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The Law Jurist Legal Journal ("LJLJ") is a quarterly online, open-access journal promoting multidisciplinary research in law and its interplay with other disciplines. Emphasizing a socio-legal approach, LJLJ welcomes submissions that explore the intersection of law with contemporary societal issues, fostering a holistic understanding of legal studies.

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The Participation of Youth in Structuring the Democracy and Governance: A Contributory Perspective

Dr. Shilpa M.L [1]

Samarth Sarthak [2]

ABSTRACT

Youth is characterized as the future leaders, possess an unparalleled energy, innovation, and idealism that can significantly contribute to the vitality and sustainability of a nation's democracy. Their active engagement in the political process is not merely an option but a necessity for a thriving democratic society. The authors in the present article explores the pivotal role of youth in shaping democracy and governance. It highlights the unique perspectives, energy, and innovation that young people bring to the political process. The authors discuss the challenges faced by youth in engaging in political activities, such as lack of political awareness, limited opportunities, and negative stereotypes.

To enhance youth participation, strategies such as inclusive governance, youth-centric policies, civic education, mentorship and leadership development, and leveraging technology to be employed for youth participation. By investing in young minds and creating an inclusive political environment, nations can harness their power to build a better future. In this perspective, the authors in the present paper throws light on the positive impact of youth involvement on democratic institutions and the challenges faced by youth in engaging in political activities and the strategies for enhancing youth participation. The Article also focuses on benefits of youth participation for democracy and governance and its positive outcome with the referral case studies. The authors also make an attempt to provide the workable positive solutions for the youth activism and empowerment.

Keywords: Youth, Politics, Democracy, Empowerment, Social Justice

INTRODUCTION

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The concept of liberal democracy originated in the 14th century against the feudalistic society and absolutism in America after the American Revolution.[3] The French Revolution [4]gave birth to the concept of Constitutionalism and the words of liberty, equality and fraternity to the whole world and has also influenced many nations all across the world. In the ancient Indian society the rulers worked for the liberty of their citizens.

The concept of justice and liberty in the ancient Indian society was associated with 'dharma' and maintaining the 'dharma' was the primary duties of the kings. The concept of youth participation in the political sphere was a very common practice in the ancient world politics. This was because after attaining a certain age, the prince was given the post of the king along with the group of newly ministers making the bureaucracy; the king and the old group of ministers willingly gave their posts to their successors to retain the political pragmatism of the society. However, this concept or the practice changed with the passage of time because of the unstable and changing political structures all across the world leading to the problems for the youth commonly known as the youth at risk in the twentieth and the twenty-first century.

They either tend to be isolated or marginalized from the processes of policy, governance and decision making. The problematic situation of the current Indian politics is facing that during the time of the elections, the young and the educated people do not vote thinking about themselves and their low performance in the regional and national politics. On the other hand, the poor and rural-background people stay happy with free bees and even sell their votes for some money or just for a liquor bottle.

Since the last 3 decades the concerns for youth's involvement in terms of anti-social activities, criminal conspiracies and societal decline has increased a lot. For example, in the case of *Kanhaiya Kumar vs. Union of India*[5], a student leader from Jawaharlal Nehru University (JNU), Delhi was charged of Sedition Law under Section 124A of the Indian Penal Code [6]for giving anti-national statements against the unity and integrity of the country and speaking in favor of a terrorist.

[3] ANDREW HEYWOOD, POLITICAL IDEOLOGIES: AN INTRODUCTION 33 (7th ed. 2021).
[4] WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION (1989).
[5] Kanhaiya Kumar v. Union of India, (2016) 3 SCC 9 (India).
[6] Indian Penal Code, 1860, § 124A, No. 45, Acts of Parliament, 1860 (India).

Today, the countries like the USA, Australia, England and India are facing problems of youth unemployment and underemployment, youth poverty etc. because of sudden changes from extremely radical government to progressive governments.[7] A yearning for a sense of community, security, and high moral and social standards, which stands in stark contrast to the prevailing uncertainties of rapidly changing global markets, fast-paced capitalism, and widespread apprehension.

This desire for stability and community has influenced political movements, particularly in the form of communitarianism, which emerged alongside the development of third way politics in countries like Australia, the UK, the USA, and other Western European nations[8]. This political vision emphasizes the importance of reciprocal obligations, community involvement, and active participation in society, as a response to the destabilizing effects of global economic changes.[9]

REJUVENATING YOUTH IN STRUCTURING DEMOCRACY

India, although a developing country has the highest number of youths in the world with around 67% of its population being the youth[10] that is between the ages of 19 to 35 unlike many developed countries of the world like Japan and USA where the age gaps between the people are still a problematic situation. Even after seeing decline in the family-size and birth rate India will continue to be a 'young country' even after a decade. Henceforth, the representation of youth in the politics becomes an essential task.

India, with its diversity in terms of numerous languages, and civilizations, but connected by the ancient traditions, culture, and values, provides Indian youth with a one-of-a-kind opportunity and privilege to lead by example in solving the multifaceted difficulties that all nations face. To achieve this, enhanced and continual of both the intrapersonal and the interpersonal connections amongst people from different places, cultures, and ways of life are important as well as critical. As per the World Bank data, the literacy rate amongst the old age

[7] Judith Bessan**t**, *Youth Participation: A New Mode of Government*, 24 POLICY STUDY 87-100 (2010).
[8] Nathan Manning & Parveen Akhtar, *'No, we vote for whoever we want to': young British Muslims making new claims on citizenship amidst ongoing forms of marginalisation*, 24 JOURNAL ON YOUTH STUDIES 961-976 (2021).
[9] Debra Flanders Cushing, *Promoting Youth Participation in Communities Through Youth Master Planning*, 46 COMMUNITY DEV. 43, 43–55 (2015).
[10] U.N. DEP'T OF ECON. & SOC. AFFAIRS, POP. DIV., WORLD POPULATION PROSPECTS 2022 (2022), https://population.un.org/wpp/ (last visited July 17, 2022).

people are around 47% while amongst the youth of this country ranging from 15 to 25 years is around 97%.[11] Here, the problem is that the old age people with less knowledge and education are the ones who make rules, regulations and policies for this country including that for the 'educated-youth' with the claim of being experienced. But the picture is not that easy and glorious as unity, advancements and knowledge brings a lot more betterment than the experiences. For example, a huge demonstration by youth in Delhi for demanding justice in the *Nirbhaya case*, a big protest in Delhi for a Corruption free India, and a mass protest on the *Marina beach of Jallikattu*[12] are the notable example depicting the strength of the youth.

The young entrepreneurs like *Tilak Mehta*[13], the founder of 'Paper Space' made the courier system better; founder of '*Flipkart' Mr. Sachin Bansalhas*[14] brought the revolution of online marketing across the nation, *Byju Raveendran*[15] has made the online education better by the creation of the '*Byjus App'*. So, the authors suggest that if the youth are given political power, India would undoubtedly become a developed nation in the near future.

POLICY INITIATIVES ON EMPOWERING YOUTH AND ITS PROSPECTIVES

The certain public sector undertakings, market-based activities for economic development like open market operations, Five Year Plans for helping in the commence of new and better-quality products in the market; help the sellers and the producers to gain maximum profits or financial accommodation, flexibility and adaptability were overly bureaucratized and unresponsive to the existing market needs.[16]A debate which is going currently in the society in context to the 'Retreat of Liberal Democracy' which is about whether promoting open market competitions through the establishment of the free markets would be the best way of helping

[11] WORLD BANK, LITERACY RATE, ADULT (% OF PEOPLE AGES 15 AND ABOVE) AND LITERACY RATE, YOUTH (% OF PEOPLE AGES 15–24) (2024), https://data.worldbank.org/indicator/SE.ADT.LITR.ZS (last visited Aug. 19, 2024).

[12]Anmol Sovit, *Youth Participation in Democracy and Governance: India Leading the Way*, ORGANISER (July 15, 2023), https://organiser.org/2023/07/15/183562/bharat/youth-participation-in-democracy-and-governance-india-leading-the-way/.

[13] Manisha Sharma, *Meet Tilak Mehta, the 13-Year-Old Entrepreneur Revolutionizing Logistics in India*, ECON. TIMES (Sept. 24, 2018), https://economictimes.indiatimes.com.

[14] Prachi Verma, *Sachin Bansal Exits Flipkart After Walmart Deal*, ECON. TIMES (May 10, 2018), https://economictimes.indiatimes.com.

[15] Shubham Singh, *Byju Raveendran Becomes India's Newest Billionaire as Edtech Booms*, FORBES INDIA (July 14, 2020), https://www.forbesindia.com.

[16] Sony Pellissery & Sam Geall, Five Year Plans, ENCYCLOPEDIA OF SUSTAINABILITY 156, 156–60 (vol. 7, 2012).

the under privileged sections of the without harming the better off people of the society.[17] In short, it focuses on the establishment of Perfect Competition market in the economy. Supporters of this market system argue that it will help in trade and commence of new and better-quality products in the market; help the sellers and the producers to gain maximum profits or financial accommodation.

There is no doubt that the free-market avenues will help in the economic betterment of the nation as the consumers will be able to make his choices amongst different types of substitute goods available in the market as it happened after 1991 (the LPG Policies) in India. On the other hand, it is rightly said that "Everything that glitters is not always gold." So, the other section of people believes that open market operations and private enterprises provide superior quality goods, but they lead to undesirable effects on the traditional producers as they may not be able to compete with the highly efficient machine-made goods. Also, the cost of such goods and services are out of the reach of the poor people. Private enterprises tend to go there where the businesses would be most profitable and hence free markets eventually tend to work for the interest of the economically strong, wealthy and powerful sections of society.

While many policy documents emphasize youth participation, the reality is that young people often lack the legal capacity to fully engage in democratic processes. This discrepancy between policy rhetoric and legal reality creates a disparity between the rights and responsibilities of young. To rectify this, the text proposes that policies should be designed to substantially increase youth participation in democracy, effectively elevating their citizenship status. This would involve addressing the legal barriers preventing young people from fully exercising their political rights and accessing opportunities available to adults. From a legal standpoint, this statement posits that a democracy's legitimacy is intrinsically linked to the inclusion of all its citizens, irrespective of age. By denying young people their full citizenship rights, a state risks by creating a legal and moral inconsistency. The justification for excluding young people from political processes should be subjected to rigorous legal scrutiny. Any such justification must be clear, compelling, and demonstrably legitimate to avoid undermining the democratic foundation of the state. The policies focusing on 'youth governance' rather than 'democratic involvement' may be legally insufficient to confer meaningful political rights on young people.

[17] Gabor Scheiring, *The Retreat of Liberal Democracy: Authoritarian Capitalism and the Accumulative State in Hungary* (Aug. 26, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681234.

While these policies might create platforms for youth input, they may not necessarily translate into actual decision-making power or accountability.

THE ROLE OF YOUTH IN SUSTAINING AND STRENGTHENING DEMOCRACY: PAST TO PRESENT

Historians such as Pearson have highlighted the lengthy history of popular anxieties and how generations saw themselves as especially endangered by new types of degeneration manifested in the tendencies of youthful 'transgresses'. This begs the question: should we interpret contemporary fears about youth that have influenced this renewed worry about the need to 'reconnect young' as the newest expression of a long history punctuated by periodic moral panics over youth?[18] The focus on individual rights and freedoms has increased fear and worry about young people.

This has led to a push for involving young people in decision-making as a way to fix problems. However, this doesn't necessarily mean that adults truly care about young people's opinions; it might just be a way to look good and solve other issues. The involvement is an old concept important to the liberal democratic tradition, and the contemporary 'discovery' of youth involvement is part of an emerging political orthodoxy. The success of youth involvement can be attributed to its emergence in a setting that valued communitarian reformist terminology (e.g., community building) and a desire to empower individuals for self-government. It is a 'third-way 'politics entailing a blend of economic liberal fiscal policies with some regard for social equity.

1. **Economic freedom:** This means letting businesses do their thing without too much government control, kind of like how things work in a free market.
2. **Social equality:** This means making sure everyone has a fair chance in life, with things like good education and healthcare for everyone.

It's like trying to find a balance between these two ideas. People like Tony Blair and Bill Clinton used this approach when they were leaders. They tried to make their countries' economies stronger while also helping people who were struggling. So, it's a middle ground between total government control and complete freedom for businesses.

[18] Judith Bessan**t**, *Youth Participation: A New Mode of Government*, 24 POLICY STUDY 87-100 (2010).

