the dominant position in market and excluding potential competitors.

Having obtained the position of digital monopoly, there is a potential risk of big techs using the consumers data and observing their cost patterns. They will have the knowledge of borrower's creditworthiness, and thereby determine the rate of interest a borrower can pay or the premium that can be paid for interest. This enables big techs to manipulate the services provided for customers and can designate different patterns of services to different customers that leads to discrimination. In this process of filtering customers, there is a possibility of developing biasedness that result in the elimination of minorities from availing the services provided by big techs. Experimental evidence[11] also proves the potential of big techs in influencing the sentiments of its users without them being aware of it.

V. Companies fallen prey for Cyber Crimes:

i. Yahoo!

In 2013, Yahoo has become a victim of cyber-crimes. Approximately 273 million user's data along with their usernames and passwords were stolen by exposing Personal information (phone numbers, email ids, names) of 3 billion users.

ii. Google

In 2014, usernames and passwords of approximately 5 million G-mail Account holders were exposed in the Russian forum site.

iii. Apple

[10] Benefit of users as a seller increases with the increase of number of users.

[11] A Kamer, J Guillory and J Hancock, "Experimental evidence of massive-scale emotional contagion through social networks", Proceedings of the National Academy of Sciences of the United States of America, vol 111, no 24, March 2014.

The online data storage system of company is being hacked and private photos of celebrities were being posted online. The company stated that the Apple's security system is not hacked rather the hackers guessed the usernames and security questions linked with passwords of users.

iv WannaCry Ransomware

A virus sent through email attachment locks all the MS Windows powered system that demands ransom for unlocking it. In the year 2017, UK has fallen prey for it and over 150 countries were affected by it.

v. LinkedIn

Russian cyber criminals stole over 6.5 million user accounts of LinkedIn. Some tech news revealed that the hackers tried to sell this information in Darknet.

vi. Citibank

In 1995, a criminal, Vladimir Levin, hacked the bank and transferred 3.7 million USD to the criminal organisation bank accounts. This was later found and he was captured by FBI at London airport.

vii. The Logic Bomb

During the cold war of Russia in 1982, a code was leaked which when activated lead to the explosion in a natural gas transporting pipeline.

The identity theft is a fraudulent act of acquiring the legally certified personal identifiers and other personal information essential to carry out impersonation to obtain merchandises, services and crimes and being a high-reward low-risk activity and an equal-opportunity crime, it could victimize anyone regardless of age, class and race. living in anonymity and minimal jeopardy of detection.

VI. Solutions

According to Global FinTech Adoption index[12], 64% of world population are the users of FinTech Applications. These necessities the adoption of solutions for cyber-attacks. There are few techniques followed by the fintech industries to overcome these problems.

Start-ups follow cloud computing as a leverage to securely improvise their business and services. Primary reasons of data breach of financial institutions are insider error or wrong doing and cybersecurity threats. FinTech applications must necessarily follow regional data protection regulations and KYC practices other than adopting new strategies of combating attacks as it would avail legal protections to business who become victims of cyber crimes and assurance to their customers in trusting them.

Forbes[13] has provided cloud computing technologies of 2023 that include Artificial Intelligence (AI), Internet of Things (IOT), metaverse, Virtual and Augmented Reality (VR/AR), cloud gaming etc.

[12] *Available at:* https://www.forbes.com/advisor/banking/what-is-fintech/ (visited on: December 03, 2022)

[13] The Top 5 Cloud Computing Trends In 2023, ENTERPRISE TECH, *available at:* https://www.forbes.com/sites/bernardmarr/2022/10/17/the-top-5-cloud-computing-trends-in-2023/?sh=27af29ec4648 (visited on December 03, 2022)

Compliance with banking regulations like Payment Card Industry Data Security Standard (PCI DSS)[14] and Payment Card Industry 3-Domain Secure Protocol (PCI 3DS)[15] that prevents fraud and cyber-attacks.

Financial institutions know that the issue is the security yet they are not well equipped with the skills to decipher the tactics of cyber criminals.

4. i. Data Protection Techniques:

Introduction of firewalls and Security programs like; adopting policies, regular assessment of the adequacy of security's stability and durability while doing timely essential modifications.

Testing has to be done through penetration and regular IT audits.

a) **Data encryption**: process of encoding a data into particular form or a code which requires the use of private key for decrypting the data into readable format and use it.
b) **Tokenization**: it is a process where the sensitive data is replaced with non-sensitive data such as unique identification symbols known as tokens. Tokens will not have any meaning or value. Token can later be deciphered to read the original data.

Adopting one time password systems and mandatory password change insisting the use of strong passwords

c) **Adaptive authentication and access programmes** monitor user's behavioural patterns and poses and alert alarm in case of any suspicious change in activity.

ii. National institute of standards and technology (NIST)[16] implemented five step framework for cybersecurity to all manufacturers as precaution in the cycle of identification, protection, detection, respond and recover. They are:

1. **Identifying risks and assessing your resources.**
   Develop Risk Management Strategy among systems, people, assets, data and capabilities. Identify risks and prioritize the tasks.
2. **Protecting valuable data and information.**
   Implementation of appropriate safeguards and the training programs, identity management and access control etc.
3. **Installation of mechanisms for premature detection of cyber threats and attacks**
   Includes pertinent monitoring of systems and detection of attacks
4. **Installation and implementation of cyber security software, policies and procedures.**
   After having trained personnel, responding to the detected attacks by developing solutions to tackle it immediately.
5. **Development of recovery programs:** Success doesn't arrive from detection of the issues but from the resilience of the situation to its original state. Development of

[14] Security standards for organizations that provide visa, credit card facilities.

[15] Rules for customer authentication process during online purchases.

[16] *Available at:* https://www.nist.gov/blogs/manufacturing-innovation-blog/how-protect-your-business-cyber-attacks (visited on: December 03, 2022)

recovery programs and preparation to face any such problems in future plays a predominance role.

VII. Laws and conventions relating to cybercrimes and cybersecurity

The financial sectors and national governments are endlessly working to bring in the legal regulations to avoid the risk of cyberthreat and improving the resiliency of systems to such attacks. Some of them are:

1. **UNICITRAL Model Law on Electronics Commerce, 1996**
   It is the United Nations Commission on International Trade Law, a model law that helps countries to frame laws relating to commercial transactions using computerized techniques.
2. **The Organization for Economic Cooperation and Development**
   The OECD has adopted certain guidelines and principles for the protection of information systems thereby protecting individuals
3. **G8 Summits**
   The Denver Summit in 1997 and Okinawa Summit in 2000 focused on importance of privacy protection, data free flow and transactions security. The summits focused on tackling international cyber-crimes and adopting harmonization principles among nations.
4. **The Information Technology Act, 2000 and IT (Amendment) Act, 2008**
   This act provides legal recognition to electronic commercial transaction and has provisions relating to cybersecurity and data protection. Section 43(a)-43(h) of the act penalises any cyber contraventions and Sections 63 to 74 of the act penalises any cyber-crimes.
5. **The Information Technology Rules**
6. **Digital Personal Data Protection Act, 2022**
   The act recognises the individual's right to access their personal data and its regulation for legal purposes. The act imposes hefty fines for non-compliance irrespective of the turnover of entity. This act maintains a balance between privacy of individual and learning form global approaches.

VIII. End-User Education

The introduction of e-contracts, e-governance, e-services for the benefit and easy accessibility of public also put certain responsibilities on them. One such responsibility is having knowledge about what is genuine and what is fake while accessing cyber facilities. If the reasons for the cyber-crimes can be narrowed down to 2 heads it is easy computer access and minimal user knowledge. Along with all the legal regulations and cyber security measured adopted by entities, end users should also have minimal knowledge in this area.

It means educating people about the knowledge required by them in identifying cybercrimes, its threats, potential attacks, knowledge about the recourse required to be taken after cyber-crime has been committed and before the use of stolen data. This education is given in the form of providing user manuals to publics, publishing articles about the cyber-crimes and ways of tackling it, providing awareness training to all the employees of a company in order to protect

the privacy of the data taken from the customers by following the ethical norms of transparency in its actions.

IX. **Conclusion**

For any business it is very crucial to understand the cyber security trends and identify the suitable strategy for the sustainability of business according to the satisfaction of modern needs. Globally one-third of bank transactions are done through online transfers and India recorded an alarming increase of 63.5% in cybercrime cases in the year 2019

Fraud accounted for 60.4% of all registered cybercrime cases. Most Indian firms experienced more than a 25% rise in cyber threats or alerts amidst the move to work from home owing to the pandemic. Yet the use of cyber technology is blooming in the lives of people while the cyber-crimes are blasting their hopes. The cyber frauds have now grown to an extent that it has become cyber fraud industry which not only does crimes on its own but manufactures and sells products that aid others in hacking and committing cybercrimes. It encourages anti-social behaviours like exploiting people's earnings and savings. This is done by finding loopholes in traditional cybersecurity strategies and weak cyber protection.

Striking the balance between the promotion of fintech innovations and risk management is vital as the life of individuals hinge on it. Understanding the dominance of benefits of fintech necessitates the adoption of solutions, fraud detection strategies and hazard management plans to protect the safety of public and their money entrusted with them. Modification of fintech environment will perform as a foremost stage in attaining the success in FinTech.

Paramount Highlights of Theories And Trends: Position Of IPR Vis-À-Vis Database Rights

Pooja Lakshmi*

Abstract

The protection of intellectual property rights (IPR) is crucial to any data management programme. The database and/or material of a researcher may be shared with others. Others can only utilise external data to its full potential if they are aware of its conditions of use. In the modern era, each person is constantly connected. Thus, Data is at the centre of the Fourth Industrial Revolution and is driving transformation. Data is frequently described as the new oil as Data creation and refinement can require a big investment, just like oil. As a result, while several nations recognise database rights, others do not. An outline of some of the problems with maintaining IPR in data projects especially with respect to digital databases is elaborated in this explorative study highlighting the provisions of law and some case studies.

Keywords: intellectual property rights, database rights, copyright, digital rights

Introduction

A database can be eligible for the Database Right, a relatively recent legal protection. This unique form of intellectual property protection was introduced in 1996. If there has been a significant expenditure made in gathering, validating, or presenting the database's contents, then the right is present in the database. This notion is comparable to that of a generalised intellectual property right in data and information. It only permits a very narrow exception for data extraction (but not re-use) for illustration in teaching and research, not for profit or any other commercial purposes.[1]

A database is defined legally as a collection of independent works, data, or other resources that is organised methodically or systematically and is individually accessible via electronic or other methods. A database is described as a grouping of unrelated data and works.[2] Software is not protected as a database because it is used to create or manage databases; rather, software is covered by intellectual property law as a literary work. A group of software modules could, however, be protected as databases because software is frequently designed in a modular format. A database may be made up of some components of a computer programme, such as on-screen look-up tables that users can search to discover information.

* BBA LLB (H), Bennett University

[1] McGeever, M. (2007) *IPR in databases*, *DCC*. Available at: https://www.dcc.ac.uk/guidance/briefing-papers/legal-watch-papers/ipr-databases (Accessed: October 27, 2022).
[2] Lindsey Gledhill, (2018) *Intellectual property in databases - advice*, *Harper James*. Available at: https://harperjames.co.uk/article/intellectual-property-in-databases/ (Accessed: October 27, 2022).

Both copyright and "sui generis" or database rights provide legal protection for databases. These are automatic, unregistered rights that provide the owner authority over particular database usage. The information contained in a database is safeguarded by database rights and database rights are available for databases regardless of originality. The cost of gathering, checking, or presenting the data must be significant as it is a substantial investment. In the corporate world, client lists, contact lists, extracts from research reports, etc. may be covered by database rights.

Bioinformatics-related databases, such as academic or scientific articles, books, software code, manuals, websites, books, graphic works, multi-media works, and fact compilations, can be protected by copyright (databases). Trade names, product names, domain names, and service marks/slogans are all subject to trademark protection, and through the use of patents, businesses can secure a legal monopoly to prevent their technology from being produced and sold by competing companies through online marketplaces. According to the Delhi High Court, building a database of clients or customers and then claiming confidentiality will not authorise for the establishment of a monopoly over such clients. Client information is not considered to be trade secrets or property.[34]

To promote intellectual, artistic, and cultural creation, the Copyright Act was passed. Courts must overcome obstacles in order to apply the Copyright Act to the Internet, but in doing so, they must keep the public advantages of this digital world in consideration.

"Internet and new technologies unleashed a remarkable array of new creativity."

- Professor Michael Geist[5]

I. Growth Trajectory; India

The protection of databases has become a controversial issue globally since the last ten years or more due to the increasing significance of both raw and applied information. The ease with which technology has permitted the excessive spread of databases has caused database protection to be placed on the policy agendas of most developed economies (including India's).[6]

In comparison to nations like the USA and the UK, India's copyright laws are relatively new. Under British administration, the first Copyright Act of 1847 made English law applicable throughout the nation. At independence, India has a copyright law that was entirely compliant with both the then-current copyright conventions and technologies used in the cultural sector.

[3] American Express Bank Ltd. Vs Priya Puri 2006 SCC OnLine Del 638
[4] Navigatothers Logistics Ltd Versus Kashif Qureshi & Others Lnind, 2018 DEL 4110
[5] Michael Geist,(2010) *Clearing Up the Copyright Confusion: Fair Dealing and Bill C-32*, Canada Research Chair in Internet and E-commerce Law University of Ottawa, Faculty of Law
[6] Deepu Jacob Thomas, Of Square Pegs and Round Holes: Towards a New Paradigm of Database Protection, 4 IJLT (2008) 34

Additionally, all databases and multimedia creations are protected by the Act. It might be stated that advancements in technology have shaped copyright law over time.

The WIPO Copyright Treaty (WCT) was brought forward in 1996 after discussions on a global level and brought into force in 2002. These were enacted solely with the objective of countering the emerging threat of digital infringement. The preamble of the World Intellectual Property Organization's (WIPO) Berne Convention recognises the necessity to maintain a balance between the rights of authors and the public interest. The parties to the treaty are obligated under Articles 11 of the WCT and 18 of the WPPT to take appropriate legal actions and apply effective legal remedies to prevent the circumvention of technological safeguards used by the right holders. India is not a party to the treaties but made amendments to its Copyright Act in 2012 to bring the Indian Copyright Legal regime at par with the WIPO treaties. Section 65A of the Act makes circumvention of effective technological measures with the intention of infringing the rights of the author a punishable act. Despite not being a party to the treaties, India amended its copyright law in 2012 to bring it into compliance with the WIPO accords. The act of circumventing beneficial technological safeguards with the purpose to violate an author's rights is illegal under Section 65A of the Act. The removal of any rights management information or its alteration, as well as the distribution, importation for distribution, broadcasting, or communication of copies of the work, are all prohibited by Section 65B. Several exclusions are listed in Clause 2 of Section 65A. Although the Act aims to safeguard researchers' and students' interests in the field of innovation, it can also be interpreted as favouring the use of limits on Internet users' access to information.

In India, the amendments in 2012 have attempted to bring the Indian Copyright Legal Regime at par with the international WIPO treaties. The earlier Copyright Law did not have express provisions effectively dealing with contravention of Digital Rights Management techniques. The recent amendments are also in line with the US DMCA and the European Union Directory, though less strict in nature.

It is still unclear if India has put in place sufficient safeguards to protect database rights. More stronger database protection rules are required due to the enormous amount of data that is accessible through Business Processing Offices in India from different jurisdictions. While the IT Rules[7] check all the compliance related to the international standard of protecting personal data, and protect personal data relating to sexual orientation, physical, physiological, and mental health condition, biometic information, passwords, financial information, and medical records and history, it needs more specific laws with respect to other categories of data. This is because database rights are not limited to only personal and sensitive data.. It is to be emphasised that the right of reproduction applies to authors of individual works as well as those of collections of works or compilations. A collective work can never be reproduced without also reproducing both originality sets. According to the majority, the distinction between the rights of individual authors and collective authors should be made based on the source of the copied original.[8]

[7] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
[8] Robertson Vs. Thomson Corp, [2006] SCC 43

India's attempts to acquire and analyse data must assess and foresee how Puttaswamy would affect Indian data law. According to Article 21 of the Indian Constitution, which outlines our essential rights, the right to privacy is one of those rights. In Justice K.S. Puttaswamy v. Union of India[9], a Supreme Court bench of nine judges upheld in its historic judgement dated 24th August 2017. The government launched numerous measures to enact Personal Data Protection regulations as a result of the broad interpretation. The Supreme Court of India's decision served as the foundation for many contemporary Indian case laws on data security and privacy. The Supreme Court ruled that any regulation that violated or encroached upon right to privacy would be subject to constitutional review and would need to adhere to three aspects: be legal, be necessary, and be proportionate. Different High Courts have been debating how to exercise various aspects of privacy rights in the post-Puttaswamy context. Each of these courts took different positions, and it is safe to predict that the extent and significance of these rights will continue to be litigated as time and data progress. Further, The Competition Commission of India is hearing multiple complaints that involve the misuse of data doing a great job in interpreting the statutes for the benefit of the public.

There is no independent personal data protection law in India. The Information Technology Act of 2000 contains the most significant clauses. Section 43A was introduced to the Information Technology Act by the Information Technology (Amendment) Act, 2008, which took effect on October 27, 2009. A corporate entity may be held accountable for damages if it negligently fails to maintain sufficient security when handling sensitive personal data or information that it has access to or handles. Without the subject's permission, access to any electronic document, communication, book, register, record, information, or other material may result in punishment. Most of the rules only cover "sensitive personal data and information" that is gathered using "computer resources." Data localization is not covered, which was the main issue and the basis for India's ban on Chinese apps.[10]

II. Implementation of Laws - Protection of Personal Data

The MEITY established a committee of 10 people under the direction of former Supreme Court Justice B.N. Srikrishna to make suggestions for a draft Proposal of bill on the protection of personal data. The committee's report, "A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians," was submitted after a year of study on it. On December 11, 2019, Ravi Shankar Prasad, Minister for Electronics and Information Technology, introduced in the Lok Sabha the revised Personal Data Protection Bill, 2019.

Data has been divided into three categories in the Bill: personal, sensitive personal data, and critical personal data. Data acquired online or offline that relates to personality traits, identification characteristics, or other factors that can be used to identify a person is considered personal data. Financial information, biometric data, caste, religious or political beliefs, and any other category of information designated by the government are all elements of sensitive

[9] Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors., AIR 2017 SC 4161
[10] Priya Rao, (2020) *Personal Data Protection Law in India, Legal Developments*. K&S Partners. Available at: https://www.legal500.com/developments/thought-leadership/personal-data-protection-law-in-india/ (Accessed: October 27, 2022).

personal data. Any data notified by the central government as critical in nature is Critical Personal data.

The fiduciary or data custodian must take the appropriate measures to make sure that the processed personal data is accurate, up to date, complete, and not misleading. Sensitive Personal Data should be kept in India, though it may be processed outside the country with the data principal's permission. Outside of India, only critical personal data can be processed and stored. Personal data processing must have a clear, specified, legal purpose and be protected by security measures. The fundamental principles of the Bill encompasses and are broadly similar to those provisions underlined in the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR").[11]

Following the Supreme Court's declaration that the right to privacy is a basic right protected by the Constitution, the measure was presented to Parliament. The bill sought to control how businesses and the government may use citizens' digital data. However, the bill was withdrawn in Parliament by Union Minister for Electronics and Information Technology (MeitY) Ashwini Vaishnaw.

III. Database Rights; A Global View

Intellectual property rights affect the way both the author and others can use their and others' research data. A database that contains data created or used during research is largely covered by intellectual property laws.The capacity to use and distribute the data may be impacted by failure to clearly define rights in the primary data and permissions for the use of secondary data at the beginning of study.