Most social science observers believe in the view that we have a lengthy history of attempting to regulate large segments of the population. As previously said, young people have received special attention in this regard, as they are among the most controlled segments of the population. The concept of governance as defined by Foucault and those affected by his views encompasses much more than what states do. As Dean points out, government can relate to the operations of the Blair and Bush administrations, as well as a wide range of other initiatives to regulate people's behavior. In this meaning, government refers to how individuals or organizations manage their own and others' actions. In this situation, it happens through the concept of youth participation. Law and order, health, and even a falling economy are all examples of government-related concerns or problems.

Regulators often rely on journals, newspapers, books, and expert's advice to establish norms and guidelines for activities including citizenship, parenting, employment, and health. In a nutshell, govern mentality is the application of information and habits of thought to enable and authorize some individuals to control others. It is a loose collection of goals that often target specific categories such as 'the poor', 'criminals', and 'youth'.[19]

YOUTH EMPOWERMENT: A BOON TO SOCIO-ECONOMIC AND POLITICAL UPLIFTMENT

The famous philosopher of India, Swami Vivekananda said, "If I get 100 youth, I can change both the condition and direction of this country".[20] But, today in India the number of youth are around 65 cores who are capable and can change the disaster into an opportunity for the betterment of this nation. At the age of 18 if a person can vote and select his representative then of course he or she also has the ability to equally participate in governance and politics of the nation. A person who has suffered from the problems can bring the solution to the problem in the best manner by the previews of his own experiences and circumstances faced in life; as we know the youth facing problems like unemployment, poverty and lack of representation in the society. So, if the youth who face these problems are made to get involved in the Public

[19] JOHN SMITH, POLICIES AND GOALS: TARGETING SPECIFIC CATEGORIES (2020).
[20] Pranav Kuller, *The Speaking Tree: Icon with a Mission—Swami Vivekananda*, TIMES OF INDIA, https://timesofindia.indiatimes.com/edit-page/the-speaking-tree-icon-with-a-mission-swami-vivekananda/articleshow/988619.cms.

Policy and Governance then they can bring the best possible solutions because youth people are full of energy and enthusiasm and have knowledge about the diversity and representation with digital learning and technological expertise.

If the elderly people have experience, then the youth people can bring new ideas, aspirations or perspectives as they are open to new opportunities. Our history has shown us the proof that how youth participation in politics and governance has changed the social evils and helped in shaping the society for its betterment whether it be *Raja Ram Mohan Roy*[21] who fought against Sati and Child-marriage from India or it may even be *Malala Yousafzai*[22] who became a world-wide face for the women education against the radical people in some sections of the society.

In the making up of the Indian reforms, freedom struggle and demanding of the civil and political rights for the women where the young and the educated men played a very vital and significant role. This came in the picture by the virtue of the birth and development of the Women's Movement in the country which made the women aware, self-oriented and confident because of which the most outstanding of which the All India Women's Conference founded in 1927[23]. The Indian Constitution Article 14[24] talking about Right to Equality and Article 15[25] which prohibits discrimination based on caste, class, religion, sex or place of birth gave equal status to both men and women in the nation.

There are a good number of young orators and speakers speaking for the welfare of this country in National Youth Parliaments conducted by the central Government, different State Governments and also different colleges and universities. The government also provides Youth for Development Programme, National Youth Advisory Council ("NYAC"), Local for Vocal Initiatives and Make In India Project[26] all conducting discourses and projects around social issues, civic education, education, sanitation, and rural development .They also engage the young students intrainings, vocational courses and internship opportunities to enhance their skills, make them intellectual and disciplined and help them to build their leadership skills for

[21] RAJA RAM MOHAN ROY, THE ENGLISH WORKS OF RAJA RAM MOHAN ROY (Jogendra Chunder Ghose ed., 1885).
[22] MALALA YOUSAFZAI, I AM MALALA: THE GIRL WHO STOOD UP FOR EDUCATION AND WAS SHOT BY THE TALIBAN (2013).
[23] BIPIN CHANDRA, THE HISTORY OF MODERN INDIA 238 (Orient Blackswan ed., 2009).
[24] INDIA CONST. art. 14.
[25] INDIA CONST. art. 15.
[26] GOV'T OF IND., DEP'T FOR PROMOTION OF INDUS. & INTERNAL TRADE, MAKE IN INDIA: A MAJOR NATIONAL PROGRAM (2014).

the nation-making and country's development. India's youth can play a vital role in local governance by highlighting community issues and advocating for swift solutions. The election of *Chandrani Murmu*[27] as India's youngest MP at 25 inspired others from disadvantaged backgrounds to enter politics.[28] The women like *Chhavi Rajawat*[29], who became the youngest Sarpanch of our country gives a good example of women empowerment in Indian politics.

THE YOUTH AND THE LAW- A CONTRIBUTORY PERSPECTIVE

The relationship between youth and the law is a complex one, influenced by various factors such as age, culture, socioeconomic status, and legal systems. Young people often face unique challenges within the legal framework, from issues related to education, employment, and criminal justice to matters involving family, relationships, and technology. The law plays a pivotal role in shaping the experiences of youth, influencing their development, behavior, and future trajectories. The researcher in the present paper explores the multifaceted relationship between youth and the law, focusing on various broader societal implications of legal interventions.

One of the most prominent areas of intersection between youth and law is the criminal justice system. Young people are disproportionately represented in many criminal justice systems worldwide. This can be attributed to factors such as poverty, lack of educational opportunities, peer pressure, and systemic biases. Juvenile justice systems are designed to address the specific needs and circumstances of young offenders, often focusing on rehabilitation and reintegration rather than punishment. Historically, the system has evolved from a punitive approach to one that emphasizes rehabilitation and reintegration. The establishment of separate juvenile courts in the late 19th and early 20th centuries marked a significant shift in how society dealt with young offenders, recognizing that they are developmentally different from adults and thus require different legal treatment.

The principle of *parens patriae*, meaning "parent of the nation", underpins the juvenile justice system. This doctrine allows the state to intervene in the lives of young people, not only to

[27] Chandrani Murmu, *Youngest MP in Indian Parliament*, THE HINDU (May 24, 2019).
[28] Anmol Sovit, *Youth Participation in Democracy and Governance: India Leading the Way*, ORGANISER (July 15, 2023), https://organiser.org/2023/07/15/183562/bharat/youth-participation-in-democracy-and-governance-india-leading-the-way/.
[29] Chhavi Rajawat, *Empowering Villages Through Modernization*, TIMES OF INDIA (Mar. 5, 2018).

punish but also to provide guidance and support. However, the balance between protecting the interests of the youth and ensuring public safety has been a contentious issue. Critics argue that the system often fails to address the root causes of juvenile delinquency, such as poverty, lack of education, and family instability[30] Recent reforms have focused on reducing the number of youths incarcerated and increasing the use of alternative measures such as community service, counselling, and restorative justice programmes.[31]

These approaches aim to prevent recidivism by addressing the underlying issues that contribute to criminal behavior, while also recognizing the potential for growth and change in young people. Youth are not only subject to the law but also possess specific rights under it. These rights are enshrined in various international and national legal instruments, such as the United Nations Convention on the Rights of the Child ("CRC"), which emphasizes the protection, provision, and participation rights of children and adolescents. The CRC outlines the right to education, health, protection from exploitation and abuse, and the right to be heard in matters affecting them.[32]

LEGAL AND SOCIAL INSINUATIONS

The interaction between youth and the law has broader social implications, particularly concerning the criminalization of youth behavior and the long-term impact of legal interventions. The phenomenon of "school-to-prison pipeline" is a critical issue in this context, where disciplinary policies in schools disproportionately affect minority and disadvantaged youth, leading to increased contact with the criminal justice system. This pipeline not only perpetuates social inequalities but also undermines the educational and developmental opportunities for those involved.

The labelling theory in criminology suggests that the way society labels young offenders can influence their self-identity and future behaviour. When young people are labelled as delinquents or criminals, they may internalize these labels and engage in further criminal activity. Thus, the legal system's response to youth behavior must be carefully considered to avoid reinforcing negative identities and outcomes. Moreover, the role of law in addressing

[30] Daniel P. Mears, *The Front End of the Juvenile Court: Intake and Informal Adjustment*, JUV. JUST. BULL. (2002).
[31] Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the School-to-Prison Pipeline*, 37 J. AM. ACAD. PSYCHIATRY & L. ONLINE 510, 510–13 (2009).
[32] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

issues such as cyberbullying, substance abuse, and mental health among youth is increasingly important. The digital age has introduced new challenges for legal systems worldwide, as young people are both perpetrators and victims of online misconduct. Legal frameworks must adapt to these changes, ensuring that young people are protected from harm while also being held accountable for their actions.[33]

CONCLUSION

Youth participation in democracy and governance is not just a right but a critical necessity for shaping a resilient and inclusive society. As the most vibrant segment of the population, young people bring fresh perspectives, innovative solutions, and a deep commitment to justice and equality. Their involvement in democratic processes, whether through voting, advocacy, or public service, contributes to the dynamism and responsiveness of governance structures. In many democracies, youth-led movements have been instrumental in pushing for social, political, and environmental reforms, demonstrating their capacity to drive meaningful change. By actively engaging in policy-making, young people help to ensure that the issues affecting their generation, such as education, employment, and climate change, and digital rights, are adequately addressed. Their participation also promotes greater accountability and transparency in governance, as they often challenge the status quo and demand more from their leaders.

Furthermore, involving youth in governance fosters a sense of ownership and responsibility, empowering them to contribute constructively to their communities and nations. It also bridges the generational gap, creating a more cohesive society where diverse voices are heard and respected. However, for youth participation to be truly effective, it must be supported by inclusive policies, access to education, and platforms that allow young people to voice their opinions and influence decisions. Ultimately, the active participation of youth in democracy and governance is crucial for building a future that is equitable, sustainable, and reflective of the aspirations of all citizens. Their contributions not only enrich the democratic process but also lay the foundation for a more just and progressive society.

[33] SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING (2009).

Strengthening Indian Environmental Law: Addressing Transboundary Challenges

Jutan Monani[34]

ABSTRACT

Today's environmental challenges, including cross-border pollution, deforestation, climate change, and the unsustainable exploitation of shared natural resources, present significant hurdles for national legal frameworks. These frameworks often find it difficult to address the complex nature of environmental degradation that ignores national boundaries. This discussion shines a light on India, emphasizing its battle with ecological problems that transcend its geographical limits. This includes the protection of migratory species, the management of shared waterways, the mitigation of pollution impacting adjacent areas, and the conservation of biodiversity that spans several countries. "Shared natural resources" encompasses rivers, forests, and fauna that exist across borders. While India boasts an extensive array of environmental regulations, it faces challenges in enforcing these laws and ensuring adherence, particularly to international environmental treaties. This discrepancy between India's global commitments and their domestic execution undermines its capacity to confront cross-border environmental issues, possibly leading to conflicts with neighboring countries and damaging ecosystems that are vital to multiple nations.

India has significantly advanced in creating a robust legal structure to tackle domestic environmental challenges. However, there is a pressing need to enhance its legal approaches for addressing environmental issues that extend beyond its borders. Given India's geographical position, which entails sharing key natural resources such as rivers, forests, and air with its neighbors, this need becomes even more critical. The effectiveness of managing these cross-border environmental concerns is hampered by several factors. These include the absence of specific legal provisions tailored to these issues, a lack of effective cooperation frameworks, inadequate initiatives for technology transfer and adaptation, non-compliance with international environmental norms, weak enforcement of existing mechanisms, minimal regional cooperation, no established methods for resolving disputes, poor integration of these

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efforts at the local level, and a deficit in cross-border monitoring, evaluation, and reporting mechanisms.

The paper underscores the need to strengthen national legal systems and increase international collaboration to secure India's pivotal role in managing environmental challenges that extend beyond its own territory. It contends that resolving these issues is vital for the equitable management of cross-border natural resources and for advancing environmental justice outside of India. This approach is seen as a pathway to developing a more effective and cooperative global environmental legal structure.

Key words: Environment, Transboundary, Challenges, Framework, Cooperation, Degradation, Law.

INTRODUCTION

The urgency to regulate activities impacting the environment has led to considerable evolution in environmental law over recent years. Initially, environmental legislation targeted specific areas such as air quality, conservation of wildlife, and the control of water pollution. Yet, the global environmental challenges of the late 20th century, such as deforestation, the loss of biodiversity, and climate change, highlighted the need for a broader legal approach.

Key international efforts, marked by the 1992 Rio Earth Summit[35] and the 1972 United Nations Conference on the Human Environment (Stockholm Conference)[36], have introduced pivotal concepts like the precautionary principles, sustainable development, and the notion of common but differentiated responsibilities. These efforts underline the collective responsibility towards environmental protection, emphasizing that developed nations should accept a larger portion of accountability due to their capabilities and historical activities. These initiatives have been crucial in encouraging the worldwide adoption of national environmental laws and in ensuring domestic policies are in line with international commitments.[37]

As environmental challenges know no borders, environmental law plays a critical role in managing issues that cross national boundaries, such as air and water pollution, conservation

[35] United Nations Conference on Environment and Development, Rio de Janerio, Brazil, June, 1992.
[36] United Nations Conference on the Human Environment, Stockholm, Sweden, June 1972.
[37] Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1 (2007).

of wildlife, and climate change, alongside domestic concerns like pollution from industries, waste management, and urban planning.[38] Enhancing India's environmental legal framework to address international issues is not just key for promoting global cooperation but also reflects India's increasing role in shaping global environmental policies. This is fundamental for the sustainable management of ecosystems shared across nations.[39]

Transboundary environmental issues are problems with the environment that cross national boundaries, affect multiple nations, and call for coordinated international action to solve. These issues arise when natural resources, ecosystems, or public health in neighboring countries are negatively impacted by environmental degradation in one country. Notable examples include industrial emissions and discharges that cross national borders, pollution that crosses borders via air and water, overuse of common natural resources like rivers, forests, or subterranean water systems, and biodiversity declines as a result of habitat destruction or overexploitation.[40] Climate change is another important transboundary issue, with consequences that transcend national borders, including rising sea levels, altered weather patterns, and disruptions to ecosystems.[41]

Because there are many parties involved, different legal frameworks apply, and different nations have different levels of environmental and economic development, transboundary environmental issues are complex. In order to address these issues, comprehensive legal frameworks that encourage global cooperation, harmonious policies, and potent cross-border enforcement mechanisms are required.[42] These difficulties highlight the limitations of national environmental laws, which are essentially territorial in nature. Therefore, in order to address the transnational aspects of environmental damage more successfully and achieve a more resilient and cooperative management of shared natural assets & ecosystems, it is imperative that domestic legal frameworks be improved.[43]

Specifically, in India's context, given its long borders and shared environmental assets, transboundary environmental concerns are notably pressing. Enhancing India's legal

[38] Hilary F. French, *Strengthening International Environmental Governance*, 3 J. ENV'T & DEV. 59 (1994).
[39] *Id.*
[40] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999).
[41] Robert V. Percival, *supra* note 4.
[42] *Id.*
[43] Furqan Ahmad, *Origin and Growth of Environmental Law in India*, 43 J. INDIAN L. INST. 358 (2001).

infrastructure to manage these issues not only aids in achieving sustainable development but also in fostering regional ecological balance and promoting environmental justice beyond its borders.[44]

India has made great progress in developing an all-encompassing legal structure to address its internal environmental issues. However, the nation's legal framework for handling transboundary environmental issues has significant flaws. This issue is exacerbated by India's geographical location, which necessitates the sharing of essential natural resources like rivers, forests, and air with neighboring nations.[45] The absence of specific legal measures, inadequate collaborative frameworks, insufficient technology transfers and adaptation initiatives, poor compliance with global environmental standards, ineffective enforcement mechanisms, limited regional collaboration, lack of dispute resolution mechanisms, inadequate integration at the local level, and insufficient cross-border monitoring, assessment, and reporting capabilities are the main flaws in India's current legal framework that impede the effective management of transboundary environmental issues.[46]

This paper aims to pinpoint & evaluate the serious shortcomings in India's environmental laws, particularly with regard to handling transboundary environmental issues. Moreover, it puts forth a thorough framework for institutional and legal changes aimed at strengthening India's capacity to mitigate & successfully settle conflicts pertaining to transboundary ecological issues. This paper aims to investigate and evaluate the deficiencies[47] in the existing environmental laws in India concerning transboundary environmental issues like shared natural resource management, cross-border pollution, and cross-border biodiversity conservation. It aims to evaluate how environmental justice principles are applied in transboundary situations and to suggest ways to make sure that communities at risk of environmental harm across borders are adequately protected by stronger legal frameworks. Additionally, it suggests ways to strengthen India's institutional capacities for better enforcing and putting laws governing transboundary ecological issues into practice. One such strategy is the establishment of specialized bodies or mechanisms tasked with handling transboundary environmental disputes.[48]

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] K. Sivaramakrishnan, *Environment, Law, and Democracy in India*, 70 J. ASIAN STUD. 905 (2011).
[48] *Id.*

ANALYSIS

Examining India's environmental legislation system reveals a notable need to address transnational environmental issues, but it effectively addresses local ones. This critical analysis uses particular case studies to illustrate the advantages and disadvantages of the current legal framework as it examines how well India's national legal framework handles environmental issues that impact several nations.

The existing Indian environmental legislation, such as the Water,[49] Air,[50] and Environment Protection[51] Acts, primarily concentrates on domestic environmental issues. These laws do not adequately address cross-border pollution or environmental degradation. While they effectively manage pollution within India, there is a pressing need to extend their scope to include international environmental concerns, like shared rivers and transboundary air pollution.[52]

The need for conformity between international environmental accords and India's domestic environmental laws further complicates matters. India has ratified many international treaties, such as the Convention on Biological Diversity[53] and the Paris Agreement.[54] Still, its domestic legislation frequently needs to incorporate these international agreements' responsibilities & guiding principles. India's capacity to effectively communicate with its neighbors on transboundary environmental issues is compromised by this disconnect.[55]

The Ganga Water Agreement[56] stands out as a positive example of cross-border environmental cooperation, promoting fair water sharing and sustainable management between India & Bangladesh, and enhancing diplomatic relations. However, its effectiveness in tackling the issue of transboundary water pollution could be improved.[57]

[49] The Water (Prevention And Control of Pollution) Act, 1974, No. 6, Acts of Parliament, 1974.
[50] The Air (Prevention And Control of Pollution) Act, 1981, No. 14, Acts of Parliament, 1981.
[51] The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986.
[52] K.I. Vibhute, *Environment, Development and the Law: The Indian Perspective*, 7 J. ENVTL. L. 137 (1995).
[53] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, January, 2000.
[54] United Nations Climate Change Conference, Paris, December, 2015.
[55] Goutham Shivshankar, *Environmental Law in India: The Task Ahead*, 50 ECON. & POL. WKLY. 38 (2015).
[56] Ganges Water Sharing Treaty, Indo-Bangladesh Cooperation, 1996.
[57] Furqan Ahmad, *supra* note 43.

In contrast, air pollution between India & Pakistan showcases a significant shortfall in cross-border environmental governance. Northern India's industrial & agricultural activities lead to smog & haze that severely affect Pakistan, especially during the winter months.[58] The lack of a formal agreement or legal framework to address this issue highlights the shortcomings of India's laws aimed at controlling domestic air pollution without considering the impacts on neighboring countries.[59]

Water pollution in the Sutlej & Ravi rivers, which flow from India into Pakistan, is another example of how environmental laws fail. These rivers have been severely contaminated by industrial and agricultural pollutants from upstream Indian sources, which impacts Pakistan's public health and water quality downstream.[60] The problem is made worse by the two nations' lack of a formal framework for cooperation on transboundary water pollution. This instance highlights the need for more robust bilateral agreements and comprehensive legislation to control transboundary water pollution.[61]

Environmental laws are formulated, implemented, and enforced by the Indian government. Elaborating on ecological policies and collaborating with foreign agencies are the responsibilities of several ministries at the national level, including the Ministry of Environment, Forests, and Climate Change ("MoEFCC").[62] However, effective cross-border environmental management is hampered by inadequate enforcement mechanisms and a shortage of more particular legal provisions addressing transboundary issues in India. Enhancing collaboration among federal, state, and local government tiers is vital to guarantee that environmental transboundary problems are suitably tackled.[63]

States in India that share borders with other countries are crucial for the management of shared environmental resources. State-level legislation occasionally lacks the comprehensive framework necessary to address cross-border issues, particularly when natural resources like rivers or forests are at risk. Effective cooperation between state and federal administrations, as

[58] Akhileshwar Pathak, *State, Environment and Law,* 29 ECON. & POL. WKLY. 3138 (1994).
[59] *Id.*
[60] K.I. Vibhute, *supra* note 52.
[61] Akhileshwar Pathak, *supra* note 58.
[62] *Id.*
[63] Goutham Shivshankar, *supra* note 55.

well as neighboring nations, is necessary to coordinate transboundary environmental protection initiatives.[64]

United Nations Environment Programme ("UNEP") is the premier global environmental organization that promotes international cooperation. UNEP facilitates legal frameworks for managing transboundary ecological concerns through its agreements, such as the Basel Convention on Hazardous Wastes[65]. However, as mentioned in Strengthening Indian Environmental Governance through Two-Phased Reform of UNEP, there are differences in how UNEP's reforms affect nations such as India, especially when harmonizing domestic and international legislation.[66] These groups can improve India's ability to handle cross-border problems by offering financial support, forums for cooperation, and technological know-how.[67]

Organizations that support transboundary environmental projects, such as pollution control methods and sustainable resource management, include the World Bank and other Multilateral Development Banks.[68] They play an essential role in providing rules for sustainable development, guaranteeing that infrastructure development does not result in cross-border environmental degradation.

NGOs frequently play the role of watchdogs, keeping an eye on business and governmental actions that can endanger the environment. NGOs can campaign for more vital environmental rules, draw attention to cross-border ecological infractions, and hold corporations and governments accountable regarding transboundary issues.[69] To ensure that local perspectives are heard during decision-making, they can also help communities impacted by transboundary environmental challenges cooperate.[70]

NGOs have played a significant role in India's public interest lawsuits, which force the government to act on environmental issues. Public Interest Litigations ("PILs") could be extended to address transboundary environmental challenges and large-scale environmental

[64] K.I. Vibhute, *supra* note 52.
[65] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, Switzerland, March, 1989.
[66] Goutham Shivshankar, *supra* note 55.
[67] Furqan Ahmad, *supra* note 43.
[68] K.I. Vibhute, *supra* note 52.
[69] Akhileshwar Pathak, *supra* note 58.
[70] Goutham Shivshankar, *supra* note 55.

problems like pollution management.[71] NGOs advocate for court interventions that guarantee environmental protection across national boundaries by filing PILs.

Addressing transboundary concerns requires regional cooperation through bilateral treaties or multilateral agreements, especially when shared resources like rivers, forests, and wildlife are at risk. The Indus Water Treaty[72] and other agreements between India and its neighbors on joint river management show how bilateral cooperation can address transboundary issues.[73] These agreements must be amended to address more environmental concerns, such as preserving biodiversity and air pollution.

CASE LAWS

A notable illustration of how the judiciary might shape environmental law in the absence of broad legislative measures is the *Vellore Citizens' Welfare Forum v. Union of India & Ors.*[74] case. The judiciary's expansive interpretation of constitutional rights and enforcement of international environmental norms made more robust legal frameworks possible. In this decision, the Supreme Court stressed the value of sustainable development, striking a balance between the demands of environmental preservation and economic expansion. The formal introduction and application of the polluter pay, as well as precautionary principles to Indian environmental jurisprudence, was one of the most significant contributions of this ruling.

The Court recognized the critical importance of preventing environmental damage before it occurs, especially in cases where there is insufficient scientific evidence to support concerns. This is particularly crucial in transboundary situations, where environmental harm in one country can affect neighboring nations, necessitating precautionary measures (precautionary principle)[75] to prevent cross-border deterioration. The Court ruled that those responsible for pollution should bear the cost of repairing the damage. By establishing a framework for holding polluters accountable (polluter pays principle)[76] for cross-border harm, this principle is essential for addressing transboundary environmental issues and ensuring that environmental degradation is not overlooked due to jurisdictional constraints. The case exemplifies the

[71] K.I. Vibhute, *supra* note 52.
[72] The Indus Waters Treaty, India-Pakistan, Karachi, 1960.
[73] Akhileshwar Pathak, *supra* note 58.
[74] Vellore Citizens' Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647.
[75] Vellore Citizens' Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647.
[76] Vellore Citizens' Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647.

judiciary's proactive role in bridging gaps resulting from executive and legislative actions. The Indian Supreme Court strengthened the judiciary's role in protecting environmental rights by expanding the scope of Article 21[77] (Right to Life) to include the right to a healthy environment. This was achieved through judicial activism. The Court asserted that environmental degradation is a public issue requiring judicial intervention, citing this fundamental right, even when caused by private entities.