However, Many jurisdictions or countries are yet to adapt any specific legislation governing database rights, sui generis or otherwise. In three significant jurisdictions, we may quickly assess the protection provided to databases under standard copyright law. i.e. the US, Australia, and Canada. In the US, the landmark case Feist Publications, Inc. v. Rural Telephone Service Co., Inc. led to the replacement of the "sweat of the brow" doctrine of originality with the "modicum of creativity" standard. A database is protected in Canada under copyright law as a compilation. Because Australia still adheres to the "sweat of the brow" heritage of standards, facts are protected by copyright under Australian law. Australian copyright law did not necessitate any intellectual effort, in contrast to the US, where the Constitution and the Copyright Act of 1976 mandated originality. According to Brazilian Federal Law No. 9610 of 1998, database owners are granted exclusive rights to copies, translations, and distribution of their databases. In Russia, Although the Civil Code of Russia does not need registration in order to enjoy legal protection, it does provide for the recording of rights, which is helpful if the claims are contested in court. Under European law, a database is not subject to restrictions on how its contents are used by third parties. The justification for database protection is that

[11] Priya Rao, (2020) *Personal Data Protection Law in India*, *Legal Developments*. K&S Partners. Available at: https://www.legal500.com/developments/thought-leadership/personal-data-protection-law-in-india/ (Accessed: October 28, 2022).

data is not often protected by copyright but rather is viewed as "property per se." The right to intellectual property was purpose-based under conventional copyright law.[12]

IV. Copyright Database Rights - A boon or bane to Institutions?

Due to the fact that libraries preserve books and other important works, they are regarded as the repository of knowledge. Libraries' digitization allows for the preservation of books for future generations while bridging time and space barriers. The establishment of fundamental infrastructure in India, such as the internet and telecommunications, as well as concerns with a lack of qualified staff, inadequate management support, out-of-date technology and software, etc., must all be addressed.

Digital libraries can provide for lifelong learning, research, scholarly communications as well as conservation and preservation of knowledge. The fair use concept provides exceptions to copyrighted content in ways that benefit society while preserving the book market. Internet and telecommunication facilities must be made available even to the remote areas so that those who do not have access to traditional or physical libraries can at least have their access in the digital form. Another suggestion is that The Ministry of Human Resource Development can announce an opt-out policy whereby those authors or owners of copyright who do not want their work to be digitised can request the government for exclusion.[13]

The Research Data Management Policy permits university researchers to make data and source code freely accessible. If employees from other universities contributed to the creation of the data, it is likely that these institutions will also allow for data sharing. If you are using secondary data, then you do not own the data or have rights in them. The Research Data Management Policy permits university researchers to make data and source code freely accessible. If employees from other universities contributed to the creation of the data, it is likely that these institutions will also allow for data sharing. You do not own or have any rights to the data if you are using secondary data. A licence that restricts the distribution of the data in a commercial database will be enabled to provide the data. The availability of government and academic data frequently falls under open licences like Creative Commons.[14] For databases, there are two types of protection that can be applied depending on the situations. As a piece of literature protected by copyright as well as by a separate database right. Typically, software used to create or run a database is covered by copyright as a collection of software modules rather than as a database itself. The law of confidence may also provide protection for database data that is not in the public domain.[15]

[12] Deepu Jacob Thomas, Of Square Pegs and Round Holes: Towards a New Paradigm of Database Protection, 4 IJLT (2008) 34

[13] Heena Dhyani, *Digitisation of Libraries and the Copyright Issue*, (2018) 5.1 GNLU L. Rev. 90

[14] Robert Darby (no date) *Intellectual property rights and research data*, *University of Reading*. Available at: https://www.reading.ac.uk/research-services/research-data-management/data-management-planning/intellectual-property-rights-and-research-data (Accessed: October 28, 2022).

[15] Lindsey Gledhill, (2018) *Intellectual property in databases - advice*, *Harper James*. Available at: https://harperjames.co.uk/article/intellectual-property-in-databases/ (Accessed: October 27, 2022).

Clarity and accessibility must be prioritised while granting libraries protection. It must be enunciated in precise terms, if for no other reason, by statute. Legislators will need to take the system into account overall and in context if they want to ensure sustainable copyright. And the first step toward achieving it is a revitalised fair use framework, both for libraries and other institutional intermediaries.[16]

In addition, in order to avoid the trademarking or patenting of nearly 900 yoga positions, the Indian government has compiled a public database of them in the Traditional Knowledge Digital Library. The courts have often held that Yoga must remain exempt from existing intellectual property laws unless significant novelty or originality can be established. The Indian government, however, is promoting effective protection in the area of traditional knowledge.[17]

V. Evolution of IPR in Database Protection

IPR has been protected ever since the Berne Convention for the Protection of Literary and Artistic Works was adopted in 1886. IPRs and associated status now face new issues as a result of data protection. In the digital context, namely when using works in digital form, the reproduction right as outlined in Article 9 of the Berne Convention is fully applicable. An Agreed Statement about Article1(4) of the WIPO Treaty provides more evidence that there is no loss of copyright as a result of replication or reproduction in digital storage forms, including the databases.[18]

When there has been "a considerable investment in obtaining, validating, or presenting the contents of the database," a database right exists'. The word 'investment" in acquiring the contents' was explored in British Horseracing Board Ltd and others v William Hill Organisation Ltd [2004][19] since the resources required to create the elements that make up the database will not be enough to give rise to protection. The Penwell case[20] concluded that the issue of database ownership may change depending on the employee's type of work..

Productores de Música de Espana (Promusicae) v Telefonica de Espana SAU. Promusicae[21] case involved Promusicae requesting the European Court of Justice to require internet service provider Telefonica to provide personal information on its customers i.e., revealing personal data of the customers. The Court found that Member States must carefully apply general principles of proportionality and strike a fair balance between the rights in dispute. The decision does not impose hard lines on clash of IPRs and DPRs (Data protection rights), which could

[16] Ujwala Uppaluri, *The Libraries Exception: What the Amended Copyright Act Does (And Should Do) for Preserving and Sharing Knowledge In the Digital Era* ,(2012) 5 NUJS L Rev 665
[17] Rashmi Raghavan, *Traditional Knowledge and India's Backbend on Yoga,* (2019) 2.2 JIPS 113
[18] Robertson *v*. Thomson Corp., [2006] 2 S.C.R. 363, 2006 SCC 43
[19] British Horseracing Board Ltd and others v William Hill Organisation Ltd [2004]
[20] Pennwell Publishing (UK) Ltd and others v Ornstien [2007]
[21] Case C-275/06, Productores de Música de Espana (Promusicae) v Telefonica de Espana SAU. Promusicae

lead to novel approaches needed in new progressive law areas such as online privacy and data protection.[22]

With the right to privacy accorded the position of a fundamental right, questions will be raised in the future as to the role of Digital Rights. Use of such technologies also raises grave concerns for security as hackers may find a route to access various personal information of the users. The provisions need to be scrutinised more closely.

In contrast to the European Union (EU Data Protection Directive 1995) and the proposed legislation in Singapore, India does not have a distinct law protecting universal database rights. Databases are covered under the Copyright Act, 1956, under the heading of "literary works".[23] The old methods of data retention in tangible paper form, such as phone books and yellow pages, are being phased away, making it simpler for someone to duplicate the data of another and share it for financial advantage.

The Information Technology Act of 2000 ("IT Act"), specifically Section 66E, which deals with penalties for privacy violations, provides the limited protection currently offered to database rights in India. Copyright to a database (rights related to the labour and money invested in gathering, validating, presenting, and using data in a way that adds value to it) is protected under the Copyright Act of 1957.

Further, The Delhi high court in Burlington Home Shopping v. Rajnish Chibber[24] has recognized that the Copyright Act of 1995 has compilation which is also a literary work and is therefore protected. The reason for the protection is that, as compiling a compilation requires a significant amount of work, resources, and time, it is protected. India followed the common law doctrine of "sweat of the brow".Here, The defendant filed an application for a perpetual injunction prohibiting breach of secrecy and copyright as well as an interim injunction, asking the Local Commissioner for guidance. If Defendant was allowed to utilise Plaintiff's database, it would undoubtedly result in harm to Plaintiff that cannot be quantified in monetary terms.

Indian Supreme Court has held that the Copyright Act only protects slavish imitation of data[25]. The threat of copying someone else's database and making minor changes would not be properly addressed by this interpretation. The court further noted that minor edits such spelling changes, typographical error corrections, quotation additions, or omissions do not amount to a substantial work that justifies copyright protection in a compilation. Moreover, In Eastern Book Company v. D.B. Modak, the essentials of copyright protection extending to compilations were

[22] Petra Žárská and Martin Daňko (2021) *(PDF) Data Protection vs. intellectual property - researchgate, Data Protection vs. Intellectual Property*. Available at: https://www.researchgate.net/publication/355985277_Data_Protection_vs_Intellectual_Property (Accessed: October 29, 2022).

[23] Deepu Jacob Thomas, Of Square Pegs and Round Holes: Towards a New Paradigm of Database Protection, 4 IJLT (2008) 34

[24] Burlington Home Shopping v. Rajnish Chibber, 1995 IVAD (Delhi)732

[25] V. Govindan v. E.M Gopalakrishna [AIR 1955 Mad 391]

encapsulated.[26] In this case, the court decided that a piece of writing is not a protected work unless it was created with the author's labour, skill, and originality.[27]

Due to the inclusion of work of freelance authors in internet databases, independent authors had filed a lawsuit against the New York Times for copyright infringement. As a remedy, they were successful and the newspaper removed all of the articles which were affected from its databases. Its response was not surprising, since publishers have "virtually no economic upside" to retaining freelance articles in archived editions.[28] Similarly, If it is determined that the online databases are not newspapers, the employees of the publisher have the right to stop publication of their articles there under section 13(3) of the Copyright Act. A "compilation," which the Act defines as "a work resulting from the selection or arrangement of data," also includes a newspaper.[29]

Finally yet importantly, in Himalayan Drug Company v. Sumit[30], The Himalaya Drug Company, the plaintiff, possessed a sizable database of Ayurvedic theories and plants on their website. The defendant, who was based in Italy, precisely duplicated the entire database and posted it on the website "ayurveda.sumit.net." The plaintiff could only be contacted via the email address listed on the website, sumit@democrat.com. According to section 62 of the Copyright Act of 1957, a lawsuit may be brought at the location of the plaintiff's base of operations, where harm may also be deemed to have occurred. The defendants' Italian citizenship did not prevent the court from having jurisdiction over this matter.

VI. AI Generated Database Rights

Machines are able to produce work automatically and without human input using artificial intelligence. Unauthorized usage of copyrighted works is part of the machine learning process and is done to support neural network research. While AI intends to create a work, the exact parameters of the work are not known to the programmer of the AI or the AI itself. This is unlike a photographer who takes a picture using a camera, or a graphic designer using Photoshop. In this case, the AI is not merely the medium, but decides what the final work itself will be.

A Canadian programmer, Adam Basanta, was sued for an alleged violation of copyright in a picture generated and uploaded to a Twitter and Instagram account by an Artificial Intelligence (AI) designed by him, but acting independently of his or any human intervention.[31] The AI uses a deep-learning algorithm that is taught to generate images, influenced by the lighting

[26] Eastern Book Company v. D.B. Modak [Appeal (Civil) 6472 of 2004]
[27] Vidushpat Singhania (2013) *Is there a database right protection in India, Lakshmikumaran & Sridharan: Top Law Firm in India*. Lakshmikumaran & Sridharan. Available at: https://www.lakshmisri.com/newsroom/archives/is-there-a-database-right-protection-in-india/# (Accessed: October 29, 2022).
[28] New York Times Co. v. Tasini, MANU/USSC/0074/2001 : 533 U.S. 483 (2001)
[29] Robertson Vs. Thomson Corp, [2006] SCC 43
[30] Himalayan Drug Company v. Sumit, Suit No 1719 of 2000 (High Court of Delhi)
[31] Adam Basanta, *ALL WE'D EVER NEED IS ONE ANOTHER*, 2018, http://adambasanta.com/allwedeverneed

conditions in the room as constantly analysed by the computer's scanners. The generated images are then validated as "art", if it matches any of the contemporary artworks in the AI's database, and uploaded online with due credit. Art Factory's (formerly known as Basanta) database is used to "validate" the art it generates. The protected works in the database are not available for public viewing, but are mined and temporarily reproduced in its database. Further, Amel Chamandy argued that this mining and reproduction of protected works indicated that the AI must have had an unauthorised copy of her work.[32]

The promotion of technological growth requires liberal application of copyright laws, so far as the purpose of the use is completely transformational. In the case of Chamandy v Basanta, utilisation of a protected work to validate a newly created work is fairly unheard of and extremely distant from that the art was originally meant to serve. A distinction between romantic readership and information analysis should provide a compelling guideline to proceeding with the infringement analysis of deep-learning and data mining processes.[33]

In order to identify how laws should handle these AI systems, the law of copyright needs to be reevaluated. To prevent harm, policymakers must establish new moral guidelines for these systems. One suggestion is to consider artificial intelligence-generated works as works created for hire, giving the person who hired the AI rights to their creations.[34]

VII. A Way Forward

According to Reichman and Uhlir, a sui generis right will result in market distortions since it will be used in conjunction with laws against unfair competition, technological protection measures, and restrictive licencing.[35] The scientific community is concerned that costs for scientific research will skyrocket. An incentive to spend should be justified when the costs of creating an information product are high and copying produces a product that is almost identical, allowing the copyist to set a low price without having to incur significant research and development expenditures.

It is problematic to think of information as property. Only actions that will reduce the potential market share of the database should be prohibited under the law as infringing behaviour. This would be conceivable in the US, because databases have little protection now that the Feist judgement has been given. However, common law nations, where protection is already quite robust, require sufficient simplification of intellectual property legislation. First condition is that the Commercial use must have the ability to negatively impact the claimant database's market share. For the specific act of copying information providers' databases, the second

[32] Teresa Scassa, *Artist sued in Canada for copyright infringement for AI-related art project*, (Oct. 4, 2018), http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=286.
[33] A. Swetha Meenal and Sayantan Chanda, *Keeping Up With the Machines-can Copyright Accommodate Transformative Use in the Age of Artificial Intelligence?*, 11 IJIPL (2020) 242
[34] Avishek Chakraborty, *Authorship of AI Generated Works Under the Copyright Act, 1957: an Analytical Study*, [2019] 8.2 NULJ 37
[35] Deepu Jacob Thomas and Prasan Dhar, *Of Square Pegs and Round Holes: Towards a New Paradigm of Database Protection*, 4 IJLT (2008) 34

criteria should be waived. As if such providers should demonstrate that they engage in downstream uses, then we return to the initial circumstances of infringing behaviour.

There should inevitably be a compulsory licence provision in the event of sole source information generators and other situations when raw data is exceedingly difficult to obtain. The grounds can be comparable to those stipulated under patent law. The registration organisation, or alternatively, a Registrar, might have characteristics with the Registrar of Companies under the Companies Act of 1956. If the owner does not use the registration within a reasonable amount of time, regulators should have the authority to invalidate the registration in that class. This is done to stop owners from registering claims for planned commercial use ineffectively and frivolously. The owner would be shielded against unauthorised copying after registration. Players on the secondary market may use the data in the protected database as long as doing so does not have an impact on the database owner's current or projected market. The customs of scientists and knowledge-sharing must be taken into account in any responsible database protection mechanism. Database value-added functions may be decomposed using digital technology, and these same technologies also have the power to highlight entirely new types of functions.

VIII. Conclusion

Huge sums of money are being spent by business owners to get intellectual property rights for their projects. Any knowledge or information that corporate people perceive as having commercial viability is of utmost importance since it may be covered by the intellectual property regime's protections. The sharp expansion and general development are made possible by the vastly expanded expenditure in research and development. There is scope for increasingly comprehensive commercial agreements around the licensing of data. The key question is whether a significant portion of the expertise and judgement used by the publishers to create the newspaper is reproduced in the database. There is no reason why the designation and nature of the electronic editions should change because of the database in which they are stored.

Laws should be enacted in accordance with an institutional framework that aims to firmly establish the concepts of competition, fair use, and other associated public interests while rewarding database generators' investment. The advantages to society of not having database rights must be fewer than those of having database protection.

Sharda Law Review **Vol. 2 Issue: II December 202**
ISSN: 2583-2476

Policy and Legal Issues in E-Commerce and E-Governance

Purti Srivastava*

Sanya Kapoor**

Abstract

This research paper has been put forward by the researchers to examine the legal and policy issues governing the E- commerce and E- governance platforms. This paper starts with an **Introduction** wherein, the terms E-commerce and E-governance, its types and its benefits are introduced to the readers. Next, it proceeds with **Chapter I** wherein, the legal and policy regulatory framework of E-commerce is discussed and then the issues involved in this sector is explained via reference to case laws and provisions of various Statutes is taken into account for further easy understanding. Further, **Chapter II** talks about the policy and legal issues of E-Governance wherein legislations governing the notion of E-Governance have been laid down along with the judicial pronouncements. Furthermore, the chapter lays down the roadblocks which are being faced by the government to ensure an effective implementation of E-Governance in India. In continuation to this, **Chapter III** examines the ways through which the issues of these sectors can be overcome and hence, provides the viable solutions for the obstacles and finally the paper has **Conclusion** which points out the status so far in the implementation of E-platforms from the traditional practices of conducting business.

Keywords*:* E-commerce, E-governance, Information Technology, Obstacles, Statutes.

I. Introduction

'Technology made large populations possible; large populations now make technology indispensable.' – Joseph Wood Krutch [1]

Information Technology can be classified as an instrument that generates a foundation for the growth and development of the nation, thus offering a number of advantages not only to the individuals but also assisting to advance the nation as a whole. Our country is witnessing a digital revolution with internet becoming a part of every individual's life as its easy accessibility in mobile phones. The price of the internet is decreasing and thus, there is change in the lifestyle wherein there is a great revolution. The business activity conducted online is E-commerce and there are

* 5th year BBA LLB (H) student, Bennett University, (Times of India) Greater Noida
** 5th year BBA LLB (H) student, Bennett University, (Times of India) Greater Noida

[1] Sumanjeet, E-Governance: An Overview in the Indian Context, The Indian Journal of Political Science, Vol LXVII, No. 4, Oct-Dec 2006, https://www.jstor.org/stable/pdf/41856269.pdf?refreqid=fastly-default%3A9c8fd19a342f596d8a929b6859705cda&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results.

three types of e-commerce business model. Namely, inventory based, market based and hybrid model. Although there is no specific definition provided in any Statute. It can be defined as: "The use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals."[2]

In simple terms, E-commerce is the way by which business is conducted electronically. Above all, there is no definition that is accepted universally and different organizations have given different meanings to this. Though, these transactions seem to be cost-effective and simple at first hand but this is not the case and hence, there are various factors must be evaluated by the organizations from time to time to keep a track of its operation. Even the governments all around is struggling to get the answers to these difficulties, it still has not reached to nay conclusion per se.

E-Governance is the utilization of information technologies by the government organizations to enhance and transform their interactions with people, businesses and other parts of the government in order to provide services to their constituents and grant them a convenient way to adhere to the rules that have been established by the government. The implementation of such a technological application for the benefit of the disadvantaged groups in society will serve as a step towards assisting them in integrating into the mainstream of the society.[3] The government's use of IT to enable services like online form filling, paying bills online for utilities like electricity and water, submitting tax returns, and distance learning which is available to its citizens has rendered the system efficient and simple to use, regardless of individual differences. A paradigm change in IT usage has resulted from the rising idea of E-Governance, which facilitates for the delivery of the right to public services to the individual's front doors. Thus, the platform of E-Governance has enhanced administration while also assisting citizens in discovering about new procedures, rules and support lines which have been made readily accessible by the government at all levels.

II. Objective And Scope Of Study-:

- To comprehend the legal framework governing E-Commerce and E-Governance in India.
- To address the obstacles faced in deployment of E-Commerce and E-Governance.
- To suggest viable solutions to overcome the barriers crossing the path of E-Commerce and E-Governance.

III. Methodology-:

The researchers have used the doctrinal method i.e., reference from the available primary sources like Acts, Rules, and Regulations to study the present questions in hand. The researchers have also taken reference from secondary sources like books, articles, and newspaper reports to delve into the policy and legal issues in E-Commerce and E-Governance.

[2] Didar Singh, "Electronic Commerce: Issues for the South" Trade-related Agenda, Development and Equity, Working Paper, South Centre, October 1999, p. 4.
[3] https://www.legalserviceindia.com/article/l143-Role-of-Law-in-E-governance.html, last visited 11/11/2022.

IV. Chapterization-:

PART I: What are the policy and legal issues in E-Commerce?

PART II: What are the policy and legal issues in E-Governance?

PART III: What are the ways to overcome the policy and legal issues in E-Commerce and E-Governance?

V. PART I: THE POLICY AND LEGAL ISSUES IN E-COMMERCE

"Though the internet is a goldmine, without adequate legal protection it could become a landmine."

In India, the business of e-commerce has come a long way since its inception. It has brought about evolutions via its expansion in the market. With the advancement of online media, the online business is becoming a common trend. This new concept means that there is no physical touch directly as used in the traditional practices rather now the transactions is via electronic communication. E- commerce includes various online transactions that operate commercial activities of products and services but all of this does not mean that one is immune to its policy and legal issues.

The first step towards e-commerce are e-records and e-signatures which are duly recognized under the Information Technology Act, 2000 (hereinafter referred to as IT Act). There has also been establishment of the Ministry of Electronics and Information Technology (MeitY) for ensuring that suitable practices and procedures are followed to meet the standards of protecting sensitive personal data and information. The Consumer Protection Act, 2019 is also incorporated to regulate the concerns related to unfair commercial practices and deceptive ads. The New Consumer Protection (E-Commerce) Rules, 2020 is established that would apply to all the electronic shops selling products or service in or outside India and strict guidelines are imposed on those who do not adhere to the guidelines. This applies to both aggregator markets, like Amazon and Flipkart and the inventory led models, wherein the merchants are responsible or controlling the goods.

There would be serious problems to the business if the legal issues associated to the business are not taken care of. The common legal issues are discussed below:[4]

i. **Contracts**: As the parties to the contract make, enforce and perform contracts online, it becomes difficult at the stance to have legally binding contracts. As now, the paper documents have been replaced by electronic elements. However, there is Section 10 A of IT Act to govern these contractual elements of electronic records but this Act should be read in consonance with the

[4] Legal Issues and Regulations in E-Commerce by Law Corner, https://lawcorner.in/legal-issues-and-regulations-in-e-commerce/, last visited 17/10/2022 and India: Legal Issues in E-Commerce: Think Before You Click! by PSA, https://www.mondaq.com/india/it-and-internet/299686/legal-issues-in-e-commerce-think-before-you-click, last visited 20/10/2022.

Indian Contract Act, 1872 as this Act specifies the elements of the contracts which includes offer, acceptance and consideration. If these are included in the E-contracts, it would be beneficial for the parties involved in the contracts. In connection to this, another problem that arises in such transactions is to acknowledge the age of majority with the person one is entering into the contract and check if he has reached the age of majority (18 years). For this, the websites should have the form which confirms the age of consumers with whom they are enforcing such contracts. Further, there is Section 3 of Evidence Act which states that evidences maybe in electronic form. In the landmark case of *Trimex International FZE Ltd. Dubai vs. Vedanta Aluminum Ltd*,[5] the Supreme Court held that the e-mail exchanges between parties regarding mutual obligations would be a contract.

ii. **Privacy and Data Protection:** This is another issue in online transactions as individuals and organizations are easily getting personal data and sensitive information as there is lack of safe and due process involved. It is a big issue for both the consumers and company as the consumers easily share their details to the company and they are assured that companies would keep it private but this does not happen and ultimately these companies share these data with another company that would cater to the consumer needs and thus, this infringes the privacy of the consumers. Section 43 A of IT Act mandates that body corporates should mandate to implement reasonable security practices for protecting sensitive personal information.

iii. **Intellectual property (IP) rights**: India has a proper framework for protecting the items, words and symbols. But this has not been implemented in the country yet. As still, there is no law for misrepresentation and abuse of domain names. There are several websites that are free and one can easily access them and get online content and utilize for own benefits. This might create serious legal issue and may even terminate the business of individuals who commit such offence. These e-commerce websites are formed by the third companies and till the point they do not expressly mention that the IP rights are protected, there is huge risk of infringement of trademark, copyright and patents in online business platform. The Hon'ble Court in *Satyam Infoway Ltd. vs. Sifynet Solutions Pvt. Ltd*.,[6] held that a domain name would come under the meaning of Section 2(z) of Trade Marks Act, 1999.

iv. **Jurisdictional Issues**: In India, there is shortage of jurisdiction for e- commerce sectors. There are several transactions that take place and as a result of this, several issues with regard to the liability of a website arises. Even if an individual who is running the website in a foreign country is not physically present in that country, he can be sued there because the website has minimum contact with that country. This basically means, having long arm jurisdiction and causing inconvenience to the parties. The business should therefore include

[5] Trimex International FZE Ltd. Dubai vs. Vedanta Aluminum Ltd, 2010 (2) AWC 1170 (SC).
[6] Satyam Infoway Ltd. vs. Sifynet Solutions Pvt. Ltd., Appeal (civil) 3028 of 2004.

choice of forum and law in online transactions to easily identify the jurisdictional issue for the parties.

v. **Incorporation Problem**: This is another problem when a company has been operated via website. Any company involved in sale and purchase of products and selling activities will be considered illegal and any individual cannot claim their right in case of fraud or corruption, if there is no incorporation of the company. Thus, companies involved in E-commerce must be incorporated at the first instance only then it could further operate.

vi. **Transaction Issue:** If the company that is operating any business and it does not provide any description of the product, cost, its purchase details and information about the delivery, any information related to refund, exchange etc., then the Consumer law will impose penalty on such business transactions. Hence, companies must have proper laws, rules and regulations regarding its operations.

vii. **Competition:** As a result of legal issues, there have been new players in the market and mergers and acquisition with several old players. This has developed new services, channels, and has increased the efficiency of business activities than before. This has brought competition among the companies for developing their strategies for growing the network and maintaining status in the market.

All these outcomes have shown that it is not easy continue business online. The power of internet enhances the global economy and international trade. It is similar to the concept that every coin has a flip side so are these issues to the e-business. The legal system is struggling because of this and to keep the pace, the legal system has to fit in the new business, laws and procedures.

VI. PART II: THE POLICY AND LEGAL ISSUES IN E-GOVERNANCE

"A transparent, adaptive E-Governance that is convenient to use, has a secure, authentic flow of information, transcends departmental boundaries, and offers the citizen a service that is impartial and fair." - Dr. APJ Abdul Kalam[7]

Governments have been leveraging the internet increasingly in order to fulfill their responsibilities towards the citizens of the country. Although the country has long been plagued by difficulties such as rivalry and red tape, the government has commenced relocating its services online due to India's expanding internet usage. The Government strives to regulate all the digital activities by enforcing the provisions which have been laid down under the IT Act and the Right to Information Act, 2005.

The IT Act had been enacted with the objective of providing the crucial legal framework so that the information through electronic records is not denied legal effect, plausibility and enforceability in the light of the increase in transactions and communications that were being carried out through

[7]http://www.drbrambedkarcollege.ac.in/sites/default/files/UNIT-2_PART-2_E-GOVERNANCE.pdf., last visited 11/11/2022.

electronic records. Even though our nation utilizes systems such as cryptography and passwords to guarantee the security of the data which is being maintained by the government officials, the information is still at significant risk to the countermeasures and the diverse strategies deployed by the hackers. As a result, Section 43 of the IT Act was inserted, which protects against unauthorized access to the computer system by imposing a severe penalty up to a whopping amount of one crore. Furthermore, the IT Act is the only piece of legislation that addresses the issue of privacy in relation to the confidential data of the citizens which has been stored by the Government. According to Section 69 of the IT Act, the right to privacy can only be violated in pursuance to the procedures which have been established by law. The Hon'ble Court in the landmark case of *PUCL v. Union of India*[8] held that the procedures established under law are untenable as the Controller has been delegated with discretionary power under this provision. The Court further ruled that appropriate rules should be set forth in this regard to ensure that there is a proper balance between people's right to privacy and the provisions under the IT Act for search and seizure. The violation of the confidentiality and privacy of the data is protected by Section 72 of the IT Act, which is intended at the officials who are authorized to collect data under the IT Act. Any individual who is found guilty in accordance with this provision will be sentenced up to two years in prison, and a fine up to one lakh rupees or both.

The Right to Information Act, 2005 (hereinafter referred to as the RTI Act) was enacted by the legislature with the objective of empowering the populace by encouraging accountability and transparency in governmental operations. The enactment of RTI Act has not only increased transparency in governmental operations but has also provided the citizens protection from the unauthorized exposure of sensitive data. The Central and State Governments are mandated by the provisions laid down under the Act to furnish the citizens requisite information regarding the policies, rules and regulations which have been implemented by them.

Despite the various legal provisions governing E-Governance, in developing nations like India wherein the literacy rate is very low, it has become exceedingly daunting for the government to offer its services to such citizens. E-Governance has modified the path that government employ IT by making it easier for the general public to obtain government services rapidly, conveniently and simply. As a result of which, a large number of obstacles have arisen in the implementation of E-Governance in India. They have been laid down as follows -: [9]

VI.I. Environmental and Social Challenges

i. **Different Languages -:**

[8] PUCL v. Union of India, (1997) 1 SCC 301.
[9] Dr. Pardeep Mittal, Amandeep Kaur, E-Governance – A Challenge for India, International Journal of Advanced Research in Computer Engineering & Technology, Volume 2 Issue 3, March 2013, http://www.egovstandards.gov.in/sites/default/files/IJARCET-VOL-2-ISSUE-3-1196-1199_1.pdf.

The premise that India has such a diverse culture, wherein people of all religions and cultures coexist, poses one of the greatest obstacles in the implementation of E-Governance in India. Furthermore, English is a language that many people in the nation, especially those living the slums may find challenging to comprehend. As a result, it is challenging for the government to develop E-Governance programmes in several languages that will be well-received by the users of different languages.

ii. **Low Literacy -:**

The low levels of literacy in our nation are yet another massive obstacle in the implementation of E-Governance. Many citizens of our nation lack basic literacy skills, including knowledge of information technology and the requisite level of education. As a result, the implementation of E-Governance programmes has not been very productive due to the low level of literacy.

iii. **Population -:**

The size of our nation's population is a substantial barrier to the adoption of E-Governance. Because of the enormous quantity of the population, it is now problematic for the government to determine individual identities. Furthermore, maintaining a database of all Indian citizens, counting the population and then offering E-Governance to the entire population have been acting as roadblocks in the way of successful implementation of E-Governance. In addition, people consider it difficult to adapt to new advances and technologies. Governmental organizations and public policy makers cannot disregard the changes brough about by the use of ICT, hence outreach to the population about the positives of the new system is essential.

VI.II. Economic Challenges

i. **Cost -:**

The expense of implementing E-Governance in developing nations like India is a substantial economic hurdle as the bulk of the population has been living below the poverty line. Huge sums of money are invested on setting up, operating and maintaining the E-Governance tasks. Thus, the costs associated with this must be sufficiently low to ensure a benefit ration.

ii. **Maintenance of Electronic Devices -:**

The failure to rapidly update the current systems is another impediment in the way of the successful deployment of E-Governance. Though maintenance can be regarded as a crucial component for long-lasting systems in a technological environment that is continually evolving, it is extremely complicated because of the disparities between the regulations of various devices and its unique characteristics, it becomes difficult for the systems to handle all the emergent needs.

iii. **Inadequate Financial Resources -:**

India has lower financial resources than other developing nations, rendering it more complicated to effectively deploy E-Governance. This is due to the country's relatively lower Gross Domestic

Product, which is a gauge of its financial strength. People in India cannot afford the online services that the government offers because not only it has a relatively lower GDP, but it also has a lower per capita income other than the developing nations.

VI.III. Technical Challenges

i. **Geographical Problems -:**

Though business networks are centered on secure and regulated networks, government networks should traverse to all inhospitable places to live. The wiring of the communities is an expensive endeavor. Therefore, regardless of the geographic locations, E-Governance systems should utilize wireless networks like existing cellular networks to access the applications in the remote areas.

ii. **Privacy and Security –:**

The privacy and security of the personal information that a person offers to the government in order to use its services is a significant barrier to the successful deployment of E-Governance. Even though the government has taken some initiatives to protect citizen's personal information, the advancement of E-Government projects has been stalled by the lack of security standards.

iii. **Tried and Tested Technologies -:**

Due to the limited financial resources, our government is reluctant to adopt new technologies every year as they become outdated very quickly in today's world. Therefore, it is recommended to employ technologies that have been tried and tested over a longer period of time rather than those which are required to be replaced frequently.

VII. PART III: WAYS TO OVERCOME THE POLICY AND LEGAL ISSUES IN E-COMMERCE AND E-GOVERNANCE

The factor of trust plays a major role when it comes to online business between the consumers and suppliers. As when it comes to online system, there is a bar on physical connection and opportunity to test the professionalism of individuals is low. In order to overcome the policy and legal issues in e-commerce, few steps that must be taken into consideration are: ensuring proper online contracts, having record retention obligations, in reference to taxation original documents must be taken into consideration, the import-export obligations, the exchange control regulation, implementation of foreign data protection laws, the terms and conditions in relation to a product or services must be specific and reasonable efforts to prevent the unauthorized transactions must be accountable etc. Few of the ways by which policy and legal issues can be tackled are:[10]

i. **Create relevant online consumer protection rules:** It is to be noted that according to United Nations Conference on Trade and Development (UNCTAD) Cyberlaw Tracker just 52%

[10] Five ways to increase trust in e-commerce by Loannis Lianos and Kimberley, https://www.weforum.org/agenda/2019/03/five-ways-to-restore-trust-in-e-commerce/, last visited 16/10/2022.

countries have updated their legal framework to cover online business and the rest are still at a draft stage which further requires it to be legally binding.

ii. **Focus on personal data protection:** Again, as per UNCTAD only 58% countries have rules for protecting sensitive data while the rest do not. Thus, the focus should be on protecting the information of the individuals from being leaked.

iii. **Address variation in the rules:** There are many amendments that come about when it comes to online business such as unfair commercial practices, contract terms, e-spams, liability, returns etc. starting from before the purchase is made till after, there are several amendments involved. Thus, the accountability for such records must be taken into consideration.

iv. **Increase international cooperation and e-commerce:** From the past two decades, e-commerce has been increasing substantially and so is the shopping abroad. There an international relation wherein, the countries have enforced the extended their hands towards cooperation and trust therefore meeting the supply to the demand and reducing the friction between the international relations.

v. **Engage in international e-commerce talks:** The countries have made efforts towards online consumer rules at the organization for Economic Co-operation and Development (OECD). This is a little step towards bringing about a change in the right direction. It is via these steps that countries tend to move towards international talks amongst each other in relation to their e-business and set up business relations and cooperation.

These above-mentioned ways are mend to have effective and smooth functioning of businesses worldwide and thereby making it convenient for both the consumers and the suppliers.

In order to deliver services to its citizens through the process of E-Governance, the Indian Government has undertaken numerous efforts since the deployment of Information Technology has been advancing significantly. Despite the Government investing enormous sums of money, there has not been much success with these initiatives because of the technical, economical and environmental roadblocks which are being faced while implementing projects related to E-Governance. Therefore, the government should undertake certain endeavors to educate the populace about the use of E-Governance. In order to breakdown the diversity barrier in India, multilingual companies should be made publicly available. In order to further advance the goal of raising awareness about E-Governance services in the villages and to benefit the society as a whole, NGOs should be constituted. Furthermore, good skilled administration should be implemented to effectively manage the complete network of E-Governance. In addition, the government should not be reluctant to encourage significant investments for the effective implementation of E-Governance.[11] Also, independent committees should be established to investigate pressing concerns like data storage and security is another option to address the roadblocks. To remove the barriers with respect to tax returns, electronic confirmation for filing of tax returns should be

[11] https://www.legalserviceindia.com/article/l143-Role-of-Law-in-E-governance.html, last visited 11/11/2022.

deployed. Therefore, it is imperative to embrace these solutions in order to ensure the government's successful adoption of E-Governance and to open the door to benefits for the general public that are exponentially bigger.

VIII. Conclusion

E- commerce and the rules, regulations related to it are new subjects to the legislative bodies all around the world. the world is stepping into digitalization mode gradually and every human being is leaving some sort of digital footprint. The tracing of such footprints can be in varied terms such as, online shopping, purchasing tickets online, sending gifts to closed ones instantly etc. If this is how, the society is evolving then there has no be rigid regulatory framework to support this protect the sensitive data and information all around. Above all, Indian is one of the few countries that has enacted E-commerce legislation. However, much more efforts are required to have sufficient control over the network. The factor of effectively managing the risk management and with proper legal measures would help the e-commerce sector. On the other hand, E-Governance which has over the years played a significant aspect in every sector of the economy has become progressively prominent in our country. Although there have been difficulties in deploying E-Governance, the government has achieved to become one of the developing economies owing to the promise of ICT. In order to eliminate all these roadblocks and effectively deliver E-Governance services to its residents, the government has been implementing numerous initiatives with various projects such as Digital India and E-Kranthi. The majority of IT-based technologies have been assisting the government in facilitating the services through Common Service Centers which would mitigate any routine governance of financial issues the government is facing while implementing such projects. Not only this, but FINO (Financial Investment Network and Operations) has even developed a provision for the use of smart cards, which would be used and authenticated by the central server, containing the details of the bearer, including the digital signature and photos. Moreover, the government has stipulated in its 12th Five Year Plan that a national institution for E-Governance should be developed as a stand-alone, cutting-edge facility, with a goal of providing basic IT training to at least one person per family in 50% of the target families during this time. The Government has also created an E-Governance Fund to encourage investments in such projects. Thus, in the framework for national development agendas, E-Governance affords a potential for the government agencies to reinvent themselves become more accessible to the public, and establish a stronger alliance with a variety of communities of interest, conviction, and interdependence.

****

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

Revenge Pornography in India: It's Issues & Way Forward

Rinki Saha*

Abhishek Chatterjee**

Shreya Chatterjee***

Abstract

Revenge pornography is a type of non-consensual pornography which is faced by the people in the society in the digital age and mostly by women and girls. Long-term mental health concerns, damaged relationships, and social alienation may result from revenge pornography and as a result they tend to commit suicide. The technology sector has also taken steps to aid victims of revenge pornography by generating web forms which can be used to request the removal of connections to explicit content. This paper is an unassuming undertaking to concentrate on the problem of revenge pornography particularly in India where the women are subjugated through revenge pornography with the characteristics of how revenge porn is committed and the effects of revenge pornography upon the victim in different aspects. The paper also studies the existing laws which are enacted in order to deal with the issue of revenge pornography in India. This is followed by some case studies and incidents which happened in last few years both in India and outside. In the last segment, the paper continues to analyse the preventive measures which can be taken in order to reduce and stop the revenge pornography in the society.

Keywords: Revenge pornography, Technology, Victim, Existing laws, Preventive measures.

I. Introduction

The term Revenge Porn "is very dreadful word when we heard this word it creates fear on the mind, the revenge porn is an act of distributing, publishing explicit private sexual images, videos in internet without her consent, for the intention of causing harm, embarrassment, shame that is known as revenge porn."