This legal strategy becomes extremely important when it comes to transboundary environmental issues. Addressing cross-border ecological harm can be based on the Court's understanding of environmental protection as a fundamental right, especially in cases where legal frameworks are insufficient or adjacent countries may be impacted by environmental damage that originates in India.[78]

Secondly, the judgment given in the case of the *Indian Council for Enviro-Legal Action v. Union of India & Ors.*[79] in Indian environmental jurisprudence showcased the judiciary's proactive role in enforcing ecological accountability and addressing large-scale pollution. In this case, the Supreme Court adopted a firm stance on environmental protection, affirming that polluting industries must be held strictly liable for the environmental damage they cause. This led to applying the absolute liability principle,[80] which holds that industries engaged in hazardous activities are strictly liable for any harm caused by their actions, regardless of intent or negligence. This principle has far-reaching implications for both domestic & transboundary environmental governance.

In contrast to the conventional ideas of negligence-based liability, the principle of absolute liability guarantees that companies causing environmental damage cannot avoid accountability by arguing that they did not intend to take necessary safeguards. This is especially important when dealing with transboundary environmental issues because pollution from one nation can disastrously impact other countries. Strict liability for polluters is essential to guarantee accountability for environmental damage caused across international borders.[81] The theory of

[77] INDIA CONST. Art. 14.
[78] Geetanjoy Sahu, *Why the Underdogs Came Out Ahead: An Analysis of the Supreme Court's Environmental Judgments, 1980–2010*, 49 ECON. & POL. WKLY. 52 (2014).
[79] Indian Council for Enviro-Legal Action v. Union of India & Ors., 1996 SCC (3) 212.
[80] *Id.*
[81] *Id.*

polluter paying was upheld by the court, which held that the parties responsible for the pollution must pay for all remediation expenses. In a transboundary setting, this concept can serve as a cornerstone for cross-border environmental governance, ensuring that polluters bear the financial consequences of their actions for the harm they inflict to neighboring countries' ecosystems and that the costs incurred in recovering shared environmental resources are covered.

In this case, the Supreme Court's verdict shows the ability of judicial activism to resolve environmental challenges where legislative & executive frameworks are missing or inadequate. The Court broadened the meaning of constitutional provisions to encompass the right to a clean environment by invoking Articles 21[82] (Right to Life), 47[83] (Public Health), and 48A[84] (Environmental Protection) of the Indian Constitution. The judiciary could directly interfere with environmental concerns due to its expanded scope, especially when government control was insufficient. The judiciary's proactive approach becomes even more critical in the context of transboundary environmental challenges. Transboundary pollution and environmental degradation often occur due to loopholes in legal frameworks that oversee cross-border ecological impact.[85]

In such situations, judicial activism highlights the judiciary's responsibility for upholding environmental protection laws and making up for any inaction or delay on the part of the legislature.[86] Although the *Indian Council for Enviro-Legal Action* case focused on pollution inside India's boundaries, its legal ideas can benefit significantly from transboundary environmental issues. The polluter pays principle emphasizes the judiciary's critical role in ensuring that polluters cannot evade responsibility, even when environmental damage crosses borders and other vital aspects of the ruling offer insights for strengthening India's environmental law to manage cross-border environmental issues more effectively.[87]

[82] INDIA CONST. art. 21.
[83] INDIA CONST. art. 47.
[84] INDIA CONST. art. 48A.
[85] Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 INT'L J. PEACE STUD. 71 (2012).
[86] Geetanjoy Sahu, *supra* note 78.
[87] Robin Kundis Craig, *Constitutional Environmental Law, or, the Constitutional Consequences of Insisting That the Environment is Everybody's Business*, 49 ENV'T L. 703 (2019).

In addition, the Court's involvement in this case established a standard for proactive environmental management. Even without comprehensive law, courts can enforce international environmental norms and require governments to take corrective action when transboundary environmental harm occurs. Ultimately, although judicial activism has played a vital role in addressing deficiencies in environmental governance, the Court's involvement in such instances highlights the constraints associated with depending exclusively on legal recourse. Enhancing environmental laws to address transboundary issues would lessen the need for judicial activism and offer more extensive, legally binding procedures for averting and resolving international environmental disputes.[88] Examples of these mechanisms include creating frameworks for resource sharing, international cooperation, and cross-border pollution control.

One of the biggest environmental and development-related legal cases in Indian history was heard by the Supreme Court of India in *Narmada Bachao Andolan v. Union of India & Ors.*[89] The majority ruling maintained the dam's construction, arguing that the project's advantages exceeded its adverse environmental effects, especially regarding managing water resources and producing energy. The Court emphasized the need to balance the demands of national growth with the significance of environmental issues. Even though the Court approved the project, it established a precedent for how significant projects with substantial environmental effects should be managed by strictly adhering to environmental safeguards like Environmental Impact Assessments ("EIAs") and rehabilitation & resettlement plans.[90] This demonstrates how the enforcement of procedural environmental protections by the judiciary can guarantee that development projects adhere to environmental legislation. This essay emphasizes how important it is that India's environmental laws comply with international environmental agreements, particularly when working on projects involving shared natural resources. Legal frameworks must be established in order to ensure that transboundary environmental concerns are adequately taken into account during project design and execution.

The case also highlights the importance of comprehensive EIAs for large-scale projects. EIAs should mainly contain procedures for examining cross-border environmental consequences for transboundary projects to ensure that environmental harm stays inside national borders.

[88] Geetanjoy Sahu, *supra* note 78.
[89] Narmada Bachao Andolan v. Union of India & Ors., 2000 (10) SCC 664.
[90] *Id.*

Furthermore, although the judiciary can set limitations and safeguards, its function is limited to post-event enforcement.[91] Instead of relying solely on judicial intervention, environmental rules should be reinforced to prevent transboundary harm before it occurs and promote sustainable global development. Judicial activism emphasizes the judiciary's limits in addressing complex, global environmental issues, though it is crucial for guaranteeing that environmental regulations are enforced.[92]

The *Research Foundation for Science, Technology and Natural Resource Policy v. Union of India & Ors.*[93] is a landmark case that highlights the proactive role of the Indian judiciary in addressing environmental challenges posed by the transboundary movement of hazardous waste. The critical issue, in this case, was the import of dangerous waste, which not only violated India's domestic environmental laws but also breached international agreements, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[94] to which India is a signatory.[95] When it comes to ensuring environmentally sound hazardous waste management, and to reduce the movement of hazardous waste between nations, particularly from developed to developing countries, the Basel Convention comes into aid.

Through this decision, the judiciary demanded that India fulfill its international duties under the Basel Convention, broadening the scope of already-existing environmental regulations.[96] This improved domestic environmental governance and established a standard for handling transboundary environmental problems with hazardous waste. The Court used the precautionary principle,[97] which requires that, even in situations where there is a lack of scientific confidence, preventative action be taken where there is a danger of environmental harm.[98] This idea is essential for dealing with transboundary environmental issues when the

[91] Lord Justice Carnwath, *Judicial Protection of the Environment: At Home and Abroad*, 16 J. ENVTL. L. 315 (2004).
[92] Geetanjoy Sahu, *supra* note 78.
[93] Research Foundation for Science, Technology and Natural Resource Policy v. Union of India & Ors., 2007 AIR SCW 5851.
[94] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, Switzerland, March, 1989.
[95] Research Foundation for Science, Technology and Natural Resource Policy v. Union of India & Ors., 2007 AIR SCW 5851.
[96] Robert V. Percival, *supra* note 37.
[97] Vellore Citizens' Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647.
[98] Research Foundation for Science, Technology and Natural Resource Policy v. Union of India & Ors., 2007 AIR SCW 5851.

possibility of harm extending beyond national boundaries calls for preventive actions to avert permanent, long-term harm.

The polluter pays principle was upheld by the Supreme Court, which declared that anybody who pollutes the environment, including importers of hazardous material, is liable for cleanup expenses.[99] This idea is essential to handle transboundary environmental challenges—i.e., pollution from one nation that extends beyond its borders. The Court's decision underscored the need for robust legal frameworks and harsh accountability for violators to reduce transboundary environmental impact.

RECOMMENDATIONS

Comprehensive policy change and new legal frameworks are required to overcome the shortcomings in India's present environmental legislation about transboundary problems. The main goals of these changes must be to improve how proposed legislation is carried out, strengthen international collaboration, and improve India's capacity to handle environmental challenges that span national borders.[100]

There are no specific provisions in the current Indian environmental legislation that deal with transboundary concerns. Including explicit provisions in legislation, such as the Environment (Protection) Act of 1986,[101] that outline India's responsibilities regarding transboundary pollution, shared resources, and biodiversity would significantly improve. This might entail taking up tenets from global environmental treaties, such as the UNEP's recommendations for cross-border environmental matters.

India ought to establish an official organization tasked with overseeing cross-border environmental issues. This jurisdiction might supervise the execution of bilateral or multilateral agreements, make coordinating with neighboring nations to share natural resources easier and guarantee that transboundary environmental problems are considered when making rational decisions.[102] It is necessary to form new agreements, especially with neighboring nations, to handle shared environmental issues. These include cross-border wildlife protection, air quality

[99] Vellore Citizens' Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647.
[100] Goutham Shivshankar, *supra* note 55.
[101] The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986.
[102] Goutham Shivshankar, *supra* note 55.

monitoring, and cooperative management of river basins (such as the Ganges and Brahmaputra).[103] Legally binding clauses that hold nations responsible for resource management and cross-border contamination should be included in the agreements.

Strict enforcement is necessary for environmental laws to be implemented effectively. India should make investments to increase the ability of state and federal pollution control boards and other regulatory organizations to oversee and enforce cross-border environmental laws.[104] Within these institutions, specialized departments with technical know-how on cross-border matters had to be established. Environmental factors ought to be incorporated by the government into its framework for foreign policy.[105] India can more effectively handle common environmental concerns and advance regional stability by prioritizing transboundary environmental issues in diplomatic ties with neighboring nations. Engaging the public is necessary to strengthen environmental legislation. Public engagement in decision-making and awareness efforts are essential for transboundary environmental legislation to be implemented successfully.[106] PILs can also dramatically elevate transboundary environmental challenges to the court front.

India has to take a proactive role in international environmental governance systems since transboundary environmental concerns are fundamentally global. This entails fortifying its adherence to international accords like the Paris Climate Change Agreement[107] and the Basel Convention on Hazardous Wastes.[108] India can guarantee that its transboundary concerns are sufficiently handled and that global environmental rules are influenced by taking a more active role. When creating regional forums devoted to transboundary environmental governance, India needs to take the lead. These forums may be used as discussion boards, information exchanges, and capacity development exercises for cross-border pollution, shared water

[103] Furqan Ahmad, *supra* note 47.
[104] Shivshankar, Goutham, *Environmental Law in India: The Task Ahead*, 50 ECONOMIC AND POLITICAL WEEKLY 39-40 (2015),
[105] Hilary F. French, *supra* note 38.
[106] Goutham Shivshankar, *supra* note 55.
[107] United Nations Climate Change Conference, Paris, December, 2015.
[108] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, Switzerland, March, 1989.

management, and climate change adaptation.[109] For example, a Transboundary Environmental Cooperation Council for South Asia may offer a formal framework for cooperation.[110]

Technology-based solutions, such as data exchange platforms, sophisticated monitoring systems, and pollution control technologies, are frequently needed for transboundary environmental management. India ought to work with foreign organizations to get financing for these technologies and make it easier for adjacent nations to acquire them. Mechanisms for international climate funding, such as the Green Climate Fund, may be able to assist this collaboration.[111]

India should fortify its diplomatic connections with adjacent nations using bilateral environmental accords. Common concerns, including preventing water pollution, preserving forests, and safeguarding migratory species, ought to be the main topics of these agreements.[112] These agreements would be more successful if they included collaborative environmental studies, frequent consultations, and conflict resolution procedures. When managing shared resources, environmental disputes between nations are unavoidable. India should support & participate in international dispute settlement processes that address environmental disputes, including those administered by the Permanent Court of Arbitration or the International Court of Justice. These procedures can offer a third-party forum for settling disputes involving cross-border environmental damage.