Nowadays, revenge porn is a major issue, and many girls, women, and children are sufferers of this delinquency, ranging from 12 years old to much older adults. This type of behaviour is frequently the result of a lack of appropriate knowledge and support regarding the dangers and consequences of sharing such a graphic image.

Not only that, in the past, only a few people used cell phones, and there was no camera attached to them, but in the twenty-first century, cell phone use has expanded, and smart phones have made it very easy to shoot photos and share them on social media.

* *Advocate, High Court of Calcutta.*

** *Advocate, District and Sessions Judge's Court, Paschim Bardhaman.*

*** *Shreya Chatterjee, LL.M, Part-1, Jogesh Chandra Chaudhuri Law College, Calcutta University.*

This crime is not only committed in India, but also in other countries like as Germany, the United Kingdom, Australia, and Canada. This incises horribly in the Covid pandemic crisis, as this is the type of abuse that has gotten increasingly frequent at this time. The number of people seeking help for releasing intimate images on the internet has increased, according to the UK help revenge porn help line. The Australian Safety Commission likewise recorded an increase during the pandemic era, with figures ranging from 21% to 60%. Italy, Israel, Germany, the United Kingdom, and Canada are the only countries that have passed legislation prohibiting this behaviour.

II. Characteristics

In online revenge pornography, the offender utilises the victim's personal information with the goal of deforming her and causing her emotional suffering. In contrast to ordinary cyber pornography, online revenge pornography contributed in the massive distortion of the victim.

The victim uploads films, photographs, and clips to her partner's device or clicks any compromising posture with her partner, and her partner stores those recordings and images on his device in this online revenge pornography. Then her partner might send the image and videos to a friend in order to embarrass his partner as a form of retaliation.

That picture was shared to the internet by the partner and his friend, the second recipient, on a variety of pornographic platforms. Those photographs and videos quickly went over the internet, capturing the attention of millions of people. The girl was labelled a "sex item," and her reputation was severely tarnished.

Revenge porn not only includes ex-couples only. It can also include any type of hacking into someone's account in order to distribute sexual photographs of them. According to new data, children as young as 11 years old are becoming victims of revenge porn, highlighting the magnitude of the problem.[1]

III. Effects of Revenge Porn on Victims

Victims of revenge porn might suffer a lot of pain and suffering. In revenge porn, the offender's goal is usually to ridicule, dishonor, and disturb the victim. This can have terrible consequences, and it has been defined as a sort of abuse.[2] Due to the severity of their emotional distress, some victims have committed suicide.[3] Society's opinions toward revenge porn might increase its emotional impact beyond the initial sentiments of shame and humiliation. Victims of revenge pornography are frequently chastised by the media for enabling the photographs to be made in the first place. In certain circumstances, the individual represented is hesitant to share or generate intimate photographs, and it is the culprit of revenge porn who forces them to be made.[4] Furthermore, this broad language is frequently used to restrict exclusively

[1]Loulla Mae & Elef Therious Smith, Revenge porn: what it is – And How Big Is the Problem?
THE INDEPENDENT (Jun. 26, 2021, 9.30PM), Revenge porn: What is it – and how big is the problem? | The Independent | The Independent
[2]755 GBPD HL 969 (21 July 2014).
[3]Emily Poole, "Hey Girls, Did You Know? Slut-Shaming on the Internet Needs to Stop"
48 USF L Rev 221-240 (2013)
[4]See the claimant's evidence in L v G [2002] DCR 234.

women's behavior. When half of the population has the ability to communicate photographs that the other half does not, it is evident that revenge porn is to blame. Taking or sending personal photographs is not illegal if done properly and consensually. Furthermore, if a victim feels responsible or that others are holding her or him responsible for the suffering, the emotional harm produced by revenge porn is compounded. Suicide and self-harm thoughts are more likely to rise when a victim has no one to turn to for support or blame.

Aside from psychological trauma, the victim may lose his or her career or have difficulty finding work in the future. Employers are increasingly using web searches to evaluate potential job candidates. Some victims alter their names in order to distance themselves from their past. Holly Jacobs, who started the website End Revenge Porn.com and is now a revenge pornography activist, has firsthand experience with the damaging effects of revenge pornography on employment. Her ex-boyfriend started publishing sexual photos of Ms. Jacobs on the Internet in 2009, along with her full name, e-mail address, employment information, and a copy of her Facebook profile. She spent three years in full-time damage management mode, engaged a lawyer and an Internet expert to help with the removal of public photos, and pleaded with law authorities to press charges against her ex-boyfriend, all to no avail.[5] An anonymous individual emailed her university's human resources department, claiming that "a professor is masturbating for her pupils and posting it online." In the face of such humiliation, Ms. Jacobs eventually quit her employment. She even tried to change her name to avoid being found out. After learning of her new name, her harasser just uploaded her graphic images and linked them to her new name.

The purpose of revenge porn is to humiliate the victims. Monica Lewinsky spoke of the "very personal costs of public humiliation" at a seminar on public shame.[6] Even if a revenge porn victim chooses to feel ashamed of engaging in a consensual and non-harmful conduct like sharing intimate photographs, their public perception can be irreversibly altered. Social injury is isolating and uncontrollable for the victim, and this is exacerbated when revenge porn is posted online. Few other acts have the power to drastically affect the public opinion of a victim owing to no fault of their own. Women, in particular, are subjected to an onslaught of explicit threats, which are usually intended to force the individual to leave the public domain of the Internet.[7] In terms of social consequences, revenge porn can permanently hurt a victim and expose them to a legitimate fear of being harmed.[8]

Revenge pornography can have a pecuniary harm on the victim also. Beyond a résumé, a person's online reputation or existence can be the most accessible source of information about them to a potential employer. If revenge pornography is linked to a person's name on the internet, victims may have difficulty finding or keeping work. While such photos may elicit

[5]Dr. Holly Jacobs, A message from our founder: Cyber Civil Rights Initiative, CYBER CIVIL RIGHTS INITIATIVE (Jun.22,2021,7:40PM), http:// www.cybercivilrights.org/a-message-from-our-founder-hollyjacobs/.

[6] Monica Lewinsky "The price of shame" (March 2015) TED at 9.19pm

[7]Michael Salter & Thomas Crofts "Responding to revenge porn: Challenging online legal impunity" in Lynn Comella and Shira Tarrant (eds) New views on pornography: Sexuality, politics and the law 233 PRAEGER PUBLISHERS, WESTPORT 236 (2015).

[8]Danielle Keats Citron & Mary Anne Franks "Criminalizing Revenge Porn" 49 WAKE FOREST L REV. 345-361 (2014)

pity, it is likely that stereotypically negative conclusions about a person's lifestyle and personality will be made. The pecuniary impact on a victim of revenge porn may be considered a secondary harm because it is the only harm that can be completely compensated and hence may be less genuinely harmful.

IV. Legal Aid to the Victims In India

Digital transformation has created greater technical power as well as a wider breeding ground for such offence and abuse. Incidence of revenge porn are now on the increase in many countries worldwide, which are already plagued by a variety of crimes and sexual assault against women. In India, there are no explicit rules, and cybercrime has increased dramatically, making it impossible to regulate the crime. Various Acts in India, including as the Indian Penal Code,1860 and the Information Technology Act of 2000, deal with provisions relating to retaliatory pornography.

- **Section 67 of The Information Technology Act, 2000*:* -** It states that "Punishment for publishing or transmitting obscene material in electronic form. -Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees. Information Technology Act have given protection to the victim for protection."[9]
- **Section 67A of The Information Technology Act, 2000**: - It states that "Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form -Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees."[10]
- **Section 67B of The Information Technology Act, 2000: -** It states that "Whoever,– (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or (c) cultivates, entices or induces

[9]Information Technology Act, 2000, No.21, Acts of Parliament, 2000 (India).

[10]Information Technology Act, 2000, No. 21, Acts of Parliament 2000 (India).

children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or (d) facilitates abusing children online, or (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form– (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is the interest of science, literature, art or learning or other objects of general concern; or (ii) which is kept or used for bona fide heritage or religious purposes.

Explanation. -For the purposes of this section children means a person who has not completed the age of 18 years."[11]

- **Section 354 of The Indian Penal Code: -** It states that "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[12]

- **Description of IPC Section 354A: -** According to section 354A of Indian penal code,

1. "A man committing any of the following acts
    1. physical contact and advances involving unwelcome and explicit sexual overtures; or
    2. a demand or request for sexual favours; or
    3. showing pornography against the will of a woman; or
    4. Making sexually coloured remarks, shall be guilty of the offence of sexual harassment.
2. Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
3. Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."[13]

- **Description of IPC Section 354C: -** According to section 354C of Indian penal code, "Any man who watches, or captures the image of a woman engaging in a private act in

[11]Information Technology Act, 2000, No. 21, Acts of Parliament 2000 (India).

[12]Indian Penal Code,1860, No. 45, Acts of Parliament 1860 (India).

[13]Indian Penal Code, 1860, No. 45, Acts of Parliament 1860 (India).

circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanations:

1. For the purpose of this section, private act includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victims genitals, posterior or breasts are exposed or covered
2. only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.
3. Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section."[14]

- **Section 506 of The Indian Penal Code *:* -** It states that "Punishment for criminal intimidation.—Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.— And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 1[imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."[15]
- **Section 509 of The Indian Penal Code *:* -** It states that "Word, gesture or act intended to insult the modesty of a woman—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."[16]
- **Section 406 of The Indian Penal Code*:* -** It states that "Punishment for criminal breach of trust—Whoever commits criminal breach of trust shall be punished with

[14]Indian Penal Code, 1860, No.45, Acts of Parliament 1860 (India).

[15]Indian Penal Code, 1860, No. 45, Acts of Parliament 1860 (India).

[16]Indian Penal Code, 1860, No.45, Acts of Parliament 1860(India).

imprisonment of either description for a term which may extend to three years, or with fine, or with both."[17]

Case studies

1. In the landmark case of *State of West Bengal vs. Animesh Boxi*,[18] "The accused, Animesh Boxi was in a relationship with the victim for three years prior to the incident that occurred in July 2017. Boxi allegedly hacked into her phone to obtain revealing photos from the woman over the course of the relationship. He then began blackmailing her, threatening to post the photos and videos online if she refused to spend time with him or go on vacations with him. A few days later, the victim's brother discovered the obscene photos and videos on a porn site (Porn Hub), including the one that exposed the victim's name and also identified her father. Boxi was charged under sections 354A (Sexual Harassment), 354C (Voyeurism), 354D (Stalking), and 509 (Criminal Intimidation) of the Indian Penal Code, 1860 (IPC), as well as sections 66C (Identity theft), 66E (Violation of privacy), and 67/67A (Transmitting Obscene Material Online) of the Information Technology Act 2000. Judge Gautam Nag presided over the trial and found the accused person guilty of the charges. Regarding the charges of sexual harassment, voyeurism, stalking, and criminal intimidation under sections 354 and 509 of the IPC, the Court stated that Boxi had demanded sexual favours from the victim, captured images of her in situations where she would not have expected to be observed, and stalked her extensively online. The Court dismissed Boxi's contention that sexual harassment, voyeurism, and stalking had not amounted in physical harm to the victim. It stated that the victim's reputation was sufficiently harmed since it was under the definition of damage as defined in Section 44 of the IPC. The Court also found Boxi guilty of disseminating private images online in violation of Sections 66E, 67, and 67A of the IT Act, as well as identity theft in violation of Section 66C, because he had hacked into the victim's phone and secretly shot the pictures. As a result, the Court found Boxi guilty of all charges and sentenced him to five years in prison and a fine of Rs. 9,000. It further ruled that the victim be compensated under the Victim Compensation Scheme of the state."
2. The most notable vengeance porn case was that of *Revenge porn kingpin*,[19] "In this case Hunter Moore, created a website called IsAnyoneUp.com in 2010.[20] The website featured explicit media with links to the victims' social networking profiles and reportedly attracted 30 million views monthly. Many victims claimed that the revealed photographs and videos were shared without their consent by ex-intimate partners. Other victims indicated that their personal computers or cellular devices were hacked and the explicit content stolen. Some victims even stated that the content featured on

[17]Indian Penal Code, 1860, No. 45, Acts of Parliament 1860 (India).

[18]State of West Bengal vs Animesh Boxi, C.R.M. No. 11806 of 2017, GR/1587/2017.

[19]United States of America v. Moore, No. 2:13-cr-00917 (C. D. Cal. 2015)

[20]Revenge Porn Kingpin Hunter Moore Pleads Guilty, Faces Jail, NBC News (Jun. 26, 2021, 7:45PM), http://www.nbcnews.com/news/crime-courts/revenge-porn-kingpin-huntermoore-pleads-guilty-faces-jail-n313061.

the website was fabricated. Hunter Moore paid another man, Charles Evens, to hack e-mail accounts of hundreds of victims and provide him with explicit photographs. In January 2014, Mr. Moore was indicted by the Federal Bureau of Investigation (FBI) on 15 counts of conspiracy, unauthorized access to a protected computer to obtain information, and aggravated identity theft. In February 2015, he pleaded guilty to aggravated identity theft and aiding and abetting in the unauthorized access of a computer and faced two to seven years in federal prison. On December 3, 2015, Mr. Moore was sentenced to two-and-a-half years in prison and fined $2,000."

3. In a case of revenge pornography, a man was detained in Cyberabad, Hyderabad's technological city, for reportedly capturing explicit video of his ex-girlfriend and putting them online.[21] According to the woman, who is now married to someone else, the accused, known as Banda Rupesh, also mailed CDs of the movie to her in-laws. She was in a relationship with Rupesh six years ago when they were both students at an engineering college in Tadepalligudem, Andhra Pradesh, according to her complaint. The woman claimed that she afterwards realised Rupesh was not who he seemed to be and that she decided not to marry him. The woman married someone else after graduation, and Rupesh relocated to Hyderabad to open a car-service centre. Rupesh, on the other hand, has been attempting to blackmail her into continuing the relationship for the past few months. When she refused, Rupesh plotted his vengeance and covertly shot tapes, according to the woman. Rupesh was accused under the Nirbhaya Act, which amended the Code of Criminal Procedure, 1973, to include legislation relating to sexual offences, as well as the Information Technology Act, in 2013. Voyeurism was made an offence under Section 354C of the Indian Penal Code, which is described as 'seeing or capturing a lady in a private act', Violations of privacy are punishable under Section 66E of the IT Act. Sections 354C of Indian Penal Code and 66E of IT Act, 2000 both stipulate a maximum sentence of three years for first-time offenders. Cases of defamation under Section 500 and criminal intimidation and file charges under Sections 504 and 506 of the IPC can also be registered, in addition to the IT Act and Section 354 of the IPC. While Section 354C solely protects women, Ramalingam claims that men who are victims of revenge porn can always pursue a defamation lawsuit.[22]
4. In a shocking revenge porn case, the Noida police arrested a man in West Bengal. The accused, aged 20+, shared lewd snaps of a woman who had broken up with the accused 4-5 years previously. According to a report,[23] on 3rd May, a woman lodged a complaint at Noida's Phase 3 police station, alleging that some of her lewd imageries were being

[21]Revenge Porn Case in Hyderabad, Video Mailed to Woman's In-Laws,

NDTV (Jun.28,2021,8:30PM) https://www.ndtv.com/hyderabad-news/revenge-porn-case-in-hyderabad-video-mailed-to-womans-in-laws-1427434.

[22]Hyderabad man arrested in revenge porn case, where does India stand on legislation? THE NEWS MINUTE (Jun.28,2021,8:50PM) https://www.thenewsminute.com/article/hyderabad-man-arrested-revenge-porn-case-where-does-india-stand-legislation-45902.

[23]Revenge porn: Man posts obscene photos of ex-GF, put behind bars by Noida police, THE TIMES OF INDIA (Jun.29,2021,9:30PM) https://timesofindia.indiatimes.com/city/noida/noida-police-arrests-man-from-bengal-for-posting-obscene-pictures-of-ex-gf/articleshow/76278660.cms.

published on different platforms over the internet, prompting the Police to launch a case under the IT Act. The complainant informed the police about potential possibilities, one of whom being this man with whom she had a bond year before. As the police narrowed down on the perpetrator, their investigations disclosed that he was in West Bengal's Baruipur district. A police squad was called to the area, where they joined forces with the local police station to apprehend the perpetrator. The authorities took his mobile, which has all of the images and video clips of the victim that he had published on different platforms over the internet.[24]

V. SOME METHODS TO PREVENT REVENGE PORNOGRAPHY

People may now share and update information on a large scale however to the internet. This has resulted in both benefits and drawbacks; one of the drawbacks is that it encourages people to engage in criminal behaviour. It permits individuals to access data anonymously and commit misconducts while keeping their personal information safe. Cybercrime, such as cyber stalking, cyber bullying, and cyber harassment, is on the rise in large numbers.[25]

Cybercrime is a major issue in today's digital world, and it is also the most damaging transgression; it not only has a negative influence on victims' mental health, but it also damages their reputation in society.

This can be avoided in the following ways:

- Sharing any indecent or private image with anyone carries the danger of causing an incident. Never store any obscene photos on your phone or computer since they could be hacked.
- Installing software security on the computer and mobile device establishes a barrier against data backup and leaking.
- Devices should always be secured with a strong password.
- Never give out your password to anyone; they may appear trustworthy at first, but they may later utilise your photographs and videos for malicious purposes.
- Parents can teach their children about the dangers and risks of sexting through a school-based awareness initiative.
- This form of crime legislation should be gender-neutral, treating both men and women equally.
- Laws should be propagated that specifically address issues of revenge porn.
- Keep a close eye on your online presence to see if it's still active.

[24]Noida: Man arrested for posting obscene photos of ex-girlfriend in revenge porn case, NEWSD. (Jun.29,2021,10:30PM) https://newsd.in/noida-man-arrested-for-posting-obscene-photos-of-ex-girlfriend-in-revenge-porn-case/

[25]Asheeta Regidi, New laws for revenge porn to be introduced: we have a look at some of the required changes, THE TECH NEWS: BACK TO THE FIRST POST, (Jul.2,2021,10:30PM), https://www.firstpost.com/tech/news-analysis/new-laws-for-revenge-porn-to-be-introduced-we-have-a-look-at-some-of-the-required-changes-3703905.html

VI. CONCLUSION

Although revenge pornography is becoming more common in India, scholars, lawmakers, and the media have a limited grasp of the problem due to a lack of research. Consensual pornography and other sorts of non-consensual pornography are intrinsically different from revenge pornography. Victims are subjected to a heinous breach of sexual privacy and personal space, generally by someone they love and trust, and they suffer from poor mental health consequences such as anxiety and depression, as well as a number of other mental health difficulties. After being victimised by revenge porn, several women have been dismissed from their professions or have had difficulty finding work. Many of the younger victims are concerned that they would be unable to pursue careers as a result of the naked images of them that have surfaced on the internet. It would be foolish and dishonest to argue that the "real life" consequences of revenge porn victimisation are insignificant or ephemeral.

It is quite clear that though we have laws in India but they do not adequately deal with the issue of revenge pornography as a separate offence. While the sections can be used to punish offenders, it can also result in the victim being prosecuted if they freely captured the photographs or videos and shared them with their partners. This can be hazardous since the very component of the framework that the victim is depending on for legitimate response could likewise be utilized to arraign the person in question. While courts and the overall set of laws endeavour to give equity to survivors of such violations, there are different guidelines that should be adhere to. The development of new laws that effectively handle such new challenges that are becoming more prevalent in the cybernetic world and are not gendered in nature could be one viable solution. Without such adjustments, the legal system's inconsistencies will continue to exist, preventing victims from receiving definitive justice.

*****

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

Socio-Economic Offences, White Collar Crimes and Differential Association Theory

Dr. Krishna Murari Yadav*

Abstract

The Santhanam Committee observed that socio-economic offences are more dangerous not only because of the involvement of huge amounts of money but also for causing irreparable loss. Such offences are increasing day by day. These offences are like cancer for the country. It is very dangerous for the development of the nation. Many laws have been enacted to deal with these offences. It covers new offences. These offences differ from 'Traditional Offences' in the scope and manner of commission of offences. Socio-economic offences are wider than 'White-collar Crimes'. Whenever maxim 'actus non facit reum, nisi mens sit rea' is applied, it favours to accused. But when this maxim is not applied, it favours prosecutors. In this paper, the evolution of socio-economic offences, differences between socio-economic offences & white collar crimes, the application of maxim 'actus non facit reum, nisi mens sit rea' in socio-economic offences and 'Differential Association Theory' will be discussed.

Key Words: White-Collar Crimes, Socio-economic Offences, Blue Crimes, Traditional Offences, Mens Rea.

I. Introduction: Evolution of Socio-Economic Offences

Socio-economic offences have been committed since the ancient period. But it was not discussed separately. It was covered under traditional offences. It became part of the discourse in the 18th Century. White-collar crimes (hereinafter to be known as 'WCCs') are part of socio-economic offences. Every WCC is socio-economic offence. But every socio-economic offence is not part of WCC. Law Commission of India, in its 47th Report, discussed the definition of WCC given by Edwin H. Sutherland and mentioned four examples. If the upper class does the socio-economic offence during his occupation, that socio-economic will also come under white-collar crime. In many socio-economic offences burden of proof is on the accused. Section 24 of the PMLA, 2002 was challenged. Supreme Court held that it is constitutional. It has reasonable nexus with the object sought to be achieved.[1]

There are the following steps of the evolution of socio-economic offences –

* Assistant Professor (Sr. Scale), Law Centre -1, Faculty of Law, University of Delhi, Delhi
[1] *Vijay Madanlal Choudhary & Ors.* v. *Union of India & Ors.*, 2022 SCC OnLine SC 929. Date of the Judgment: July 27, 2022.

(i) Eighteenth Century

The Law Commission of India in its 29th Report discussed the development of socio-economic offences. This report states that problems like white-collar crime came on surface in 18th century in form of 'South Sea Bubble' case[2]. This 'South Sea Bubble' case led to the enactment of the Bubble Act, 1720. The Act shows the efforts of legislatures to deal with fraud. Industrialization was another reason. Varieties and manifestations of such offences came on the surface after the First World War.[3]

Santhanam Committee discussed the growth of white-collar crime in para 2.13. Law Commission of India in its 29th Report at para 6 quoted contents of the Santhanam Committee regarding the development of white-collar crimes. It was observed that mass society emerged due to the development of technology. The elite class emerged and created to monopoly. Eroding standards of ethical behaviour played a vital role in the emergence of white-collar crime.

(ii) After First World War

After the First World War, several scholars started to discuss this topic. Among them, Edwin H. Sutherland was prominent. He wrote "White Collar Criminality", published by 'American Sociological Review' in February 1940. There was a scarcity of goods, especially grain, during the Second World War. The hoarding of grains and their supplies in the market was a big issue. Corruption was another problem.

(iii) Independence of India

During the movement for freedom, many freedom fighters were in favour of socialism. But few persons are involved in corruption and other illegal activities. That tendency is increasing day by day. Bank fraud is a glaring example of socio-economic offences and white-collar crimes. The Gujarat High Court said that highly trained investigating officers must investigate white-collar crimes. Such offences involve crores of rs. A person took the loan and left the country.[4]

The development of Socio-economic offences can be discussed with the help of the following points -

(a) Statutes

There were several laws related to white-collar crimes or socio-economic offences. But these words had not been used anywhere. After independence, several laws were enacted, including the Prevention of Corruption of Act, 1947, the Essential Commodities Act, 1955, the ITPA, 1956, the NDPS Act, 1985, the Prevention of Corruption Act, 1988, the Prevention of Money-laundering

[2] In this case, South Sea Company was based on public private partnership. It was registered in U.K in 1711. The company got monopoly for supply of slaves in 1713. There was no profit. But the company was showing profit. When information came out about this bubble, the money of many investors sank.

[3] The Law Commission of India, Report 29, 1966, "Proposal to include Certain Social and Economic Offences in the Indian Penal Code", Para 13, p. 8.

[4] *Noormohamed Jamalbhai Latiwala* v. *State of Gujarat*, Gujarat High Court, March 25, 2004.

Act, 2002, the Food Safety and Standards Act, 2006, the Tax Evasion Undisclosed Foreign Income and Assets (Imposition of Tax) Act 2015 etc.

(b) Court

Several cases were decided in which mens rea was excluded as an essential ingredient of the crime. In *The Indo-China Steam Navigation Co. Ltd.* v. *Jasjit Singh*[5] Supreme Court, at the time of interpretation of Section 52-A of the Sea Customs Act, 1878, said that if the provision is silent, there is no need to require mens rea. Such cases must be interpreted strictly. Such cases may rudely affect the economy of the country. In *State of Maharashtra* v. *M.G.George*[6] Supreme Court convicted the accused under the Foreign Exchange and Regulation Act, 1947 (FERA, 1947) even without mens rea.

Gujarat High Court in *Noormohmed Jamalbhai Latiwala* v. *State of Gujarat*[7] said that white-collar crimes have been rising rapidly in India for the last few years. Such offences affect the country's economic condition and lead to financial disaster. These crimes are committed for private gain at the cost of public gain. In the present case also, if not national interest, but in view of the rampant white-collar crimes in the field of the cooperative banking business of the State, it can hardly be denied that it has adversely affected the economic conditions of the public at large in general and the class of depositors in particular whose life-saving money is either deposited or whose livelihood is dependent on the income of interest.

(b) Committee and Commission

Santhanam Committee submitted its Report in 1964. The Committee discussed the emergence of socio-economic offences. The Committee said that the development of science and technology contributed to the development of mass society. Due to this small controlling elite class emerged and created a monopoly. There was a scarcity of goods. It leads emergence of socio-economic offences. Such offences are more dangerous. These affect not only the economic condition of the country but also cause irreparable damage to public morals.

There are a few reports which also contributed to the development of socio-economic offences. These are –

(1) Santhanam Committee Report (Pages 53 and 54) [1964]
(2) Law Commission of India, 29th Report [1966]
(3) Law Commission of India, 47th Report [1972]

[5] AIR 1964 SC 1140. Date of Judgment: February 03, 1964.
[6] AIR 1965 SC 722. Date of Judgment: August 24, 1964.
[7] Date of the Judgment: March 25, 2004.

Santhanam Committee Report

Santhanam Committee submitted its Report[8] in 1964. The Committee discussed the emergence of socio-economic offences, categories of socio-economic offences and provided some examples of white-collar crime.

The Committee observed that the advancement of technology and scientific development contributed emergence of mass society. The elite class emerged, which started creating a monopoly. The scarcity of resources and excessive greed of society also played in the emergence and growth of white-collar crimes. Such offences are more dangerous due to the involvement of financial stakes and irreparable damage to public morals.

Santhanam Committee recommended amending the IPC, 1860. It was observed that the IPC, does not deal with social offences in a satisfactory manner committed by powerful sections of modern society. Certain social offences were broadly classified.[9] Categories of socio-economic offences made by the Santhanam Committee were quoted in Reports of the LCI.[10]

The Santhanam Committee observed the following examples of white-collar crimes - (1) malpractices, (2) hoarding, (3) monopolistic control, (4) usury, (5) corruption and bribery, (6) election offences, (7) profiteering, (8) tax evasion and avoidance, (9) sub-standard performance of contracts of constructions and supply, (10) mal-practices in the share market etc.[11]

Law Commission of India, 29th Report, 1966

The title of 29th Report of the Law Commission of India is "Proposal to include certain social and economic offences in the India Penal Code". The Report discusses the history of White Collar Crimes, the kind of crimes, definition of White-collar Crime given by Sutherland and Arnold.

Law Commission of India, in its 29th Report at Para 13 discussed the development of socio-economic offences with the help of the Bubble Act, 1720.

There are two types of crime. These are – (1) White-collar crime,[12]and (2) Blue-collar crime.[13]

Earlier it was presumed that the lower class was committing crimes. Sutherland, by his studies, established that crimes are also committed by the upper class, which is more dangerous than a crime committed by the lower class.

Law Commission of India, 47th Report, 1966

Law Commission of India submitted 47th Report in 1972. Title of the Report is "The Trial and Punishment of social and economic Offences". The Commission discussed the definition of white-

[8] *Available at*: https://cvc.gov.in/sites/default/files/scr_rpt_cvc.pdf (Visited on November 29, 2022).
[9] Santhanam Committee Report, 'Committee on Prevention of Corruption', Para 7.3, Pages 53 and 54, 1964.
[10] These reports are - 29th Report, Para 2, Page no. 2 and 47th Report, Para 1.6,
[11] Santhanam Committee Report, 'Committee on Prevention of Corruption', Para 2.13, p. 11.
[12] Upper or middle-class persons commit it.
[13] It is generally committed by the underprivileged.

collar crimes and its examples, social offences, economic offences and salient Features of Socio-economic offences[14] etc.

'White-collar crime' may be described as a crime committed during one's occupation by a member of the upper class of society. It can be understood with the help of the following examples[15] -

1. The supply of sub-standard drugs by the manufacturer of the drug is WCC.
2. Fraudulent evasion of tax by a big corporation is WCC.
3. Illegal smuggling of TV Sets for personal use is not WCC. The reason of this is that there is no connection between smuggling and occupation.
4. Filing a false income tax return by pensioners is also not WCC.

But all of them (Examples 1 to 4) are guilty of social or economic offences.

Social offences affect the health and material welfare of the community as a whole. Economic offences affect the economy of the country rather than an individual victim. Socio-economic offences and white-collar crimes could be intersecting circles. Intersecting circles could also represent socio-economic offences and crimes of strict liability.[16] There are the following salient features of the socio-economic offences[17] –

(1). Motive – The motive of committing socio-economic offences is greed rather than lust or hate.
(2). Emotion – There is no emotion between the accused and the victim. It makes it differ from traditional offences. In traditional offences like murder, rape and defamation, emotion always plays a vital role.
(3). Victims at large – Victims of socio-economic offences are at a large level. It affects the State or section of the public.
(4). Fraud – Offenders commit crimes through fraud. They don't use force.
(5). Wilful – Socio-economic offences are committed willfully and deliberately.
(6). Protection of interest – Socio-economic laws protect social interest from exploitation and help in the economic growth of the country by punishing it.

II. Differences between Socio-Economic Offences and Traditional Offences

In *Tofan Singh v. State of Tamil Nadu*[18] the Supreme Court, at para 50 of the judgment, discussed socio-economic offences and WCCs. The Court observed that such offences affect the whole of society. It is not committed by disadvantaged people. Very affluent and immensely powerful people commit it. It must be firmly tackled.

[14] Paras 1.4 & 1.5, Page 2.
[15] Law Commission of India, "47th Report on The Trial and Punishment of social and economic Offences" Para 1.8, p. 4 (1972).
[16] *Id.* Para 1.9, p. 4.
[17] *Id.*, Para 1.4, p. 2.
[18] *Tofan Singh* v. *State of Tamil Nadu,* 2020 SCC OnLine SC 882.

The Indian Penal Code is the best example of traditional offences. There are the following differences between both –

(1). *History* - Socio-economic offence is a new concept. As per 29th Report of LCI, the origin of socio-economic offence is found in the Eighteenth Century. The traditional offence is an old concept.

(2). *Mens Rea* - Generally, persons are convicted even without mens rea.[19] Generally, Actus non facit reum, nisi mens sit rea is followed in case of traditional offences.

(3). *Presumption* – Generally, the presumption of guilt is the rule in socio-economic offences.[20] The presumption of innocence of the accused is followed in traditional law.[21]

(4). *The burden of proof* – In socio-economic offences, generally burden of proof lies over the accused.[22] In traditional offences, generally, the burden of proof lies over the prosecutor. If the accused wants to take benefit of exceptions or general exceptions, the accused will be bound to prove.[23]

(5). *Victims* - Here, generally victim is a whole nation or at a mass level. It damages the national economy and national interest.[24] In traditional offences, generally, the victim is an individual or group.

(6). *Heat of passion* - In *State of Gujarat* v. *Mohanlal Jitamalji Porwal & Anr.*[25] Supreme Court observed that white-collar crime is committed with a cool mind and calculation. This is committed for personal profit regardless of the consequences to the community. Traditional offences may be committed either with a cool mind or a heat of passion. For example, a murder may be committed in the heat of passions being aroused.

(7). *Mode of operation* - Mode of operation of the offender is generally fraud, not force.[26] The mode of operation of the offender is generally forced.

(8). *Motive* - The criminal's motive is greed rather than lust or hate.[27] In traditional offences, generally, the motive becomes lust or hate.

[19] *State of Maharashtra* v. *M.H. George* is related to the FERA, 1947.
[20] Sections 35 & 54, the NDPS Act, 1988 and Section 24, the PML Act, 2002
[21] Malimath Committee, "Committee on Reforms of Criminal Justice System" p. 6, para 1.7. Vol. 1 (March 2003).
[22] Section 24, PML Act, 2002 and Section 68J, the NDPS Act, 1988. Section 35 of the NDPS Act deals with rebuttable presumption. The accused may rebut this presumption.
[23] The Indian Evidence Act, 1872, Section 105.
[24] *State of Gujarat* v. *Mohanlal Jitamalji Porwal and Anr*, AIR 1987 SC 1321, Date of the judgment: March 26, 1987,
[25] AIR 1987 SC 1321.
[26] Law Commission of India, "47th Report on The Trial and Punishment of social and economic Offences" para 1.4., p. 2 (1972).
[27] *Ibid.*

III. Differences between Socio-Economic Offences and WCCs

Edwin H Sutherland in his famous speech to the American Sociological Society in 1939 introduced the concept of 'white collar crime'.[28] He coined the term 'white-collar crime'.[29] According to him, WCC means crime committed during an occupation by a person of high social status and respectability.

The Law Commission of India (in short 'the LCI') in its 29th Report said that the connection of crime with the occupation is the deciding factor for deciding whether an offence is a white-collar crime. WCCs do not cover murder, intoxication and adultery, even if the upper class commits it. The reason of this is that these crimes are not connected with their occupation or profession.[30] The Law Commission of India (in short 'the LCI') in its 47th Report said that WCC is a crime committed by an upper-class member in his occupation.[31]

Socio-economic offences and white-collar crimes could be intersecting circles.[32] There are the following salient features of WCCs[33] -

(1) there is no social sanction against such WCCs; (2) Such offences are committed by an organized gang. Such gang uses modern technology. (3) Such offences can't be committed without the nexus of politicians, enforcement law agencies and offenders. (4) Public does not take such offences seriously. So there is no organized public opinion against such offences. (5) The traditional crimes are isolated crimes, while the WCCs are part and parcel of society.

There are the following differences between 'Socio-economic Offences' and 'White–collar Crime' –

(i) Definition

Socio-economic offences may be committed by any person even if he does not have a high social status in his occupation. Such offences affect the health and material welfare of society along with the country's economy.

White-collar crime is committed by very rich and high social status during his occupation.

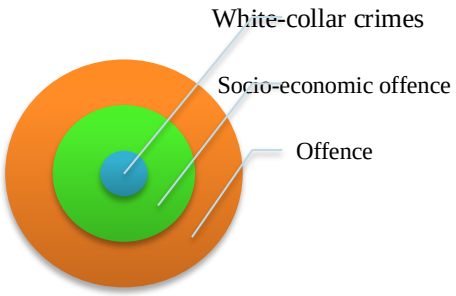
Law Commission of India, in its 47th Report quoted four examples. All examples were socio-economic offences, and two examples were also coming under the category of white-collar crimes. I

[28] James William Coleman, 'Toward an Integrated Theory of White-Collar Crime' Vol. 93, No. *2 American Journal of Sociology*, 406 (Sep., 1987).
[29] Sally S. Simpson and David Weisburd (eds.), 'The Criminology of White-Collar Crime' 16 (Springer, New York, 2009).
[30] Law Commission of India, "Proposal to include certain social and economic offences in the India Penal Code" 29th Report, 1966, Para 8, p. 5.
[31] Law Commission of India, "47th Report on The Trial and Punishment of social and economic Offences" Para 1.8 p. 4.
[32] *Id.*, Para 1.9, p. 4.
[33] Law Commission of India, "155th Report on the Narcotic Drugs and Psychotropic Substances Act, 1985" Para 1.2. p.2 (1997).

1. Illegal smuggling of TV for personal use is a socio-economic offence. But it is not white-collar crime. The reason for this is that the person did not commit a crime during his occupation.
2. A pensioner who submits false returns of income is not a white-collar criminal. It is only a socio-economic offence.
3. Supplying of sub-standard drugs deliberately by the manufacturer is a white-collar crime. This is also a socio-economic offence.
4. A big corporation that has committed evasion of tax fraudulently is a 'White-collar criminal'. This is also a socio-economic offence.

(ii) Relation between both

Every Socio-economic offence is not a White-collar Crime. It is a genus. It is wider. But every White-collar Crime is a Socio-economic offence. It is species. It is narrower.



(iii) Criminals

Criminals may be from high or lower society. Here both rich and poor can commit socio-economic offences. Criminals are from high society. Here only the rich commit white-collar crime.

(IV) Socio-economic Offences and Mens Rea

Common law is based on Actus non Facit reum, Nisi Mens Sit Rea. According to this actus reus (prohibited act) is not sufficient to constitute an offence unless it is caused by a guilty mind. This is also known as "Fault Liability". The presumption of the accused is a cardinal principle of criminal law.

Justice Write in *Sherras* v. *De Rutzen*[34] observed that in every statute, mens rea is to be implied unless the contrary is shown". There are certain circumstances in which deviation is possible. Justice Goddard[35] in *Brend* v. *Wood*[36] observed that where a statute is silent about mens rea, mens rea should be treated its part unless the implication of the statute clearly rules out.

[34] (1985) 1 QB 918.
[35] He is known as 'Revival of Mens rea.
[36] [1946] 175 LT 306, (1946) 62 TLR 462.

47th Report of Law Commission of India[37] suggested the following two important points regarding mens rea –

1. It was suggested that socio-economic offences must be treated differently from traditional crimes. In such offences, mens rea should not be required. Socio-economic offences represent greater harm.
2. The burden of disproving mens rea should lie over the accused.

The requirement of mens rea was rejected in the following statutes and cases -

(i) The Sea Customs Act, 1878

In *The Indo-China Steam Navigation Co. Ltd.* v. *Jasjit Singh, Addl.*[38] interpretation of several provisions of the Sea Customs Act, 1878 was involved. In this case requirement of mens rea was rejected, and the accused was convicted.

(ii) The Foreign Exchange and Regulation Act, 1947

The majority opinion of Supreme Court in *State of Maharashtra* v. *M.H. George*[39] convicted accused even without mens rea. The accused was convicted under the Foreign Exchange and Regulation Act, 1947.

(iii) The Immoral Traffic Prevention Act, 1956

In *Chitan J. Vaswani & Anr* v. *State of West Bengal & Anr.*[40] Section 18 of the Immoral Traffic and Prevention Act, 1956 was involved.[41] Supreme Court observed that for application of Section 18, mens rea is not necessary.