CONCLUSION

The evolution of Indian environmental jurisprudence has been pivotal in shaping the legal landscape for environmental governance. Beginning with the introduction of key legislations like the Water (Prevention and Control of Pollution) Act, 1974,[113] and the Environment (Protection) Act, 1986,[114] India has established a robust legal framework aimed at addressing domestic environmental concerns. However, as environmental crises have grown more

[109] Simon H. Olsen & Mark Elder, *Strengthening International Environmental Governance by Two-Phased Reform of UNEP: Analysis of Benefits and Drawbacks*, INST. FOR GLOB. ENV'T STRATEGIES (2011).
[110] *Climate Diplomacy in South Asia: Transboundary Challenges, Collective Solutions*, THE STIMSON CENTER (May 2024).
[111] Joëlle de Sépibus, *Green Climate Fund: How Attractive Is It to Donor Countries?*, 9 CARBON & CLIMATE L. REV. 298 (2015).
[112] Goutham Shivshankar, *supra* note 55.
[113] The Water (Prevention And Control of Pollution) Act, 1974, No. 6, Acts of Parliament, 1974.
[114] The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986.

complex and cross-border in nature, this framework has revealed significant inadequacies in managing transboundary environmental challenges.

Judicial activism has played a crucial role in the development of Indian environmental law, with the judiciary expanding constitutional provisions, particularly under Article 21 (Right to Life),[115] to encompass the right to a clean and healthy environment. Through landmark rulings, the courts have advanced critical environmental principles like the "precautionary principle" and the "polluter pays principle."[116] However, while judicial interventions have been instrumental in advancing environmental justice domestically, there remains a need for more robust legal frameworks specifically addressing transboundary issues.[117]

In light of transboundary issues, this paper has identified a number of crucial reforms that India's environmental law needs to strengthen. These include drafting institutional structures to handle cross-border environmental issues, negotiating bilateral and multilateral environmental agreements with surrounding nations, and incorporating transboundary provisions into domestic laws.[118] Strategies for effective implementation, such as enhancing enforcement mechanisms, integrating environmental governance into foreign policy, and fostering public participation, are also critical to ensuring the success of these reforms.

The resolution of transboundary environmental issues requires international collaboration. India will be able to successfully address cross-border ecological concerns through its active involvement in global environmental governance, the creation of regional environmental forums, and its engagement with international dispute resolution systems. Increased cooperation with neighboring nations will further support these initiatives through technology transfer, capacity building, and cooperative environmental assessments.

To sum up, strengthening India's environmental laws to address cross-border issues will require a multimodal approach involving judicial oversight, international collaboration, and legislative modifications. Through the implementation of these measures, India can safeguard its environment, foster ecological stability, and advance sustainable development, all while

[115] INDIA CONST. art. 21.
[116] Vellore Citizens' Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647.
[117] Geetanjoy Sahu, *supra* note 78.
[118] Robert V. Percival, *supra* note 37.

ensuring that environmental justice transcends national boundaries. This approach will be crucial for managing the complexity of transboundary environmental regulation in the complex world we live in today.

The Legal Recognition of Living Wills: In the Indian Context

Malavika A D Gowda [119]

Rushil S [120]

ABSTRACT

In this paper, the author explores the evolving legal framework of passive euthanasia and living wills in India, focusing on the Supreme Court's landmark rulings *in Aruna Shanbaug v. Union of India (2011)* and *Common Cause v. Union of India (2018).* The paper examines how these judgments establish the right to die with dignity under Article 21 of the Constitution while addressing the challenges of implementation, including judicial delays, procedural complexities, and low public awareness. The central argument of this paper is that the Common Cause (2023) judgment significantly improves the feasibility of living wills by reducing judicial intervention and introducing a two-tier medical board system for verification and enforcement. The revised framework simplifies the execution process by allowing notarized witnessing instead of judicial approval and strengthens patient autonomy by permitting authorized representatives to give consent on behalf of incapacitated individuals. Additionally, the inclusion of living wills in electronic health records and the provision of legal recourse under Article 226 further enhance the effectiveness of these directives. However, the paper also highlights persistent challenges, such as limited public awareness, ethical debates, and the absence of standardized guidelines in healthcare institutions. By comparing India's approach to global legal frameworks, the paper argues that while the *Common Cause* (2023) ruling is a crucial step forward, further legislative reforms and public education are necessary to ensure the practical realization of the right to die with dignity.

Keywords: Passive Euthanasia, Living Wills, Right to Die with Dignity, Judicial Intervention and Medical Board System.

STATEMENT OF PROBLEM

The legalization of passive euthanasia and living wills in *Common Cause v. Union of India (2018)* was a turning point in Indian law. Nevertheless, procedural intricacies, absence of

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statutory support, and restricted public knowledge hinder smooth implementation. The 2020 amendments attempted to make the process easier, but problems still exist in enforcement, medical adherence, and legal certainty. This research analyses the legislative development of euthanasia, reviews procedural reforms, and determines challenges that hinder practical application, with the view to suggesting legal and policy interventions for facilitating accessibility and efficiency in end-of-life decision-making.

RESEARCH OBJECTIVE

1. To evaluate the legal development of passive euthanasia and living wills in India via judicial precedents.
2. To determine the procedural changes made in the 2023 judgment and how they affect the implementation of advance medical directives.
3. To evaluate India's legal framework regarding end-of-life decisions against global best practices.
4. To recognize major hindrances to the practical application of living wills and passive euthanasia in India.

RESEARCH METHODOLOGY

The research in this study is doctrinal in nature, with emphasis on primary sources of law like constitutional provisions, statutes, and court judgments, including *Common Cause v. Union of India (2018)* and the 2023 amendments. Secondary sources, such as academic writings, medical reports, and international law structures, complement the analysis. Empirical evidence from credible studies also supports the discussion. A comparative legal review assesses India's place in comparison with international standards, establishing best practices for policy reforms in the Indian medical and legal landscape.

INTRODUCTION

"*Life is not mere living but living in health.*"[121]

Though the concept has been a subject of philosophical, legal, and moral discussion for centuries, the right to die with dignity has only recently gained substantial traction. This idea

[121] P. Rathinam v. Union of India, (1994) 3 SCC 394 (India).

has received a lot of attention concerning advanced medical directives, mainly living wills and euthanasia. In the landmark ruling in *Aruna Ramchandra Shanbaug v. Union of India (2011)*[122], the Supreme Court of India upheld the legitimacy of passive euthanasia, thereby conforming to the right to a dignified death. This ruling sets the stage for future discussions about end-of-life care and the value of maintaining a person's autonomy even in their last moments. By acknowledging living wills, the subsequent ruling in the *Common Cause v. Union of India (2018)*[123] case bolstered this right and made it possible for individuals to make proactive decisions on their medical care in the event of incapacitation.

Firstly, ancient philosophical debates are where the idea of the right to die with dignity emerged. In addition to Indian customs, the ancient Greeks and Romans also thought about the ethics and morality of ending a life voluntarily. Self-determination has been defended by intellectuals such as Ronald Dworkin and John Stuart Mill, who highlight the value of individual liberty and the prevention of unnecessary suffering. There is a significant resonance between permitting people to choose a dignified death and Mill's claim that true freedom is found in the opportunity to pursue one's own good in one's own way. Moreover, the development of life-support technologies in the context of contemporary medical developments has heightened the discussion surrounding end-of-life decisions and euthanasia. Long-term medical procedures frequently lower the quality of life, raising moral questions regarding how much life should be saved when suffering becomes intolerable. These issues are addressed by the right to die with dignity, which promotes kind and considerate decisions that put the patient's desires and welfare first.

REDEFINING THE CHALLENGES

Advance directives, commonly called living wills, are essential for ensuring that the right to a dignified death is protected. These legal documents enable people to specify their preferences for medical care in cases where they are unable to express their choices because of illness or incapacity. Patients who are unable to engage in their medical care actively can nevertheless have their autonomy honored as a result of living wills. Additionally, they ease the strain on family members and healthcare providers by offering explicit guidance regarding the patient's final wishes. Living wills are still comparatively underutilized in India despite being widely

[122] Aruna Ramchandra Shanbaug v. Union of India, (2011) 4 SCC 454 (India).
[123] Common Cause v. Union of India, (2018) 5 SCC 1 (India).

accepted in the US, Canada, Australia, and some European countries. This gap has been exacerbated by the lack of a thorough legal framework and a general lack of knowledge on advance directives. To resolve this matter, the *Common Cause v. Union of India*[124] The ruling established the legality of living wills and procedural protections for their execution. This ruling was a significant step in acknowledging the right to self-determination and guaranteeing that people can make informed choices regarding the treatment they receive.

The cultural and historical background of end-of-life decisions emphasizes the significance of living wills even more. As seen by the custom of *"samadhi"* and the practice of *"iccha mrityu,"* Indian mythology and spiritual practices have long recognized the idea of deliberate dying. The profoundly ingrained conviction in the dignity of individual liberty is reflected in these culturally accepted means of determining one's own death time and manner. The legal acceptance of living wills is consistent with these philosophical ideas, giving an ancient idea a modern context. Around the world, significant court rulings and legislative initiatives have influenced the development of advance directive law. With a focus on patient autonomy and informed decision-making, the Patient Self-Determination Act of 1990[125] established precise standards for the execution of living wills in the United States. More thorough documents like the "Five Wishes"[126] directive, which includes medical treatment preferences, comfort measures, and interpersonal issues, have also emerged as a result of the evolution of advance directives. This ensures a comprehensive approach to care during one's final days.

Living will present specific difficulties, though. The necessity for strong legal and procedural frameworks has been brought to light by legal disputes, differing interpretations of medical futility, and the requirement for frequent revisions to account for evolving individual preferences. By establishing precise guidelines for the creation, execution, and application of living wills, the Common Cause ruling sought to resolve these problems and reduce uncertainty and potential conflict. According to the Indian judiciary, the freedom to pass away with dignity is an essential component of both individual liberty and compassionate healthcare. Living wills are crucial tools in this context, guaranteeing that people's final desires are respected and their dignity maintained. *The Common Cause v. Union of India*[127] ruling is a groundbreaking ruling

[124] *Id.*
[125] Patient Self-Determination Act, 42 U.S.C. § 1395cc (1990).
[126] Aging with Dignity, *Five Wishes*, AGING WITH DIGNITY (Mar. 13, 2016), http://www.agingwithdignity.org/five-wishes.php.
[127] Common Cause v. Union of India, (2018) 5 SCC 1.

that gave advance directives in India's legal standing and procedural clarity. This paper aims to investigate the practical, ethical, and legal aspects of living wills, looking at how they promote the right to a dignified death and the necessity of a thorough legal framework to enable their use.

LIVING WILLS IN OTHER COUNTRIES: LEGAL EVOLUTION, CASE STUDIES, AND CONTEMPORARY CHALLENGES

With the ongoing debate over the right to die with dignity, living will have become a significant tool for those who want to take charge of their end-of-life medical care. While a few countries have adopted it as a vital component of patient autonomy, others have yet to do so, with some resistance based on ethical, religious, and cultural grounds. The international canvas of living wills is, therefore, one of complexity, composed of strands of historic judicial precedents, ethical discussion, and present healthcare dilemmas.

Origins and Legal Status of Living Wills

Living wills originated in prominence within the United States in the 1960s with Luis Kutner, an attorney on human rights matters. The concept was based on the notion that patients should be in charge of their healthcare decisions as they are of their finances after their death. Legal approval of living wills in the United States was greatly enhanced by precedent cases like *In re Quinlan (1976)*[128] and *Cruzan v. Director, Missouri Department of Health (1990)*[129]. The earlier case set a precedent for the right to withdraw life-sustaining treatment, and the latter reiterated the requirement of clear and convincing evidence to justify such actions. These cases resulted in the enactment of the Patient Self-Determination Act in 1990[130], which required all healthcare facilities that received federal funding to inform patients of their right to establish advance directives.

Other nations followed the U.S. model. The United Kingdom, by the Mental Capacity Act of 2005[131], legislatively enshrined advance decisions to refuse treatment ("ADRTs") so that patients could make their care wishes known in legally enforceable documents. In Canada, the

[128] In re Quinlan, 355 A.2d 647 (N.J. 1976).
[129] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).
[130] Patient Self-Determination Act, 42 U.S.C. § 1395cc (1990).
[131] Mental Capacity Act, 2005, c. 9 (UK).

Supreme Court's decision in *Carter v. Canada (2015)*[132] opened up Medical Assistance in Dying ("MAID")[133] on the back of further solidifying the values of self-determination and dignity in end-of-life care. Australia followed suit, with several states enacting laws permitting advance directives and voluntary assisted dying[134]. The Netherlands, renowned for its progressive stance on euthanasia, became the first country to legalize the practice in 2002, allowing individuals to draft advanced euthanasia directives. Similar provisions exist in Belgium, Luxembourg, and Switzerland, where assisted dying is integrated into the broader framework of end-of-life care.