(iv) The Essential Commodities Act, 1955

The Parliament amended the Essential Commodities Act, 1955 in 1967 and nullified the judgment of *Nathulal* v. *State of Madhya Pradesh*.[42] After the Amendment, this Section covers contravention either knowingly, intentionally or unintentionally. The Supreme Court applied the 'Strict Liability' in State of Madhya Pradesh v, Narayan Singh.[43]

(v) The Prevention of Money-Laundering Act, 2002

An Enforcement Case Information Report (ECIR) is not equal to FIR. It is an internal document of the Enforcement Directorate. So the supply of ECIR to the accused is not necessary.[44] ED is not a police officer.[45] In *Ramaraju* v. *Union of India*, the issue was 'whether Section 8 of The

[37] Para 3.17, Para 3.20.
[38] AIR 1964 SC 1140, Date of the judgment: February 3, 1964.
[39] AIR 1965 SC 722.
[40] AIR 1975 SCC 2473.
[41] Section 18 – 'Closure of brothel and eviction of offenders from the premises
[42] AIR 1966 SC 43.
[43] AIR 1989 SC 1789.
[44] *Vijay Madanlal Choudhary & Ors.* v. *Union of India & Ors.*, July 27, 2022.
[45] *Ibid.*

Prevention of Money-Laundering Act, 2002 is invalid on the grounds of vague & exclusion of mens rea'? Hon'ble A.P. High Court replied in negative.

(V) "Differential Association Theory"

Edwin H Sutherland propounded "Differential Association" theory.[46] He was searching for how a person becomes a criminal. According to him, when a person associates with another criminal, he learns values, attitude, techniques and motives for criminal behaviour and become a criminal. His main focus was on *how* a person becomes a criminal. He did not discuss *why* a person becomes a criminal.

This theory was implied in the book of Sutherland published in 1933. It came expressly in his book (third edition) published in 1939, which was revised in 1947 (fourth edition). His book was "Principles of Criminology" in which he discussed 'Differential Association Theory. This is also known as the "Learning Theory of Deviance". This theory contains nine assumptions.

There are the following key points of 'Theory of Differential Association -

1. Criminal behaviour is *learned* from other individuals.
2. During the process of communication, people learn criminal behaviour.
3. Mainly criminal behaviour is learnt by an intimate personal group.
4. Learning includes technic for committing crimes and justification.
5. Hedonism plays a vital role. It means if pleasure is more and pain is less, the person will commit a crime.[47]
6. If a law is favourable, a person will commit a crime.
7. It depends upon intensity, priority, duration and frequency.
8. It involves all the mechanisms involved in any other learning.
9. While criminal behaviour is an expression of general *needs and values,* it is not explained by those needs and values since non-criminal behaviour is an expression of the same needs and values.

James Short Jr. supported Differential Association Theory based on his study of 176 school children (126 Boys and Girls) in 1955.

(i) Contribution of this Theory

This theory is based on Hindi Poem i.e. "संगत से गुण होत हैं संगत से गुण जात". The role of Peer Group in the commission of crime has been emphasized. This theory emphasized considering the activities of those persons in whose concert he is living. Parents always take care of their children with whom babies are living and playing.

---

[46] Edwin H Sutherland, "The Theory of Differential Association" , in David Dressler, Readings in Criminology and Penology, 365-370 (Columbia University Press, 2nd Ed., 1972).

[47] James William Coleman, 'Toward an Integrated Theory of White-Collar Crime' Vol. 93, No. *2 American Journal of Sociology*, 415 (Sep., 1987).

(ii) Criticism of the Theory

There are the following criticism of this theory –

1. Tappan had criticized for ignorance of the role of personality, biological and psychological factors.
2. He failed explaining origin of criminality. He was saying that criminality was learnt. From where first person learnt?
3. Elliot explained systematic crimes but failed to discuss situational crime.
4. He did not discuss why a person becomes a criminals.
5. जो रहीम उत्तम प्रकृति, का करि सकत कुसंग। चंदन विष व्यापत नहीं, लपटे रहत भुजंग॥ Some person may be so much strong that outer criminal can't affect his life.

(VI) Conclusion

Socio-economic offences are increasing day by day. It affects society at large and affects the economy of nations. It is different from white-collar crime. But many times, controversy arises about which law should come under the category of socio-economic offences and white-collar crimes. At the time of discussion of the syllabus of socio-economic offences, even professors of the Faculty of Law, University of Delhi, had no unanimous opinion. The reason for this is that this law had not developed fully. There is a shortage of literature. Many other universities and colleges put some Acts and topics in the syllabus of socio-economic offences and white-collar crimes. I thoroughly discussed the differences between socio-economic offences and white-collar crimes in this research paper. At the time of deciding whether any law should come under the category of socio-economic offences or not, both types of effect, i.e. direct and indirect, should be considered. Many times it may happen that some provisions of a law may come under white collar crimes, and some provisions may not come. Another example is that offences committed by paddlers under the NDPS Act will come in socio-economic offences, and a producer of a company of such drugs will come in the category of white-collar crimes. Edwin H. Sutherland developed the concept of socio-economic offence. He also developed the 'Differential Association Theory' to determine how a person becomes a criminal.

The Quintessence of Melody in Bangla Literature in Law

Zahirul Basha*
Shah Ahsan Ahmed Khan**

Abstract:

Language is considered the most important aspect of human beings, and lawyers feel the same way. The expressions of language that verbalize the inner thinking of authors lead to the connection between law and literature. In this paper, two young minds tried to visualize the century-long relationship between the law and literature. Every country has its literature and the law of the land. In addition to the western affiliation between law and literature, young learners attempted to capture and articulate the relationship between law and literature in Bangla literature. This article outlines the complex yet interdisciplinary nexus between the law and the literature, which has been developed due to the course of time and exploration by both legal and literary scholars. This paper looks at the linking between law and literature and how literature can change the law or how the law can inspire writers to write about laws that do not exist, or how the writers themselves can find out what laws do not exist and use their words to talk about the lack of laws in a certain time, place, or situation.

Keywords: Law, Bangla Literature, Jurisprudence, Legal Rights

I. Introduction

Laws come from the norms of society. Laws change as a result of societal needs and the passage of time. Sometimes, various loopholes can be identified concerning laws in force; however, it is a matter of sorrow that the law does not mention those. The necessities of society are expressed in writings, and skilled writers articulate their thoughts in literary forms. Consequently, these literary works have made their place in society with great importance, and the influence of those literary works has impacted the laws, rules, and regulations of the then-existing society from time to time. With the flow of time, both the law and society are changing day by day. Therefore, the pen, which is mightier than the sword, can essentially revolutionize the outlook of society. The link between law and literature forms when literature seeks to change the law or when the law inspires authors to write fiction and other works. The index of literature is full of stories about society and its people. Law comes from the needs of the people, and these needs are filed in the books of literature. The aftermath of literary works influences people to pass laws establishing rights. In the literature, law and the legal system are linked to show from the perspective of an individual or to represent the thoughts of the people. Law is more than just a piece of paper with strict guidelines; it is alive, and it changes with the passage of time. The relationship between literature and law is complicated, but it has always existed. This paper will embrace a journey to find out how law and literature are connected, from the minds and perspectives of juvenile learners.

* Research Associate, MCLaw Services Ltd., 110, Kazi Nazrul Islam Avenue, Bangla Motor, Dhaka 1000, Bangladesh
** Associate (Corporate-Legal), Orr, Dignam & Co., Shajan Tower-2, 3 Shegunbagicha, Dhaka, Bangladesh

II. Method of Writing

This analytical review paper has been constructed with assistance from the data in the secondary sources. This work has drawn its materials primarily from books, articles, and newspaper reports. Since this paper concentrates on the relationship between law and literature, literary works such as novels, short stories, and poems were also the primary source for this paper. Some literary works in Bangladesh are embedded in the educational curriculum and have become part of the society's folklore, serving as basic knowledge to the juvenile learners. This paper has combined legal instruments and writings with literary works to pursue the nexus of law and literature.

III. Law: fons et origo

The establishment of a normative order by means of law is inherently authoritarian in its character and many inks have been used in the attempt to define the law.[1] The definition of law is relative, and therefore, the view of law varies from person to person.[2] John Austin founded a definition of law that says 'the law is nothing but the command of the sovereign'.[3] Among other definitions of law, because of its clear definition, it is considered by some scholars to be the most acceptable definition that defines the law.

According to Ronald Dworkin, 'law' is a communal practice if for justified uses of "collective power against individual citizens or groups."[4] Furthermore, what constitutes legal compulsion 'legitimate' depends on one's legal theory. In the broadest sense, the debate over the justification of law revolves on the distinction between 'justice according to law" and "justice beyond the law.' To imagine the situation, a famous case decided long ago called *Riggs v. Palmer* can shed some light.[5] The facts of the case arose when a young man filed a lawsuit after learning that his grandfather had written a will leaving him all of his property. After learning that his grandfather was about to marry again and make a new will, he murdered him to stop him from doing so. Later on, the young man was sent to jail.[6]

But then the question arose: "Was the young man still entitled to inherit the property of the man he had murdered?" There was no disagreement about the facts. Everyone agreed that the young man had murdered his grandfather. Everyone agreed to deal with the situation according to the law.[7] However, the statute said nothing about murderers, or it did not say that if the heir murders the testator, the heir is disqualified from inheriting. Moreover, one's legal theory determines what makes legal compulsion 'justifiable.' In the broadest sense, the contested

---

[1] Ronald Dworkin, *Law,* "Philosophy and Interpretation" 80 Archives for Philosophy of Law and Social Philosophy (1994), https://www.jstor.org/stable/23679854 (last visited Nov 15, 2022).

[2] Brian H. Bix, John Austin and Constructing Theories of Law. In: Freeman, M., Mindus, P. (eds) The Legacy of John Austin's Jurisprudence. Law and Philosophy Library, vol 103. (Springer, Dordrecht, 2012) https://doi.org/10.1007/978-94-007-4830-9_1.

[3] *Id*. at 8

[4] Dworkin, *supra* note 1, at 463-475.

[5] Riggs v. Palmer, 115 N.Y. 506 (22 N.E. 188, 1889).

[6] Rodger Beehler, *Legal positivism, social rules, and Riggs v. Palmer*, 9 Law and Philosophy 285–293 (1990), https://www.jstor.org/stable/3504804 (last visited Nov 15, 2022).

[7] *Id*. at 287.

arguments surrounding the justification of law center on the distinction between 'justice according to the law' and "justice beyond the law." Nonetheless, the disagreement between lawyers and judges arose regarding the answer to the situation. Two judges said that the law is that murderers may not inherit, and the dissenting judge stated that it was wrong.[8]

A non-legal example can be given to explain the dilemma. The question is "whether X is a rich country or not." The answer can be given in two categories: one is epistemological, and the other is ontological. Some people might be perplexed about the epistemological issue of how people would find out the right answer to the question. Another branch of people might be puzzled regarding the ontological issue of what evidence counts for deciding whether a country is rich or not. No one would believe that the proposition "X is a wealthy nation" is true simply because "X is a wealthy individual." Hence, the questions come to the mind and therefore instigate asking what kinds of facts make a nation rich, i.e., the facts considering the actual wealth of the nation or the individual financial situation of that nation? Similar to the aforesaid statements, epistemological and ontological issues are raised by the disagreements of lawyers and judges in the case. Ronald Dworkin's first answer to the legal reasoning would be, "What makes a good case that a murderer should not be able to inherit from the person he or she killed?" From a bird's eye view, the concept of legal theories arises from the debate of "what law is" or "how law functions." Over many years, many scholars of the law tried to define the law, the function of the law, or the nature of the law. As a result of the disagreement, legal theories developed. If the situation is examined through the eyes of naturalists, murder is murder since it goes against morality. According to the naturalist, a rule is a law if it is commonly validated by morality. Thus, the law gets its validity from morality. If any rule is made into law, that must be validated by morality. It could be argued that higher norms represented morality and lower norms represented legal rules. Saint Thomas Augustine, a modern naturalist, said that an unjust law is not a law at all. Those are known as "*Malum in se*," which means something wrong in itself or elaborately. Malum in se is a Latin phrase that denotes "wrong or evil in itself." The phrase refers to any behavior that nature judges to be sinful or fundamentally wrong, as well as the self-governing of the regulations that govern the behavior. For instance, murder However, if it is murder for self-defense with no option in hand, then it becomes a different scenario, and at that stage, because of the factual situation, although murder against self-defense does not pass the morality test as it is a murder, on the other hand, the act of murder for self-defense does not seem to be fundamentally wrong or evil in itself. From the illustrations and discussions, it is clear that the law has a strong connection with morality. Sometimes, laws are enacted according to the morality of a society. The art of literary penmanship dazzles social morality and sociological perspective. In the end, the law establishes a deep connection with literature from various dimensions. The following section of the paper will discuss the origins of law and literature, how literature influenced law, how the law is embedded in literature, and how literary works promoted rights.

[8] *Id*. at 290.

IV. Harmony of Law and Literature

The likelihood development of Law and Literature can be outlined in the 17th Century. '*Typographia*' is the oldest evidence.[9] James Boyd White's '*The Legal Imagination: Studies in the Nature of Legal Thought and Expression'* (1973) is considered as the modern root of law and literature.[10] Referring to French sociologist Pierre Bourdieu, Law is a magic that works in real life. The term Magic refers to terms associated with magic. The majority of law and legal concepts are conveyed using words. Without language, a lawyer is nothing. For instance, the most prevalent duty in law is wordplay.[11] A lawyer must be able to analyze and interpret a document, relate it to reality, and in certain instances, translate it into action.[12] Therefore, only then will he or she be able to operate with a text. A text contains the essential provisions of the legislation. The path from words or spoken social magic to storytelling is really brief. In fact, the law is tied to reality and is not only a document.[13]

V. Literature Enchants Law

The literature contains an astonishing amount of legal subject-matters, such as a trial provides the climax of the '*Oresteia, The Merchant of Venice, Billy Budd'*, and '*L'Etranger*', the focus of attention in Bleak House and James Gould Cozzens' fine novel *The Just and the Unjust*; the title of Kafka's most famous novels '*The Judgment, The Penal Colony, and Before the Law*'.[14] Even, Shakespeare's plays contain various incidental references to law such as '*The Merchant of Venice*'.[15] Furthermore, '*Alice in Wonderland*' ends in a trial-a trial notable for a depiction of the jury system.[16] Major writings by Kafka, T.S. Eliot, Joyce, and Mann, as well as Hemingway and Gide and their work, created the connection between law and literature.[17]

There are several literary works where literature instigates the rights and from those concepts of rights later played an important role to enact laws. Ergo, literature does not oblige anyone to create law rather inspires the society to apprehended what rights are missing or sometimes exhibits the thoughts of society. If society is hostile to a particular group or gender, that implies enacting sufficient law to assist the unfortunates to uphold their rights and dignity.

---

[9] Sally E. Hadden & Alfred L. Brophy, *Law and Literature, in* A companion to American Legal History 461–483 (Wiley-Blackwell, Hoboken, 2013).
[10] Ibid.
[11] Skop Martin, "Law and Literature - a Meaningful Connection" 4 Filozofia Publicznai Edukacja Demokratyczna 6–20 (2015), https://pressto.amu.edu.pl/index.php/fped/article/view/13426 (last visited Nov 15, 2022).
[12] *Id*. at 8.
[13] *Id*. at 10.
[14] Jarrell D. Wright, "Transcending law and literature: Literature as law in Plato, Vico, and Shelley" 29 Law & Literature 291–310 (2016).
[15] Richard A. Posner, "Law and literature: A relation reargued" 72 Virginia Law Review 1351 (1986).
[16] Catherine Siemann, "Curiouser and curiouser: Law in the Alice Books" 24 Law & Literature 430–455 (2012), https://www.tandfonline.com/doi/abs/10.1525/lal.2012.24.3.430 (last visited Nov 15, 2022).
[17] Robert P. Burns, *Kafka's law: The trial and American Criminal Justice* (University of Chicago Press (September 2, 2014).

VI. Writings create Rights

As aforesaid, from the pen of the writers, many literary works were created. Sometimes those literary works envisage some circumstances which were true to the society but those were not addressed in the law. Rights that come from law, are also advocated in the instruments of literature. Women have fought for their place as well as rights in society for a long time. In the world of men, the voice of women was maffled. Susan Glaspell' s '*A Jury of Her Peers*' (1917) showed the investigation power and intelligence of women in the story.[18]

In the narrative, two ladies who lived next door to a lonely plain housewife suspected of murdering her husband surveyed the couple's kitchen and found evidence indicating the reason for the crime that the sheriff and district attorney had failed to see due to their pragmatic worldviews.[19] The neighbors agreed to hide this evidence that may have led to the woman's guilt, and the narrative concluded with her being acquitted by the 'jury of her peers.'[20] Feminist critics also stress the need of knowing the legal position of women in order to get perspective on a wide range of literary works.[21]

Literary works such as Mary Wilkins Freeman's '*The Revolt of 'Mother*' (1890), Charlotte Perkins Gilman's '*The Yellow Wallpaper*' (1892), and Kate Chopin's '*The Awakening'* (1899) which are the pioneer of women's rights illustrated the situation of women and their desires in the literature.[22] Those pioneer works not only illustrated the inequality towards women but also sowed a seed of women's rights.[23] Due to literature, society is always changing but also the moral standards and values are developing. Thus, the law is in a state of flux. For example: before 1920, there were no voting rights of women. On August 18, 1920, through the 19th Amendment to the U.S. Constitution American women earned to right to vote.[24]

VII. Intonation of Law in Bangla Literature

Similar to American Law and Literature, in Bangladesh, poets and writers have expressed their feelings and thoughts in their literary works. Among them, the most notable are the works of Rabindranath Tagore and Kazi Nazrul Islam. The works of Tagore such as '*Sentence*' or '*The Judge*' and '*Naari* (*Women*)' of Kazi Nazrul Islam embedded law in the Bangla Literature.[25] Noble Prize winner, Rabindranath Tagore, expressed his thoughts about Law and Legal system

---

[18] Patricia L. Bryan, "Stories in fiction and in fact: Susan Glaspell's "a jury of her peers" and the 1901 murder trial of Margaret Hossack" 49 Stanford Law Review 1293 (1997).

[19] *Id.*

[20] *Id.*

[21] Thomas, supra note 13 at 406-421.

[22] Rula Quawas, "A new woman's journey into insanity: Descent and return in the yellow wallpaper" 2006 Journal of the Australasian Universities Language and Literature Association 35–53 (2006).

[23] Emma Jones, *London School of Journalism Kate Chopin: The Awakening* (Modern Library, 2019), https://www.lsj.org/literature/essays/chopin (last visited Nov 15, 2022).

[24] Leonard W. Levy, Kenneth L. Karst & Adam Winkler, Encyclopedia of the American Constitution (2000).

[25] Rabindranath Tagore, 'Shasti', Galpaguchchha, Collection of Short Stories in Carolyn Brown (translator) Parabass Inc. Tagore's 'shasti': An essay and translation--by Carolyn Brown (Parabaas Tagore section) (2010), https://www.parabaas.com/rabindranath/articles/gCarolyn_shasti.html (last visited Nov 16, 2022). *See also*, Parabaas Inc., the judge -- short story by Rabindranath Tagore; translated from original Bengali bicharok by Saurav Bhattacharya (Parabaas Rabindranath section) (2010), https://www.parabaas.com/rabindranath/articles/gSaurav_judge.html (last visited Nov 16, 2022).

of the Indian Sub-continent in his various writings.[26] Tagore mentioned judges, punishment, and an overview of the British regime in his writings.[27] During this British regime, polices who were supposed to be the protector of people abused their power upon the innocent people.[28] It is to be mentioned that, in Bangladesh sometimes same abuse of power is seen in the police system even at this age. It is due to the lack of proper reformation and loopholes of the law. Tagore envisioned the reformation of the police system in Bangladesh, which was part of British Indian rule at that time.[29] Tagore expressed the punishment is not revenge but reformation.[30] He connected Law and Humanities. From the juveniles' perspective in this regard is between Law and Literature, that a writer can see the demons of Law whereas the legislature or the people connected with the legal system can disregard the matter.