In spite of their general acceptance in some parts of the world, living will continue to be a controversy in most parts of the globe. One of the major fears is exploitation. Opponents of living will claim that vulnerable populations like the elderly and people with disabilities can be pressured into signing living wills by family or society. Furthermore, there is the problem of progressing medical technology—what was apparently an incurable condition when written may subsequently become treatable, making the directive obsolete. Cultural and religious beliefs also play a considerable part in opposition to living wills. Most Islamic countries forbid euthanasia and doctor-assisted death on theological grounds since life is regarded as sacred and its ending is a divine right. In the same vein, Hindu and Buddhist thought stresses the sacredness of life, usually dissuading any action that could be seen as bringing about death. Even in India, where passive euthanasia was legalized in *Common Cause v. Union of India (2018)*[135], the use of living wills is legally and procedurally complicated owing to the absence of general awareness and clarity on mechanisms of execution.

A Comparative Analysis of Why Some Nations Support and Others Oppose Living Wills

Countries that endorse living will tend to focus on patient autonomy and pain relief. These directives have been included in the healthcare policies of the United States, Canada, the Netherlands, and Australia so that patients' preferences are maintained even when they cannot express them. They contend that it is immoral and against the values of human dignity to make people suffer needlessly because of legal or bureaucratic obstacles. Conversely, nations that oppose living will frequently voice concerns regarding ethical consequences and their role in

[132] Carter v. Canada (Attorney General), 2015 SCC 5 (Canada).
[133] Medical Assistance in Dying Act, S.C. 2016, c. 3 (Canada).
[134] Voluntary Assisted Dying Act 2017 (Vic) (Australia).
[135] Common Cause v. Union of India, (2018) 5 SCC 1.

society. Numerous African and South Asian countries, such as India, Pakistan, and Bangladesh, have been reluctant to adopt advance directives, in part because deeply ingrained cultural values regarding death and medical treatment are present. In such cultures, the family plays a central role in deciding about dying, and codifying such decisions using legal documents can be seen as challenging traditional care arrangements and familial relationships.

With increasing advances in medical technology and rising life expectancy, the controversy surrounding living wills is bound to grow. Those countries that still lack a definitive legal framework may be subject to increasing pressure to introduce one, especially with aging populations demanding more control over the end stages of their lives. Policymakers will then have the challenge of balancing respect for individual autonomy with sufficient protection against abuse. For India, where the Common Cause judgment laid the groundwork for the recognition of living wills, the subsequent steps must be the formulation of solid procedural guidelines, public awareness, and making these guidelines part of the overall healthcare system. Taking lessons from international best practices, India can formulate a system that promotes the right to die with dignity while ensuring solutions to the ethical and legal problems that have kept it from wider acceptance. The path toward global acceptance of living wills is still a long way off. While there have been remarkable advancements in other countries in integrating advance directives into law, there are others that remain cautious owing to cultural, ethical, and practical issues. As the debate progresses, a sophisticated approach that acknowledges both personal rights and collective values will be vital in charting the destiny of end-of-life care across the globe.

EVOLUTION OF LIVING WILLS IN INDIA

The emergence and legal recognition of living wills in India developed through a series of epoch-making judicial judgments, finally culminating in the Supreme Court judgment in *Common Cause v. Union of India, (2018)*[136]. The law relating to end-of-life care and patient autonomy was unclear, with contradictory judicial statements dominating the debate prior to this. The history of living wills in India can be traced through a number of landmark cases that established the foundation for the recognition of the right to die with dignity.

Early Judicial Approach to the Right to Die

[136] Gian Kaur v. State of Punjab, (1996) 2 SCC 648 (India).

The first ever discussion on the right to die in India appeared in *State of Maharashtra v. Maruti Sripati Dubal (1987)*[137], where the Bombay High Court decided that the right to life as enshrined in Article 21 of the Constitution also involved the right to die. According to the court, a person should be allowed to control their own body, including deciding to end their life in some situations. But this view was reversed in *Gian Kaur v. State of Punjab (1996)*[138], when the Supreme Court held that the right to life did not extend to the right to die. The court based its reasoning on the fact that the right to life was a natural right, while the right to die was an unnatural end to life. This ruling maintained the constitutionality of Section 309 of the Indian Penal Code, criminalizing attempted suicide, and reiterated that euthanasia, active or passive, fell beyond the ambit of fundamental rights.

The Turning Point: Aruna Shanbaug Case

The path of India's law on euthanasia and living wills was greatly altered by *Aruna Ramchandra Shanbaug v. Union of India, (2011)*[139]. The case was about a nurse who was in a permanent vegetative state ("PVS") for more than three decades after she was brutally attacked. A petition was made requesting the withdrawal of life support so that she could die with dignity. In this path-breaking judgment, the Supreme Court made a distinction between active and passive euthanasia. Passive euthanasia, the court held, allowing a dying patient to die by withholding life-supporting treatment, could be sanctioned under judicial control. The court established a procedure of obtaining sanction from the High Court prior to the administration of passive euthanasia. But the ruling did not directly acknowledge living wills, and there was uncertainty about the autonomy of those who had already stated their end-of-life wishes.

Consolidating The Right To Die With Dignity

The Law Commission of India, in its 196th Report (2006), had suggested that patients who are terminally ill should be given the right to refuse treatment. The report suggested a legal regime for advanced medical directives but did not have legislative support at that point. In the wake of the Aruna Shanbaug judgment, the need for a more formalized process of end-of-life decision-making became increasingly stronger, and there was further judicial examination. One of the key issues that came to the forefront was the procedure of seeking judicial permission for passive euthanasia, which was considered cumbersome and inconvenient. The

[137] State of Maharashtra v. Maruti Sripati Dubal, 1987 AIR 411 (India).
[138] Gian Kaur v. State of Punjab, (1996) 2 SCC 648 (India).
[139] Aruna Ramchandra Shanbaug v. Union of India, (2011) 4 SCC 454 (India).

lack of a straightforward legal process for advanced medical directives left patients and their families in a state of uncertainty regarding making end-of-life choices. This resulted in new legal challenges and demands for change.

The Common Cause Judgment and the Legalization of Living Wills

The historic ruling in *Common Cause v. Union of India (2018)*[140] is a landmark pronouncement in the developing jurisprudence of the right to die with dignity in India. This ruling, handed down by a Constitution Bench of the Supreme Court, not only reaffirmed the constitutionality of passive euthanasia but also established a holistic framework for recognizing and enforcing living wills. The judgment balanced the scales between individual autonomy, medical ethics, and state interest in saving life, thus setting a precedent for future discussion on end-of-life care and patient rights in India.

The genesis of this case lay in a public interest litigation ("PIL") by Common Cause, a registered society, seeking legal recognition of living wills and the right to forgo life-sustaining treatment in the context of terminal illness. The petitioners argued that the right to live with dignity, guaranteed under Article 21 of the Indian Constitution, necessarily included the right to die with dignity, thus requiring a legal framework for advance medical directives. The State, in their counter-submissions, contended that allowing passive euthanasia and the acknowledgement of living wills would open the door to possible abuse and would be inconsistent with the existing legal principle that the sanctity of life must be preserved at all costs.

a. **Recognition of Passive Euthanasia:** The Court, reaffirming its decision in *Aruna Ramchandra Shanbaug v. Union of India, (2011)*[141], held that passive euthanasia—meaning withdrawal of life-supporting measures for terminal or PVS patients—is legally valid subject to strict procedural safeguards. The Court observed that forcing a person to undergo long periods of suffering, even if they cannot recover, would offend the constitutional promise of dignity.
b. **Validity of Living Wills:** In a revolutionary step, the Supreme Court legitimized the idea of living wills, or advanced medical directives. It ruled that a person with sound mind and free will should be allowed to decide the direction of their future medical

[140] Common Cause v. Union of India, (2018) 5 SCC 1 (Inida).
[141] Aruna Ramchandra Shanbaug v. Union of India, (2011) 4 SCC 454 (India).

care, in case they become unable to communicate their desires. The Court held that if the right of refusal of treatment is an adjunct of the personal liberty and self-determination over one's own body, the legally executed will to live needs to be accorded legal integrity.

c. **Protective Measures Against Misuse:** Anticipating the possibility of coercion and malpractice, the Court established a strong mechanism for the administration of living wills. A two-stage certification procedure was adopted, with medical boards at the hospital and district levels having to confirm the validity of the advance directive and the patient's medical status before withdrawing life support.
d. **Harmonizing Conflict Interests**: The ruling endeavored to reconcile the tension between the right to reject treatment of an individual and the duty to preserve life on the part of the State. The Court reaffirmed that while the sanctity of life remains paramount, this cannot be extrapolated to where an individual has to live a life that is undignified and painful.

A study published in the Indian Journal of Medical Ethics found that 60% of terminally ill patients in India endure prolonged suffering due to the lack of defined end-of-life care policy. The fact that there are no uniform palliative care services nationwide results in such patients receiving invasive medical interventions without any notable improvement in the quality of their life. This anguish is also aggravated by the long-term hospitalization, which enhances the emotional distress of the patients and their family members. Research indicates that most terminally ill patients in India undergo unwarranted medical procedures, including forceful chemotherapy and ventilation, which neither enhance prognosis nor agree with the wishes of the patients. The absence of a defined legal and medical framework for end-of-life care results in medical professionals playing it safe in prolonging life at any cost, thus denying patients a dignified death.[142] Evidence indicates that about 70% of families experience severe economic hardship from hefty medical costs of keeping terminally ill patients alive[143]. Accounts report that more than 80% of Indians have no access to palliative care, further corroborating the imperative for a legal system that permits patients to decline unnecessary medical treatments[144].

[142] Suresh Bada Math & Santosh K Chaturvedi, *Euthanasia: Right to Life vs. Right to Die*, INDIAN J. MED. ETHICS (2020).
[143] Roop Gursahani & Raj Kumar Mani, *India: Not a Country to Die In*, INDIAN J MED ETHICS (2016).
[144] *Id*.

PHILOSOPHICAL AND LEGAL CONSIDERATIONS

The Common Cause judgment is consistent with international developments in medical jurisprudence, mirroring the transition from a paternalistic system of healthcare towards a patient-orientated approach. The decision finds harmony with the precepts enunciated by John Stuart Mill in On Liberty (1859)[145], where he concludes that sovereignty over one's body is individuality's central requirement. Additionally, it has harmonious resonance with global legal evolution, including the Mental Capacity Act, 2005 (UK)[146], and the Patient Self-Determination Act, 1990 (USA)[147], both of which support the resolution of advance medical directives.

Nevertheless, the judgment also poses intricate ethical challenges. Opponents of euthanasia argue that any legal endorsement of end-of-life decision-making may set a dangerous precedent, leading to potential exploitation of vulnerable individuals. Religious and cultural considerations further complicate the debate, as many traditional beliefs uphold the inviolability of life as a divine gift. However, the Supreme Court assuaged such fears by integrating robust procedural safeguards to ensure that the right to die with dignity is availed of in an environment free of coercion and undue influence.

Despite legal approval, there are still practical problems with the widespread use of living wills. These problems include accessibility and ignorance. Programs for legal literacy and awareness must be put in place because the majority of Indians are unaware of their legal right to adopt a living will, legal, and medical reserve. Doctors are still reluctant to enforce living wills because of the potential legal repercussions and the absence of a clear legislative regulation. Codification based on statutory requirements, as is the situation in nations like Canada and the Netherlands, is necessary due to the complex procedure of executing living wills.

The Common Cause judgment is a turning point in Indian jurisprudence, a clear departure from the past towards the recognition of personal autonomy in end-of-life care. Legalizing passive euthanasia and upholding living wills, the Supreme Court has reaffirmed the constitutional right to die with dignity, while at the same time putting in place procedural checks to avoid

[145] JOHN STUART MILL, ON LIBERTY (1859).
[146] Mental Capacity Act 2005, c. 9 (UK).
[147] Patient Self-Determination Act, 42 U.S.C. § 1395cc (1990).

abuse. But the actual fulfillment of this judgment's goals depends on proper implementation, legislative certainty, and social acceptance. While India charts its course through changing topographies of medical jurisprudence, policymakers, legal professionals, and the medical community alike are responsible for operationalizing this verdict in ways that balance individual rights with ethical medical practice. The Common Cause verdict is no ordinary legal finding—it is evidence of a forward-looking society committed to guaranteeing dignity, autonomy, and empathy even in the face of irrevocable mortality.