As discussed earlier in the paper, the law is for the betterment of society according to naturalists. Law should be consistent with morality and humanities. On the other hand, Kazi Nazrul Islam is known as a rebellious poet, envisaged human dignity and equality in his writings.[31] Some of his work showed the British injustice in Bangladesh.[32] His literary works regarding women were the first step for women's rights in Bangladesh. From the mind of the juvenile learners, Tagore did find a huge lacking in the legal system and inked the situation of the period very profoundly whereas Nazrul brought equality and justice through his works. As aforesaid in the earlier stage, Susan Glaspell portraited women as the main protagonist character in her literary works, and later on, her works inspired women and contributed to the field of American drama.[33] Similarly, Begum Rokeya was the pioneer of women's rights in Bangladesh.[34] Like Susan Glaspell's '*A Jury of Her Peers*', Begum Rokeya's literary work '*Sultana's Dream*' illustrated women's empowerment and her works influenced the law of Bangladesh after the 1971 liberation.[35] Additionally, the literary works of Begum Sufia Kamal

[26] S Mary Immaculate, "Social Justice in the Writings of Rabindranath Tagore", 6 Smart Moves Journal IJELLH 201–214 (2018), https://ijellh.com/OJS/index.php/OJS/article/view/3357 (last visited Nov 16, 2022).

[27] Mohammad Habibur Rahman, *Legal thoughts in Rabindra's Writings* (2 ed. University Press Limited, Dhaka, 2002).

[28] *Id.* at 25.

[29] Rahman, supre note 32, at 44.

[30] J.G.R. Penton, How Rabindranath Tagore's worldview is expressed in "punishment" Medium (2017), https://medium.com/literary-analyses/how-rabindranath-tagores-worldview-is-expressed-in-punishment-44c3c99d147e (last visited Nov 16, 2022).

[31] Majhar Mannan, Kazi Nazrul's Humanist Literature & Centenary of 'bidrohi': The Asian Age Online, Bangladesh The Asian Age (2021), https://dailyasianage.com/news/262179/kazi-nazruls-humanist-literature---centenary-of-bidrohi (last visited Nov 16, 2022).

[32] Liesl Schwabe, Celebrating Kazi Nazrul Islam, rebel poet of Bengal by Liesl Schwabe Words Without Borders (2022), https://wordswithoutborders.org/read/article/2021-01/celebrating-kazi-nazrul-islam-rebel-poet-of-bengal-liesl-schwabe/ (last visited Nov 16, 2022). See also, Debjani Sengupta, Why we remember (and forget) the rebel poet Kazi Nazrul Islam The Wire (2020), https://thewire.in/books/kazi-nazrul-islam-birth-anniversary-rebel-poet (last visited Nov 16, 2022).

[33] J. Ellen Gainor & Jerry Dickey, *Susan Glaspell and Sophie Treadwell: Staging feminism and modernism, 1915-1941*, A Companion to Twentieth-Century American Drama 34–52 (2007).

[34] Supre note 26. See also, Tanzil Rahaman, Begum Rokeya: Commemorating women's rights pioneer New Age | The Most Popular Outspoken English Daily in Bangladesh (2020), https://www.newagebd.net/article/123803/begum-rokeya-commemorating-womens-rights-pioneer (last visited Nov 16, 2022).

[35] Upashana Salam, Rokeya's unrealised dream The Daily Star (2015), https://www.thedailystar.net/in-focus/rokeyas-unrealised-dream-185908 (last visited Nov 16, 2022).

promoted women's empowerment, rights, and equality which has contributed a great influence in culture as well as in the society of Bangladesh creating gender equality.[36]

Additionally, during the time of the British regime in the Indian sub-continent, writers took their pens and wrote against the oppression against British rule. Literary works in Bangladesh during the time of independence as well as language movement inspired the people and created the concept of having a state where the rights of citizens are ensured and no one would be discriminated against based on race, religion, sex, or ethnicity. Furthermore, the literary works of the authors fought against the oppressions and memoir the tyrannies of that time with the idea of creating an egalitarian society where the people will never be oppressed. Hence, the literature emphasized the untold story of the situations where bad law destroyed the people and at the same time, educate the next generations to enact just law that is aligned with morality.

VIII. Conclusion & Suggestions

The junction of several dimensions is where the law resides. Among these factors, the normative component is very important. The law is a standard, like the unwritten rules that govern society. The ethical component is also notable since it shapes the development of the law itself. As aforesaid discussed, the concept of rights was born through literary works. Law can be constituted such as higher norms were morality; lower norms were legal rules. Saint Thomas Augustine who is a modern naturalist said that an unjust law is not a law at all. The moral elements, values, or beliefs that society deems proper are reflected in the law. Without morals, the rule of law is meaningless. However, aesthetics has an impact on the legal system as well. The rule of law will always be influenced by people's feelings. According to Historical School, we cannot understand the law without analyzing the law from historical background. In other words, "Law is the reflection of people's spirit". The cardinal principle is "*Volkgeist*" (people's spirit).[37] The historical school does not separate law from another material catalyst. The history, as well as other aspects of history such as ethics, customs, morality, are taken into consideration. According to historical school, the law has a direct connection with the community, and law transforms and evolves like language.[38]

Throughout history, law and literature have inner connections. Law comes from people. The concept of law and social order is originated from the human mind. Language is a way to express what the human mind desires to tell. The words from the mouth are coming from the same mind where the law is created. The link between law and literature is always there in the writing, expression, mind of people. Without language, nothing comes from the human mind. A lawyer is not a lawyer if he does not know the art of expression. A lawyer's tool is his/her language even though plaint and the written statement are submitted, a lawyer has to seek relief or defend his/her client before the honorable Court. A language is a form of human behavior or rather, language is the most important thing to express the thoughts and the conscience of a human being and the authors expressed their thoughts regarding the legal provisions. The

[36] Zeenat Rezwana Chowdhury, Begum Sufia Kamal, as I knew her The Daily Star (2019), https://www.thedailystar.net/opinion/tribute/news/begum-sufia-kamalas-i-knew-her-1759429 (last visited Nov 16, 2022).

[37] George W. Paton & David P. Derham, *A text-book of jurisprudence* (Oxford University Press 1972).

[38] *Id.* at 18.

writings are like a mirror to lawyers as far as socio-legal and political developments and values are concerned and show the path from the bird's eye view and sometimes assist to find the lacking or the demons of the legal provisions. Literary works of the writers, novelists, poets are always drawing social phenomena in their canvass. The canvass shows the grass root of the human situation where the law applies. A good law can be ineffective if there are no social norms. All these are picked in the writings of literature. Literature picks every little detail of the picture. Thus, from the writings, the concept of law comes to people in times of need. Every era is canvased in the work of literature and in every era law change. The connection of law and literature envisage the connection of the human mind, law, and their perspective. From the mind of juvenile learners, law and literature come from the same human mind. This impeccable are affecting each other throughout hundreds of years.

Case Comment

Bajaj Electricals Limited Vs Gourav Bajaj & Anr[1]

Akarshita*

I. Facts

The discussed case relates to the subject matter of Intellectual Property. Instead of actual thoughts, intellectual property law protects the expression of those thoughts. The case is a recent one and was pronounced in the year 2020. It is taken to be one among the crucial judgements in the arena of intellectual property, more specifically in the domain of copyright and trademark. It is an ex- parte decision.

The factual background of the case is that Bajaj is a public limited company that was legally established in accordance with the Indian Companies Act of 1913 and is presumed to be present for purposes of the Companies Act of 2013. According to the claim, the Plaintiff is a component of one of India's oldest business conglomerates, the Bajaj conglomerates of enterprises and industries. According to the complaint, the plaintiff operates 19 "BAJAJ WORLD" branch offices across the nation. It is claimed that the Plaintiff has sought for and obtained many trademark registrations of its BAJAJ marks across numerous classes in order to secure its statutory rights in those marks and trade name. Further, it is claimed that in order to set its goods and services apart from those of competitors, the Plaintiff has utilised a number of distinctive and artistic labels, many of which use the mark BAJAJ prominently. The Plaintiff is listed as the legal holder of the copyright that is present in the aforementioned artistic labels. According to the claimant, the said artistic labels have also been legally registered under the requirements of the Copyright Act, 1957.

Now, it has come to the notice of Bajaj Electricals that the defendants are violating their exclusive rights vested upon them by the virtue of intellectual property they own. Thus, Bajaj Electricals requested an interim injunction from the Bombay High Court against the defendant. The defendant for this matter is a person who owns and operates two retail electrical appliance outlets in Abohar, Punjab. The "Apna Bajaj Store" And "Bajaj Excellent" were being run by Gourav Bajaj under the trade name "Bajaj." Additionally, the defendant runs a website at www.apnabajajstore.com, on top of the fact that it uses the “Powered by Bajaj” symbol in his business transactions. These all constitute the subject of the complaint. The plaintiffs are therefore suing the defendants for infringement of their registered trademarks and copyrights.

In this lawsuit, Bajaj Electrical claimed that "BAJAJ" was a well-known registered trademark or name and one of the first business groupings in India. It also relied on the case of *"Bajaj Electricals Limited V Metals & Allied Products And Anr.*[2]*"* where the Bombay High Court also declared it to be a well-known trademark in 1987. It is further stated that the defendant did not respond to any of the deliberations of the plaintiff even after numerous notices were served.

* BBA-LLB (H), 4th Year, Bennett University
[1]Commercial IP Suit (L) No. 195 Of 2020

[2] AIR 1988 Bom 167

II. Issue

Whether or not there exists an infringement of the trademark and copyright of the plaintiff's trade name – BAJAJ and its allied rights?

III. Plaintiff's Contention

The plaintiffs – Bajaj Electricals Limited sought the following prays

a. to grant in favour of plaintiff an ad-interim injunction
b. to prevent the defendant from using the plaintiff's registered trademark "BAJAJ" in their company name, labels, or domain name.
c. to prohibit the defendant from publishing, duplicating, disseminating to the public, or otherwise exploiting the plaintiff's registered brand.

IV. Defendant's Contention

Since the defendants did not revert to any of the notices sent on 24th and 25th of February 2020, therefore court was bound to proceed ex-parte without the participation of the defendants. Thus, there is no representation from the side of the defendant – Gourav Bajaj.

V. Rationale

The decision was undertaken by the coram in the presence of Justice B P Colabawalla on 3rd March 2020. The Plaintiff's mark "BAJAJ" was protected by an ex parte interim injunction prohibiting the Defendants from using the mark "APNA BAJAJ STORE," which is confusingly similar, and a domain name that contains the mark "BAJAJ" in order to copy or pass off the Plaintiff's mark. The likelihood of confusion refers to the likelihood that the consumer will be perplexed by the resemblance between the two traders' trademarks. It was decided in the instance of *Compass Publishing BV v. Compass Logistics Ltd.*[3] that there is a probability of confusion if the association of the marks leads the public to infer incorrectly that the various items are produced by the same or economically connected company. As a result, it is an infringement.

Further, the Act emphasises more on usage than on registration while allowing a particular trademark to a particular proprietor. Here also BAJAJ – the plaintiff has sufficiently shown that it has been in the market as one of the oldest and have been using the trademark and enjoying copyrights through a valid registration since January 1961. The same has been accepted by the court irrefutably.

In the present case, the Plaintiff was the owner of the "BAJAJ" marks and its creative labels, the Court found in reaching its verdict. The Court further noted that, given the nature of the commodities, it was impossible to completely rule out the risk of confusion and deception. Therefore, the Defendants had deceptively adopted the mark with the intention of profiting from the Plaintiff's goodwill and reputation. Not allowing thus, the plaintiff their sought relief would amount to them being suffering both in reputation and in finances.

[3] Compass Publishing BV v. Compass Logistics Ltd, 2004, RPC 41

To further strengthen the verdict, here are precedents and statutory rights in line to support the contention of the bench. In the case of *N R Dongre vs. Whirlpool Corporation* [4], the court noted that under Section 28(1) of the Act[5], the registered proprietor is granted the sole authority to use a particular trademark in connection with products, however prior registration is a prerequisite. Apart from this, the decided case put up by the plaintiff from the year 1988 that came in their favour was also taken into consideration.

VI. Analysis

According to the Copyright Act, sound recordings, cinematograph movies, musical works, and significant works all get copyright protection.[6] The term "copyright" relates to a plethora of eminent liberties granted to the owner of copyright by the honesty provided in the Act. The owner of the copyright or any other person who has been sufficiently permitted in such a manner by the owner of the copyright may exercise these powers. These privileges include the freedom to alter, produce, distribute, offer interpretations, correspond with the general audience, etc[7]. All original literary, artistic, musical, sensational, cinematographic, and sound recording works are protected by copyright. The work is unique if it hasn't been copied from another source. While copyright registration is optional, it is always advised for better work security as copyright protection kicks in as soon as a work is finished[8]. Copyright registration is merely an appearance of confirmation of a passage about the work in the Copyright Register maintained by the Registrar of Copyrights and does not confer any rights.

According to Section 2 of the Act, a trademark is defined as a mark that can be graphically represented and can differentiate one person's goods or services from those of others.[9] This mark can include the shape of the goods, their packaging, and the mix of colours. Since the industrial revolution, trademark law has been actively developing. The emphasis on manufacturers having the upper hand in the competitive market economy through showcasing their brand's quality and goodwill came from the large-scale production of goods and services. In order to differentiate their products from those of other manufacturers on the market, manufacturers started using symbols, marks, or other devices. The use of trademarks by manufacturers helped them expand the market for their products through advertising and other promotional efforts.

While the value of trademarks increased, competitors began dishonestly copying or stealing the trademarks of well-known firms after they realised the benefits that came along with them, like reputation, a seal of quality, and goodwill. The need for trademark protection was addressed, which resulted in the acceptance of trademark law on a global scale.

With advancements in the field in India, a registered trademark owner or his legal successor, can now file a lawsuit if there has been an infringement. Legal heirs of the injured party who has passed away may bring a claim against the infringer. In other situations, the joint owner, a

[4] N.R. Dongre v. Whirlpool Corporation, AIR 1995 Delhi 300
[5] Section 28(1), Trademarks Act, 1999
[6] Section 13, Copyright Act, 1957
[7] Section 14, Copyright Act, 1957
[8] Section 48, Copyright Act, 1957
[9] Section 2(1) (zb), Trademarks Act, 1999

foreign owner of a trademark registered in India, might be the plaintiff in an infringement lawsuit when the infringement happens in India. It is important to emphasise that the third party lacks locus standi to petition the appropriate court for an infraction. An infringement lawsuit is, however, also subject to limitation, just like other lawsuits. According to the 1999 Trademark Act, a lawsuit for trademark infringement has a three-year statute of limitations. According to Section 137 of the Act, the entry on the register certified by the registrar and sealed with trademark registry would be used to substantiate the plaintiff's mark's registration in infringement cases.[10] There is no need for additional evidence if the defendant has unequivocally reproduced the mark and created a facsimile image of it.

It is in this light that the present case also talks about. The Bombay High Court thus, in reaching this decision went into the basics of the very law and applied its interpretation to reach a just decision. It was necessary because such problems are very common and persists at the root level in societies. Analysis of both the sides is necessary as is the general principles of natural justice. There must be a reasoned decision[11] to any verdict that is reached at, and justice must not only be done but seem to be done[12]. There are numerous cases when people actually do take up similar trademarks, including the unique artistic labels as taken up by Gourav Bajaj either knowingly or unknowingly that they are infringing someone else's rights. There are ample examples when people through slight changes or modifications in their logo or symbols of trade tend to gain business profits by deceiving public. It is a general practice and people do get deceived as it is not in the habit of people to sit and verify the originality of every store they come across. It is mostly only after their purchase that they realise that things were otherwise.

On the other hand, seeing from defendant's side, people might or tend to use the surname of their family in their business and proprietorship because they want to let their family name continue through such businesses and in doing so they, thus do not realise the harm they do to others' reputation. It may also happen that the wrongdoers try to take advantage of the situation by putting forth arguments of ignorance etc.

The current case does not showcase such arguments or any others owing to the technical defect of it being an ex-parte decree. But had there been defendants properly replying to the notices advanced to them by the plaintiffs and rightfully presenting their case then they also would have come up with certain nuances to be able to get through with the accusations. The defences, however, were not at par with the strong contentions of the plaintiff.

The case, therefore, *Bajaj Electricals Limited vs Gourav Bajaj And Anr* becomes very vital in clarifying the air around all such confusions and vagueness. The Bombay High Court deliberated whether the use of particular names was protected in the context of the current case. It is only after many efforts to protect both parties' rights that it came to conclude that the particular protection being tried to be given to the defendants was insufficient owing to reasons like Plaintiff sufficiently showing that Defendant's use of the moniker "Bajaj" throughout the correspondence was motivated by malicious intent. Had there been factors like lack of intention

[10] Section 137, Trademarks Act, 1999
[11] Ramanand Prasad Singh V. UOI, 1996 SCC (4) 64
[12] P.N. Duda vs V. P. Shiv Shankar & Others, 1988 AIR 1208

or knowledge on part of defendant and a mere innocent attempt at doing his business, the situation would have been different. But since the otherwise has been proved, the authorities were bound to take the decision that they took. Adding to it, infringement occurs when the label is printed without authorization. Labels that include copyright will also be considered to have been violated. The Court issued a temporary injunction prohibiting the use of the brand name as the Defendant's space name in store names to bring home justice. The plaintiff's rights were restored, and it was taken care that nothing of such sort happens in the future as it forms a part of history and a deterrent.

The judgement is indispensable in the history of intellectual property as it explains the ambit of some basic IP rights. It relied on the statutory definitions to put forth that the Intellectual property rights (IPRs) are those legal privileges that, once being awarded, allow the owner or inventor of intellectual property to prevent others from using it for commercial purposes for a predetermined amount of time. When things are economically utilised, it enables the inventor or owner to profit from their creations and restrain others from exploiting it.

Case Comment

Dimminaco A.G. v. Controller of Patents and Designs[1]

Validating The Regime Of Micro-Organism Patenting In India

Pranjal Mundhra*

I. Introduction

The applicability and utility of micro-organisms in the regime of science and development is endless. Their usage ranges from modification of genes to developed of more enhanced procedures for medical purposes. However, the process of patenting of inventions pertaining to micro-organism has been debatable not only in India but all across the world. The TRIPS Agreement not only broadly interprets as to what falls under the umbrella of the term 'micro-organisms', it also explicitly puts forth in front of its signatories, the obligation to patent them. In India (though is a signatory to TRIPS), the patentability of such micro-organisms has always remained somewhat of a question mark.

Throughout the years, one can find a plethora of judicial pronouncements pertaining to patenting of the micro-organisms in India. However, there exists an unreported landmark Kolkata High Court decision which marks as the first case pertaining to the inventions regarding micro-organism patenting. The case was filed against the decision pronounced by the Controller General of Patents, Designs, and Trademark. **Justice Asok Kumar Ganguly** held in this landmark judgment that the presence of a living organism in the end result cannot prevent the procedure from being patented if the entity in question is commercially viable and is marketable.

II. Brief Facts

The Appellant (Dimminaco A.G.) had filed a process patent for the preparation one Bursitis vaccine. The purpose of this vaccine was to impart protection against the Bursitis infection which primarily affected the poultry. It is important to note that before the 2005 Amendment in the Patents Act, 1970 only process and not product patents of food and pharmaceutical items were allowed in India. The aforesaid application for the process patent which was examined under S. 12 of the Act was rejected by the Patent Office Examiner. The grounds for the same was that the said process did not fall under the ambit of 'invention' mentioned under S. 2 (j) (i) of the Patents Act. Another reason was that, the claimed process was solely a natural one without anything that involved 'manufacturing' per se. However, no explicit reasons were assigned to the decision.

[1] (2002) I.P.L.R. 255 (Cal)

* BBA LLB, Bennett University, Greater University

The appellant then filed an appeal before the Controller General, who under S. 73(3) of the Patents Act delegated his authority to the Assistant Controller General. The Assistant Controller General in his decision rejected the appellant's patent application by upholding the decision of the Patent Office Examiner. The appellant, as a consequence of the rejection, under S. 116 of the Patents Act, 1970 moved the Kolkata High Court.

III. Issues Raised before the HC:

1. Whether or not inventions pertaining to micro-organism can be subject to patent?
2. Whether or not such process falls under the ambit of S. 5 and S. 2 (j) (i) of the Patents Act, 1970?

IV. Arguments Raised by the parties

The core argument raised by the Office of Controller General was that a process can only be regarded as 'inventive' under the Act if it leads to a substance or another article. Herein, it was argued that as per the Webster New International Dictionary, the term 'article' denotes a thing which is material in nature. Hence, it is only inanimate objects and not living being that can be covered under the definition. Finally, the arguments were summed up by stating that the Bursitis vaccine which contained a living organism cannot be considered as a material article or a 'substance' and hence the process of preparation of the vaccine which possesses a living micro-organism cannot be taken as 'manufacture'.

The appellant, on the other hand, owing to the fact that the aforesaid terms 'substance' and 'manufacture' have nowhere been defined under the Act, their dictionary meanings have to be relied upon for further interpretation. It was also argued before the Hon'ble HC that the Patents Office, in earlier occasions, had in fact granted patent to applications wherein the subject matter included virus, cells, and even micro-organisms. To this, the Office of Controller General countered that the patents that had been granted involved the process of lyophilization, that is, freeze drying of such organisms. This, as per the Office of Controller General was considered to be the death of such organism.

However, it is pertinent to note that it was discovered that the process of lyophilization renders the organisms in a dormant state, and hence doesn't necessarily connoting their death.

V. Judgment and Analysis

The Calcutta HC in the present matter made several notable observations in this matter. The first and foremost, with regards to the contentions raised by the office of Controller General, the court came up with the **Vendibility Test** and ruled that the presence of a living organism in the end result cannot prevent the procedure from being patented if the entity in question is commercially viable and is marketable. Since, there is not definition provided for the word 'manufacturing', its dictionary meaning which does not exclude a viable product which has living organism in the end result must be adopted. To substantiate the same, the court referred to the meaning of the word

manufacture by Chief Justice Abbott in the landmark English judgment of R. v. Wheeler[2]. Furthermore, the court observed that the Office of Controller General raised no objections under S. 3. It held that if the office had to reject the application, then they should have considered the claim(s) on the basis of S. 3 of the Act.

With regards to the aforesaid argument of 'substance' raised by the respondents, it was laid down by the HC that, the present vaccine in question surely falls under the ambit of the word substance as after going through the entire process of manufacturing, the end result is a vendible and a commercially viable product. The court further observed that the authorities had in earlier occasions already granted patent to applications wherein the subject matter included virus, cells, and even micro-organisms. And their argument that the patents that had been granted involved the process of lyophilization, that is, freeze drying of such organisms cannot be accepted. As the dictionary meaning of the terms means rendering the organisms in a dormant state and it is nowhere suggested that during the process they are destroyed or killed.

The court noted that the arguments by the respondents made in desperation was in itself contrary to law. The said argument was that if post investigation it is discovered that the patents granted earlier contained living organisms, then it would drive the Controller General in the direction of their revocation. The court then explained as to why this argument does not have a footing. The revocation in governed under S. 64 of the Act. This section states that revocation can be initiated only by a person interested or by means of a petition by the Central Government or if there is any counterclaim in a suit for patent infringement.

The court also delved into the procedural aspects of the examination of the patent as it was claimed by the appellant that the Office of Controller General while rejecting the appellant's application for the grant of the said patent furnished no reasons whatsoever. The court held that the provision for examination as provided by the S. 12 of the Act must be read in close consonance with S. 13 of the Act. S. 13 speaks of furnishing the report of the said investigation. It was observed by the HC that not only the record lacks such above-mentioned investigation but there is also no such report present which supports the order of the Controller General stating the claim does not fall under the ambit of an investigation. In relation to the same, the court also made reliance on Terrel on the Law of Patents highlighting the quasi-judicial and not purely administrative nature of the duties imposed on the Controller General.

The court also made account of the importance of the tests of 'novelty/new invention' and 'usefulness' when it comes to patents. In this regard, the court rejected the respondents' argument that the presence of a living organism in the end result prevents the procedure from being patented. The court while accepting the arguments made by the appellant held that the present vaccine satisfies both the aforesaid tests as not only there is an involvement of a process that is novel but also the vaccine is useful as it aims towards the prevention of the Bursitis disease.

[2] R. v. Wheeler, 2010 YKTC 7

Therefore, on the aforementioned reasoning, the HC allowed the appeal and hence quashed the order passed by the Controller General. It was also passed that the application of the appellant pertaining to the patent for the preparation Bursitis vaccine should be reconsidered by the office of Controller General as early as possible.

VI. Conclusion and Suggestions

The present matter opens gates for plethora of opportunities for obtaining the patents of the inventions related to micro-organisms, which were earlier not granted. Apart from this landmark aspect, the judgment has also highlighted the importance the definitions in the Act holds. It was held that the meanings of the words cannot be interpreted on an individual-to-individual basis. Ergo, there ought to be some consistency when it comes to interpretation under the Patents Act. Now, the decision in the present matter has largely resolved the debate on the patentability of the inventions relating to micro-organisms, however, binding ruling from the Apex Court is still needed to reach to a firm conclusion.

Now, the question of ethics remains constant when it comes to patents like the one which is discussed. That whether life forms can be privately owned? However, there is also this aspect of usage of intellectual property as it is known to the developed world and its applicability in the broader sense when it comes to rights pertaining to inter alia ownership, transfer, and usage. Therefore, nations must strive towards an approach that strikes a balance between both the aspects.

As mentioned above, The TRIPS Agreement explicitly puts forth in front of its signatories, the obligation to patent not only the micro-organisms but also the non-biological production and microbiological production of both plants and animals. Thus, making it difficult for the developing countries to exclude such category in totality. Therefore, a method of attaining the said balance can be try and limit the scope of these provisions. This can also be done by resorting to certain flexibilities and exclusions provided under the TRIPS agreement. These include inventions that pose harm to environment and health of human beings and animals. Furthermore, TRIPS do not provide a definition of the term ‘micro-organisms’. Hence, the law-making bodies of each and every nation must define it in such way that the aforesaid balance is made out.

Another method can be enacting provisions that provides for a clear distinction between discovery of micro-organisms and invention of micro-organisms. As, only the latter has human input and the former is merely its discovery. For instance, if a micro-organism is genetically modified by a researcher, then it can be patented. However, blood cells or micro-organisms that can be naturally found in the environment cannot be patented. This can be attributed to S. 3(d) of the Patents Act wherein microorganisms that can be naturally found in the environment cannot be patented since they are deemed to be discoveries. The very same micro-organisms, however, post genetic modification showcasing increased efficacy are patentable.

While entering the biotechnological sector, it is pertinent to understand the pivotal role that intellectual property plays in relation to microorganisms in the commercialization of biotechnological research. Therefore, the author believes that it is acceptable when it comes to granting patent to inventions pertaining to micro-organisms as it is not against the nature and it also advantageous to use them for the human development.

Sharda Law Review **Vol. 2 Issue: II December 2022**
ISSN: 2583-2476

Book

Review on Our Moon Has Blood Clots: A Memoir of Lost Home In Kashmir

Prerna Tyagi*

"I have lost my home, not my humanity."

The title "our moon has blood clots" vividly explains the night of horror that forced the Kashmiri pandits out of their homes, not all made out safe and sound, many were murdered, religiously persecuted. This blood clot resting on moon is a simile to their plight on the night of 19th January 1990. This book is the author's personal experience and description of Exodus. He takes us through the time of their peaceful existence in Kashmir when there was a strong essence of harmony. He then talks about how on a fateful night, their world came to the verge of destruction with friends turning into foes and saviours turning into perpetrators. The book offers acerbic recollections of life after the 1990 conditions of the Kashmiri Pandits, the tribulations of Kashmiri pandits (being the religious minority of Kashmir) and how they were deprived of the most basic human right to live. The author shares how the Kashmiri pandits were deprived of food, shelter and clothing and the author recalls his kitchen garden and his childhood in which he used to hit the tomatoes with his bat and now in a completely different scenario, he has to beg from people to have a handful of them.

He even compared himself to the other migrants of India, drawing a line of distinction by stating that the migrants have a home to return but the author was compelled to flee the land of his ancestors. He mentions in what way he became indigent in his own birthplace. The father and mother of the Author lived in fear and they were accustomed to check their local newspapers just to get the news about who amongst the community has died in exodus.

Author reminisces by what means the militants coerced Kashmiri families and mass killings and religious cleansing took place. One can observe the aggressive use of words like 'murderers' which portray the sad anguish within the authors description of exodus. His clear memory sharply enumerates militant slogans and their mistreatment towards the Kashmiri pandit community and the melancholy and misery faced by his parents, how the families were tormented to the extent that they left their houses in a single night and were located to refugee camps.

The Author also highlighted the complications that affected this mountain-dwelling community as the environment around them changed overnight from chilly to sunny. Problems like heat stroke attacks, fungal diseases, pre-timely menopause, decreasing fertility rate made the

* B.A.LL.B Final Year, Trinity Institute Of Professional Studies

migration more struggling. This book continuously talks about the eroded families and their longing for their homes in Kashmir.

The book illustrates by virtue of what, the sheer violation of human rights took place in this ethnic cleansing and exodus by various anecdotes of militants overpowering the Kashmiri pandits and how the pandit kids were reluctant to identify themselves as pandits because they were terrified about them being treated as outcasts by their own friends and neighbours and thereupon being murdered. Author records the passing trucks filled with scared Pandits escaping to Jammu, the women “herded like cattle", and a man indicating the family his fist and wishing them death and a tale of the indignities of uprooting: exploitative landlords, unkind neighbours, severe hardship, grovelling xenophobia. Though the Author chronicles in any which way only the black cover blurb mentioned that “hundreds of people were tortured and killed, and about 350,000 Kashmiri Pandits were forced to leave their homes and spend the rest of their lives in exile in their own country". The journalism is actually the weakest link in what is a largely engaging memoir, where another right to be informed was violated by the so-called fourth pillar of democracy.

To show the exact figure of speech, the book outlines multiple instances of religious persecution and genocide and how the human right values were crushed down to pieces. To quote the Author on the domination and repression by militants “whenever things got soured, we lowered our heads and walked away” this shows the turmoil and agony mixed with constant fear of being killed was faced by the community.

The book is brimming with narratives of families turning against neighbours, friends conspiring with persecutors, childhood friends raping and killing helpless Pandit women, and even the police collaborating with cold-blooded murderers. To depict the sense of fear, mothers wanted to kill their daughters in order not to get assaulted and molested by the militants strikingly delineate the humiliation of human right to live freely in a democratic county. The author related the offenders as cats and the victims as mice running from them. This renders a clear picture of distress and dismay in the community caused by the militants. The Author is unforgiving of Kashmiri Muslims who remain silent while their Hindu friends and neighbours were being harassed and murdered. Another right violated as highlighted by the Author, was the right to being treated by a medical professional, while the riots and evacuation was happening, those who got injured were denied this basic right to be treated by a doctor.

The book is divided into ‘five sections’ to make its reading comprehensive.

Part I of the book reflects upon the time that existed before the exodus of the Kashmiri Hindu inhabitants. In the first half, the Author recounts his life in Srinagar. He also recalls the struggles his parents had to go through to survive and fend off themselves. The Author has meticulously penned the history of Kashmir, from the ancient to the present ages. He provides the theory surrounding the arrival of Kashmiri Pandits in the valley, before giving a brief overview of Kashmir’s celebrated literary past.

In the **Part II**, the Author narrates the incidents that happened in the aftermath of 19 January 1990, he exquisitely presented the ordeal that his family had to go through in after 19 January 1990.

In the **Part III** of the book, the Author provided accounts of Kashmiri Pandits who refused to leave their home ground. The miserable conditions of displaced Kashmiri Pandits in Jammu refugee camps, immediate after the exodus, has also been mentioned meticulously in the Book. The aggrieved Kashmiri Pandit families had to 'somehow manage' in little comfort as they had no other choice but to accept their fate.

The **Part IV** is quite personal to the Author as he recounts the ordeal that his family had to go through while overcoming the death of his cousin in 1998. As recounted by his uncle, tribal raid in 1947 was brutal as many Kashmiri Pandits were displaced from their homes and were left homeless "The captive Pandits spent seventy days like this, watching women being raped and killed in front of their eyes". Some of the Kashmiri Pandits, who were abducted and taken to Pakistan Occupied Kashmir (POK), somehow managed to cross the border and return to India.

In the Final Part (**Part V**) of the book, the author narrates his conversation with displaced Kashmiri Pandits and about his visits to Kashmir on several occasions. He lambasts the violation of human rights for failing to provide relief to Kashmiri Pandits— who are living in camps and face hardships due to poor camp facilities.

In a nutshell, the book is an attempt to sketch out the common wail of refugees trying to reclaim a happier past that is irredeemably lost. The book is an excellent effort to encapsulate the exodus and the tormenting journey from a normal resident to being refugees in one's own country. However, the critical analysis of format and layouts of the book doesn't meet its end, the reader might lose the pace and will have to connect the dots in between. Overlooking this, penning a memoir and recollection of event is not always easy. Consequently, it is a very impactful read, true to its title and value for money!

*****

SHARDA UNIVERSITY – SHARDA SCHOOL OF LAW

Sharda University Sharda School of Law (SSOL) is a dynamic and progressive Law School situated in the clean and green environment of Greater Noida (National Capital Region). SUSOL is considered to be one of the most prestigious Law schools in the National Capital Region, offering BCI approved Five Year BA. LL.B. (Hons.), BBA. LL.B. (Hons.), LL.M. (Corporate Law, Criminal Law, International Law, Human Rights, Energy Law) and Ph.D. Programme.

VISION & MISSION

Vision

To emerge as a leading school of law in pursuit of academic excellence, innovation and nurturing entrepreneurship.

Mission

1. To prepare students as legal professionals through a transformative educationalexperience.
2. To encourage the global outlook of the students by providing enriched educationalinitiatives.
3. To promote research, innovations and entrepreneurship.
4. To inculcate ethical and moral values among the budding lawyers, judges and legalprofessionals and motivate them to serve society.

The vision is to emerge as one of the top Law Schools in India and one of the best in NCR. The mission of the School is to impart the best legal education to its students and help them to shape themselves as outstanding legal professionals and to inculcate moral values in their overall personalities.

Law serves as an instrument of change to establish an egalitarian society wherein the Preambular declarations of Justice, Liberty, Equality and Fraternity enshrined in the Constitution of India are guaranteed rights. As all aware that the Indian economy is the fastest-growing economy and is poised to become a 5 trillion dollar economy by 2025. This would necessarily entail the enactment of new legislation and setting up of courts and tribunals for speedy disposal of disputes *inter alia* to improve ease of doing thebusiness ranking. This makes legal education a cutting-edge field with a plethora of opportunities for futurelegal professionals.

It is the sincere effort of the School of Law that these opportunities are made the most of, and it is in pursuance of this goal that the Faculty at School of Law, Sharda University ensures high-quality classroom teaching learning and also places focus on experiential learning, Free Legal Aid and Community Connect. At present we have 906 students. We have an excellent multi-cultural environment with best in class infrastructure.

CORE VALUES

1. Excellence: Commitment to innovation and continuous learning and to ensure we keep strivingfor the best outcomes in all facets of life.
2. Ethical Conduct: Integrity, fairness, honesty and transparency in all actions.
3. Global Outlook: Welcoming and encouraging diverse ideas, beliefs, and cultures.
4. Promote Leadership: Believing that leaders create leadership skills in others, thus igniting a virtuous cycle of growth.
5. Collaboration and Inclusiveness: Developing a symbiotic community of faculty, students, alumni, industry, government bodies and other Universities/Centers of learning.

SALIENT FEATURES

1. The School of Law has been established in the year 2012 as a constituent of Sharda University, a State Private University, established through an Act passed by the U.P. Legislature (14 of 2009)and permitted by the University Grants Commission to award degrees under section 22 of the UGC Act, 1956. The SOL has been recognized by the Bar Council of India.

2. Qualified and Experienced Faculty Focus on experiential learning - Guest Lectures, Visits, Internship, Workshop, Seminars etc. Regular Guest Lectures by legal luminaries like Supreme Court Judges, High Court Judges, Leading Academicians, Public Prosecutors and Senior Advocates on current topics related to law to enhance the ability and skills of students and to connect withlatest happenings of legal world. In the last academic sessions, faculty and students were privileged to interact with eminent legal luminaries namely, Hon'ble Mr. Sanjay KishanKaul, Judge, Supreme Court of India, Hon'ble Ms. Justice Indira Banerjee, Hon'ble Mr. Justice DipakMisra, Hon'ble Mr. Justice R.K. Agrawal, Hon'ble Mr. Justice A.K. Sikri, Hon'bleMr. Justice Swata'nter Kumar, Hon'ble Mr. Justice R.C. Lahoti, Hon'ble Mr. Justice P.C. Pant, Hon'ble Mrs. Justice Gyan Sudha Misra, Hon'ble Mr. Justice Anil R Dave, Hon'ble Mr. Justice
B.S. Chauhan, Hon'ble Prof.UpendraBaxi, Prof. B S Chimni, Prof. S.C. Raina, Prof. B.T. Kaul, Prof. Balraj Chauhan,Prof. Viney Kapoor, His Excellency ShriArif Mohomad Khan, Governor of Kerala, Hon'ble General (Dr.) V.K. Singh and Hon'ble Mr. Salman Khurshid notables amongothers.

3. School of Law adopts a multidisciplinary approach.

4. Cultural Diversity- Students from many countries.

5. World-Class Infrastructure.

6. Regular Interaction with top global law professionals and distinguished legal luminaries.

7. Focus on 3A's – Academic excellence accelerated thinking and All-inclusivedevelopment.

8. School of Law provides Moot Court Facility, Debates, Quizzes, Guest lectures, Seminars, Conferences, Case Study, Mentoring, Summer internship etc. for the students.

9. Community Connect, Free Legal Aid

10. Family Dispute Redressal Clinic, Mediation Centre at Police Station, Knowledge Park-1, Greater Noida.

2020-21 (Awards & Achievements)

1. School of Law has been ranked 4th Top Eminent Law School 2020 by the CompetitionSuccessReview (CSR)
2. School of Law has been ranked 28th in the India Today Law School Ranking 2020
3. School of Law has been awarded 'KNOWLEDGE STEEZ LEGAL AID AWARD 2019'for rendering excellent services in Legal Aid and Justice to the society in 2019.The award is presented on 19th January, 2020 at Malviya Smriti Bhawan, New Delhi at 4th National Conference on Human Rights and Gender Justice.
4. School of Law has been awarded as the 'BEST LAW SCHOOL IN NORTHERN INDIA AWARD 2019'.The award was given by the National Institute of Educational & Research (NIER), India on Saturday, 27th July, 2019.
5. District Legal Services Authority, Gautam Budh Nagar has commended School of Law for EXCELLENT COMMUNITY CONNECT PROGRAMMES 2019.

   District Jail Superintendent Office has commended School of Law for organizing EXCELLENT FREELEGAL CUM MEDICAL AID CAMP 2019 and providing books for the prison inmates.

ACADEMIC PROGRAMME OFFERED

- B.A. LL.B. (Hons.) Integrated
- BB.A. LL.B. (Hons.) Integrated
- LL.M.
- Ph.D.