THE 2023 JUDGMENT: AMENDED PROCEDURE FOR LIVING WILLS AND PASSIVE EUTHANASIA

The Supreme Court of India renewed its 2018 decision in passive euthanasia and living wills in *Common Cause v. Union of India, (2023)*[148], amending the procedural framework to address issues raised over the operation of advance directives. The judgment sought to ease the process but ensure that effective safeguards continued to exist to ward off abuse. The amendments attempted to strike a balance between medical ethics, individual autonomy, and legal regulation, reaffirming the right to die with dignity under Article 21 of the Constitution.

In the wake of the 2018 judgment, operational challenges arose in the implementation of living wills. Physicians, relatives of patients, and legal experts faced procedural challenges in adhering to the advance directive guidelines, which made it burdensome. Significantly, the need for judicial intervention at several levels caused substantial delays, which frequently made living wills ineffective in life-or-death situations. Sensing these issues, the Indian Society of Critical Care Medicine moved an application requesting clarification and streamlining of the process. The Supreme Court recognized the merits of these issues and conducted a thorough review of its 2018 guidelines.

Major Procedural Reforms Introduced in 2023

The 2018 ruling mandated that an advance directive be witnessed by two independent witnesses and countersigned by a Judicial Magistrate of First Class ("JMFC"). The amended ruling permitted the document to be witnessed before a notary public or gazetted officer, thus minimizing judicial reliance while maintaining authenticity. The need to maintain a copy of the advance directive in the JMFC office and the Registry of the District Court was eliminated,

[148] Common Cause (A Regd. Society) v. Union of India, [2023] 1 S.C.R. 1137 (India).

making documentation more flexible. Under the previous system, the attending doctor was required to validate the genuineness of an advance directive in front of the JMFC prior to its execution. The modified procedure removed this necessity, permitting doctors to act on a living will based on the hospital's verification procedures. Rather than having judicial approval at various stages, the 2023 judgment empowered medical boards to control and certify the enforcement of living wills, making decision-making in vital cases more streamlined.

The new guidelines required hospitals to form a Primary Medical Board, which includes the treating doctor and two senior subject specialists, to determine the validity of an advance directive and the medical condition of the patient. A Secondary Medical Board, which includes an independent panel of doctors nominated by the district Chief Medical Officer, was introduced to provide an added layer of scrutiny prior to the withdrawal of life support. Both boards were mandated to provide their views within a specified time frame (ideally within 48 hours), avoiding unnecessary delays in the execution of a patient's directive. In case a patient was no longer able to make decisions, the individual(s) named in the advance directive were empowered to provide consent on their behalf. The decision also allowed advance directives to be included in a patient's electronic health records to facilitate more readily accessible and verifiable documentation. If one of the medical boards declined to act on an advance directive, the nominee or treating physician of the patient could go to the High Court under Article 226 for intervention. The court was mandated to hasten such cases, and the principle of “best interests of the patient” was to govern judicial decision-making. Where there was no living will, the new procedure mandated the same medical board mechanism, where the family and doctors of the patient would take an informed decision on withdrawing the treatment.

The procedural changes made in 2023 greatly improved the feasibility of implementing living wills in India. By limiting judicial intervention and empowering medical regulation, the verdict gave a more effective framework for honoring a patient's right to die with dignity. Implementing a dual medical board system ensured that life-or-death decisions relating to the end of life were made with expert medical knowledge, reducing possible ethical tensions. Still, challenges persist. Public sensitivity regarding living wills remains low, and most healthcare facilities have no standardized guidelines for dealing with such directives. Additional legislative measures might be needed to enact these judicial recommendations as statutory law, giving greater legal support to the right to reject medical treatment. The 2023 amendments to

the *Common Cause judgment*[149] were an important step in streamlining India's policy regarding passive euthanasia and advance medical directives. By confronting the practical inadequacies of the 2018 judgment, the Supreme Court strengthened the core right to die with dignity without compromising necessary protections against abuse. Going forward, sustained efforts in public education, doctor training, and legislation will be imperative in achieving effective enforcement of such enlightened judicial principles.

[149] *Id.*

Unfit and Improper Intermediaries? An Overview of the SEBI (Intermediaries) Regulations, 2008 For Directors and Promoters of Stock Market Intermediaries

Sameep Baral [150]

ABSTRACT

Stock market intermediaries serve as bridges between the public and the secondary market. It is thus essential that they are run by management whose good character is not the subject of doubt. To overcome this issue and to maintain trust in our financial institutions, the Securities and Exchange Board of India ('SEBI') has laid down certain criteria for qualification to be appointed as promoter, director or key managerial personnel in a stock market intermediary. These 'Fit and Proper' criteria, as they are commonly known, have been laid down in a variety of regulations, the most general and far-reaching of which is the SEBI (Intermediaries) Regulations, 2008. They provide for the automatic disqualification of stock market intermediaries from participating in the secondary market, if any person holding a controlling interest in the intermediary is found to be non-compliant with these criteria.

These criteria have, however, been put to scrutiny by various experts, and concerns have been raised regarding the fairness and proportionality of the 'Fit and Proper' test when compared to similar criteria laid down by other regulators, which also have a similar goal. The purpose of this project will be to determine firstly, if SEBI's 'Fit and Proper' criteria are sound and do not suffer from regulatory excesses, conflict with other laws, and are fit to address emerging concerns; secondly, how other regulators assess the fitness and character of market players; and thirdly, what modifications, if any, may be suggested to SEBI's 'Fit and Proper' criteria to bring them in line with national and international standards.

RESEARCH PROBLEM

Two primary problems exist in SEBI's '*Fit and Proper*' criteria, that led to the undertaking of this project –

1. It is unclear whether there is sufficient market knowledge regarding SEBI's '*Fit and Proper*' criteria as under the SEBI (Intermediaries Regulations), 2008, and whether SEBI has done enough to clarify the same;

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2. It is unclear if SEBI's '*Fit and Proper*' criteria are excessively punitive and over-inclusive.

RESEARCH METHODOLOGY

The project is based on the qualitative method. The project relies on the Secondary Method of Research. Secondary data is information which has already been collected, compiled and published by other researchers. Data is collected from secondary sources such as research papers on stock market intermediaries and the materials of international organizations and foreign regulators.

AN OVERVIEW OF THE SEBI (INTERMEDIARIES) REGULATIONS, 2008

The Securities and Exchanges Board of India ("SEBI" or "the Board") has regulated the primary and secondary financial markets for over three decades now. As of today, there are well over 5,000 intermediaries registered with the Board.[151]

The Fit and Proper Criteria Before 2008

Earlier, SEBI's approach to regulation involved framing specific regulations for different types of intermediaries. This can be seen in SEBI's regulations in the 1990s – the SEBI (Stock-Brokers) Regulations, 1992,[152] the SEBI (Merchant Bankers) Regulations, 1992[153] and the SEBI (Mutual Funds) Regulations, 1996[154] were all aimed at regulating specific classes of intermediaries.

Practical difficulties arose, however, when these regulations prescribed different criteria for different intermediaries to be deemed as a financially, reputationally and managerially sound entity for registration as intermediary. To remedy this disparity, SEBI introduced the SEBI (Criteria for Fit and Proper Person) Regulations, 2004 ("2004 Regulations") as a common regulation applicable to all types of intermediaries.[155] As per Section 3 of the regulations, the regulator laid down the '*Fit and Proper'* Criteria for the registration of an intermediary in the

[151] Ameya Gokhale et al., *'Fit and Proper' Criteria under the SEBI (Intermediaries) Regulations — Is it time to Revisit?* SCC ONLINE BLOG EXP 58 (Last visited Oct. 31, 2023), https://www.scconline.com/blog/post/2023/07/06/fit-and-proper-criteria-under-the-sebi-intermediaries-regulations-is-it-time-to-revisit/.
[152] SEBI (Stock-Brokers) Regulations, 1992.
[153] SEBI (Merchant Bankers) Regulations, 1992.
[154] SEBI (Mutual Funds) Regulations, 1996.
[155] SEBI (Criteria for Fit and Proper Person) Regulations, 2004, Reg. 3.

secondary market prohibit persons of questionable repute and financial record from misusing public funds. The list of criteria under Section 3 was restricted to the following disqualifications[156] –

1) Conviction for an offence involving moral turpitude, economic offence, securities laws or fraud of the whole-time director or managing partner;
2) Declaration of insolvency of the whole-time director or managing partner, if not discharged at the time of applying for registration;
3) An Order for winding up passed against the proposed or operating intermediary;
4) An Order prohibiting or debarring the proposed or operating intermediary or its whole-time director or managing partner from dealing in securities in the capital market or from accessing the capital market, unless three years have elapsed from the date of expiry of the Order;
5) An Order canceling the certificate of registration of the intermediary for indulging in insider trading, fraudulent and unfair trade practices or market manipulation, unless three years have elapsed from the date of expiry of the Order; and
6) An Order withdrawing or refusing to grant any license/approval to the proposed or operating intermediary which has a bearing on the capital market, or to its whole-time director or managing partner, unless three years have elapsed from the date of expiry of the Order.

These regulations were fairly straightforward, preventing an intermediary from operating in the market only when some kind of adverse action was taken against an intermediary's officers for a matter relating to financial markets and securities. Further, these criteria were only applicable to whole-time directors, managing partners and the applicant as an entity.

The Fit and Proper Criteria After 2008

In 2008, SEBI notified the SEBI (Intermediaries) Regulations 2008, ("2008 Regulations") which provided for a common regulatory framework applicable to all intermediaries.[157] Among its changes and additions included the incorporation – and expansion – of the Fit and Proper criteria laid down in the 2004 Regulations. Schedule II of the 2008 Regulations contained a

[156] *Ibid.*
[157] SEBI (Intermediaries) Regulations, 2008, Sch. II.

comprehensive list of criteria and disqualifications that an intermediary needed to comply with for grant of certificate of registration by the Board. In 2021, the list was made far more comprehensive through the SEBI (Intermediaries) (Third Amendment) Regulations, 2021.[158]

Notable additions involved, *firstly*, the inclusion of a wide variety of officers of the intermediary under the ambit of the new Regulations. While the 2004 Regulations applied only to the intermediary, its whole-time director and managing partner, Schedule II of the 2008 Regulations applied to a much broader class of persons –

a) The applicant/intermediary;
b) The principal officer;
c) All the directors or managing partners;
d) The compliance officer;
e) The Key Management Persons ("KMPs"); and
f) the promoters or persons holding controlling interest or persons exercising control over the applicant or intermediary, directly or indirectly.

Secondly, the 2008 Regulations laid down certain subjective criteria for the determination of fitness and propriety. The Board had to satisfy itself of the integrity, honesty, ethical behaviour, reputation, fairness and character of all of the persons mentioned hereinabove.[159] *Thirdly*, the 2008 Regulations automatically disqualified any person against whom a criminal complaint, recovery proceedings, winding up proceedings has been instituted.[160]

This project will examine how each of these new requirements are punitive, disproportionate, and inconsistent with the Fit and Proper criteria of other regulators.

ANALYZING THE PROBLEMS WITH THE '*FIT AND PROPER*' CRITERIA

Various stakeholders in securities regulation have commented, for various reasons, on the excessiveness of the 2008 Regulations' Fit and Proper criteria.

Pre-Conviction Punishments

[158] SEBI (Intermediaries) (Third Amendment) Regulations, 2021.
[159] SEBI (Intermediaries) Regulations, 2008, Sch. II, cl. 3(a).
[160] SEBI (Intermediaries) Regulations, 2008, Sch. II, cl. 3(b).

Market regulation's chief aim is to promote confidence in the fair functioning of the stock market. This inherently involves the disqualification of people lacking good character, reputation, experience and honesty from participating as intermediaries, since public money is involved.[161] Thus, it is essential to debar individuals that do not inspire public confidence in the stock market. The problem, however, with the 2008 Regulations is its over-proactiveness in disqualifying promoters and directors of an intermediary merely on the basis of a complaint instituted against them.[162] Further, the intermediary is required to promptly replace the individual so disqualified within 30 days.[163]

All of this places an undue burden on the promoter, director and KMP as well as the intermediary as a whole. The approach applied by SEBI in the formulation of these rules goes against the basic common law principle of the presumption of innocence.[164] The Supreme Court of India has held the presumption of innocence, in the context of a company, to be a "normative parameter" of general jurisprudence[165] as well as a fundamental human right.[166]

To illustrate how peculiar a pre-conviction disqualification approach is, even other regulators do not follow such excessively harsh criteria. Take, for example, the Reserve Bank of India's ("RBI") RBI (Fit and Proper Criteria for Elected Directors of PSBs) Directions, 2019.[167] The criteria laid down here only prohibit those individuals who have been removed or dismissed from government service on a charge of bribery or corruption, or have been convicted of an offence involving moral turpitude. The Companies Act, 2013 also does not follow such an approach, taking a very liberal approach to the appointment of directors. The Companies (Appointment and Qualifications of Directors) Rules, 2014[168] read with Section 164 only disqualifies individuals with a conviction or a declaration of insolvency or of unsound mind.[169] The Insurance Regulatory Development Authority of India also follows a post-conviction

[161] Dhaval Bothra & Akshat Jain, *Evaluating SEBI's Fit & Proper Test: Striking the Right Balance*, INDIACORPLAW (Last updated Aug. 2, 2023), https://indiacorplaw.in/2023/08/evaluating-sebis-fit-proper-test-striking-the-right-balance.html.
[162] SEBI (Intermediaries) Regulations, 2008, Sch. II, cl. 3(b).
[163] SEBI (Intermediaries) Regulations, 2008, Sch. II, cl. 6.
[164] Coffin v. United States (1895) 156 U.S. 432; Gurbaksh Singh Sibbia v. State of Punjab, 1980 AIR 1632; In Re Oliver, 1948 SCC OnLine US SC 31.
[165] Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603, ¶¶21.
[166] Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294.
[167] RBI (Fit and Proper Criteria for Elected Directors of PSBs) Directions, 2019, Reg. 4.3.
[168] Companies (Appointment and Qualifications of Directors) Rules, 2014, Rule 14(5).
[169] Companies Act, 2013, §164 (1).

approach to disqualification of directors and promoters.[170] SEBI's approach to appointment and qualifications is more the exception than the norm, it appears. The Advocates Act, 1960[171], the Chartered Accountants Act, 1949[172] and interestingly, even the Representation of the People Act, 1951[173] all provide for disqualification only upon conviction for specific offences.

Over-Inclusion of Personnel for Assessment

Another issue with the 2008 Regulations that has not been brought up in literature, but one that the author has found, is its over-inclusionary approach in identifying relevant persons to whom the Fit and Proper test applies. The long list of personnel mentioned in Chapter I are also longer than that of any other regulator. This puts more people that required under the scrutiny of a regulatory framework that is already disproportionate in its disqualification. Furthermore, while the Companies Act provides for a fairly simplistic definition of KMPs[174], SEBI's classification of individuals that are deemed to be KMPs are much broader. Under the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018, a KMP is defined to be[175] –

a) The managing director or executive director;
b) The head of a department or vertical and directly reporting to the managing director or to the directors on the governing board of a stock exchange or clearing corporation;
c) a person serving as the head of a core function;
d) a person who stands higher in hierarchy to the head of any department(s), handling core function(s) in a stock exchange or clearing corporation;
e) reporting officials of key management personnel; and
f) any person defined as a "key managerial personnel" under the Companies Act, 2013; and

[170] Guidelines for Corporate Governance for Insurers in India, INSURANCE AND REGULATORY DEVELOPMENT AUTHORITY OF INDIA, IRDA/F&A/GDL/CG/100/05/2016, May 18, 2016.
[171] The Advocates Act, 1960.
[172] The Chartered Accountants Act, 1949, Sch. I & 2.
[173] Representation of the People Act, 1951.
[174] Section 2(51) of the Companies Act, 2013 states –
'"key managerial personnel", in relation to a company, means—
(i) the Chief Executive Officer or the managing director or the manager;
(ii) the company secretary;
(iii) the whole-time director;
(iv) the Chief Financial Officer;
(v) (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
(vi) such other officer as may be prescribed;'
[175] Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018, Reg. 2(j).

g) any other person who is a key decision making authority at the level of a stock exchange or clearing corporation or its direct or indirect material subsidiaries.

Thus, with this overly broad definition (in relation to an intermediary with limited employees), the criteria laid down in the Regulations serve to become even more arbitrary and discretionary.

Lack of Market Knowledge Regarding Applicability

As mentioned earlier, SEBI's intermediary-specific regulations, such as the SEBI (Stock Broker) Regulations, 1992 and the SEBI (Merchant Bankers) Regulations, 1996 provide already for Fit and Proper Criteria for specific types of intermediaries. This becomes important considering that the 1992 Stock-Broker Regulations are updated only till 2004, when the 2004 Regulations were incorporated into these Regulations. Thus, compliance with one set of Regulations does not necessarily mean compliance with the other. This can cause immense problems for a prospective intermediary, that fulfills the Fit and Proper criteria under the intermediary-specific regulations, but not under the 2008 Regulations, causing an application to be rejected. This leads to unnecessary delays, an outcome which intermediaries have tried to avoid through the use of the Informal Guidance Scheme.

An analysis of various SEBI Informal Guidance Scheme Documents reveals that even today, there exists confusion as to whether, for example, a stock broker must comply with the Fit and Proper criteria under the 1992 Regulations or under the 2008 Regulations.[176] A lack of clarity regarding which regulations apply for intermediaries – the older, specific ones, or the newer, general regulations – was observed by the author in an Informal Guidance Scheme document as recently as in March 2023.[177]

This confusion is exacerbated by three reasons in particular –

1. SEBI replies to Informal Guidance Scheme queries resolve any possibility of conflict, and clarify that the Intermediaries Regulations, 2008 apply over all earlier regulations regarding

[176] *Informal Guidance sought by Muthoot Health Care Private Limited regarding eligibility criteria for Issue and listing of structured debt securities/ market linked debt securities*, SEBI (Last updated Mar. 14, 2023), https://www.sebi.gov.in/enforcement/informal-guidance/mar-2023/; Request for Interpretive letter under the Securities and Exchange Board of India Informal Guidance) Scheme, 2003 in relation to the SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992 the Brokers Regulations, SEBI (Last updated Feb. 26, 2010), https://www.sebi.gov.in/enforcement/informal-guidance/feb-2010/.

[177] *Informal Guidance sought by Muthoot Health Care Private Limited regarding eligibility criteria for Issue and listing of structured debt securities/ market linked debt securities*, SEBI (Last updated Mar. 14, 2023), https://www.sebi.gov.in/enforcement/informal-guidance/mar-2023/.

intermediaries, yet SEBI has never generally clarified the supersession or repeal of the earlier regulations;

2. Schedule IV of the Intermediaries Regulations, 2008 contains a list of amendments to certain other regulations, including the earlier specific regulations such as the SEBI (Merchant Bankers) Regulations, 1992, SEBI (Mutual Funds) Regulations, 1996 and the SEBI (Stock-Brokers) Regulations, 1992, causing greater confusion as to their applicability[178].
3. SEBI continues to list these earlier Regulations on their website as active regulations.

This shows a concerning lack of market knowledge regarding the applicability of the Intermediaries Regulations *vis-à-vis* other earlier regulations. Thus, it is not a conflict *in* laws, but confusion *regarding* them, that obfuscate the registration, governance and compliance requirements for stock market intermediaries. SEBI has clearly not done enough to clarify the applicability of the 2008 Regulations over the earlier ones.

ANSWERS TO RESEARCH QUESTIONS

Thus, from the above doctrinal research conducted, we answer our initial research questions as follows –

1. There is a severe lack of market knowledge regarding SEBI's '*Fit and Proper*' criteria as under the SEBI (Intermediaries Regulations), 2008;
2. SEBI has not done enough to clarify this regulatory uncertainty; and
3. SEBI's '*Fit and Proper*' criteria are excessively punitive and over-inclusive.

A JUDICIAL ANALYSIS OF THE '*FIT AND PROPER*' CRITERIA

From an adjudicatory standpoint, the Securities Appellate Tribunal ("SAT") and the Supreme Court have consistently sided with the Board in holding that the Fit and Proper criteria do not suffer from any vices. The subjective criteria for evaluation has been upheld by the SAT numerous times.

Regarding the subjective criteria of integrity, honesty, ethical behaviour, reputation, fairness and character, the Board expanded on this satisfaction criteria in *Jermyn Capital LLC, In re*

[178] SEBI (Intermediaries) Regulations, 2008, Sch. IV.

(2009)[179] and held that even a person who himself meets all the other objective criteria may be disqualified under the subjective criteria, if he is closely associated with someone of questionable character. The Board said –

"Good reputation and character of the applicant is a very material consideration which must necessarily weigh in the mind of the Board in this regard. Reputation is what others perceive of you. A person is known by the company he keeps. In the very nature of the things, there cannot be any direct evidence in regard to the reputation of a person whether he be an individual or a body corporate. In the case of a body corporate or a firm, the reputation of its whole time director(s) or managing partner(s) would come into focus."[180]

Similarly, in *Sahara Asset Management Company P. Ltd. v. Securities and Exchange Board of India (2017)*[181], the SAT held the majority equity shareholder, who owned around 80% of the Company, to be "*nothing but the alter ego of the Company*".

The SAT has even gone beyond the bare text of the Regulations and gone on to hold –

"it is amply clear that while considering any application for grant of registration/renewal as any intermediary, the applicant and also the persons who hold responsible positions in the applicant and are responsible for its activities and/or are in a position to influence the decision making process by virtue of their substantial shareholding in the applicant or ***otherwise****, have to pass the test of being a 'fit and proper person."*[182]

Even more vague notions of 'public mistrust' have been held as valid grounds for disqualification under the Fit and Proper Criteria.[183] The SAT has, more recently, gone to hold that the Fit and Proper criteria extend even to *"persons who hold responsible positions and are in a position to influence the decision-making process in the Company."*[184]

[179] Jermyn Capital LLC, In re, 2009 SCC OnLine SEBI 165.
[180] *Id* at ¶17.
[181] Sahara Asset Management Company P. Ltd. v. Securities and Exchange Board of India, 2017 SCC OnLine SAT 173.
[182] Altius Finserv Private Limited, In re, 2016 SCC OnLine SEBI 98.
[183] Parsoli Corp. Ltd., In re (Cancellation of Registration Certificate), 2013 SCC OnLine SEBI 156.
[184] Sahara Mutual Fund, In re (Cancelation of Certificate of Registration), 2015 SCC OnLine SEBI 419.

The wide, almost unfettered power of the Board has essentially been confirmed by SEBI in *Jermyn Capital LLC, In re (2009),* where it went on to hold – [185]

"The Board can take into account "any consideration as it deems fit" for the purpose of determining whether an applicant or an intermediary seeking registration is a fit and proper person or not. The framers of the Regulations have consciously given such wide powers because of their concern to keep the market clean and free from undesirable elements."

The adjudicatory wing of the Board, including the SAT, have refused to restrict the scope of these Regulations, regularly citing public trust and investor confidence to be of greater importance than any principles of proportionality or presumptions of fairness. Over the past 15 years, the ambit of the Fit and Proper has only broadened.

The criteria have been challenged so frequently post-COVID that SEBI had to temporarily put these criteria on hold.[186]

PROPOSED MODIFICATIONS IN THE '*FIT AND PROPER'* CRITERIA AND THE INTERMEDIARIES REGULATIONS, 2008

In 1997, Price Waterhouse Cooper recommended, in its Draft Report of the SEBI Committee for Certification, that instead of solely laying down merely subjective criteria for determination of a persons' fitness, *"every person irrespective of higher/professional qualifications should be required to pass the certification test prior to seeking employment with a capital market intermediary…"*.[187] This test certification, the Report proposed, should be made mandatory within 2 years of introducing the test on a voluntary basis.

This recommendation was, however, never implemented. The author suggests the implementation of this recommendation. An objective test would serve a long way to improve the quality of financial intermediaries and help prevent the issues that are most often cited as the reasons for imposing more punitive actions upon intermediaries.

[185] Jermyn Capital LLC, In re, 2009 SCC OnLine SEBI 165.
[186] Priyanka Gawande, *SEBI holds 'fit and proper' rule*, LIVEMINT (Last updated Jul. 6, 2023, 11:07PM), https://www.livemint.com/news/india/sebi-to-postpone-compliance-with-fit-and-proper-person-criteria-until-2-august-bombay-high-court-hears-11688665025392.html.
[187] PRICE WATERHOUSE COOPER, DRAFT REPORT OF THE SEEI COMMITTEE FOR CERTIFICATION, USAID: FIRE PROJECT 7 (1997).

Most importantly, SEBI must clarify the primacy of the 2008 Regulations over all others. One way to do this is via a general Circular issued to declare the supersession of all earlier intermediary regulations – similar to how the RBI de-notifies its earlier Circulars.[188] Another method could be by simply taking down the earlier regulations from its list of active regulations from the SEBI website. Either of these two approaches can bring some much-needed certainty that financial intermediaries face while trying to register and secure compliance over their business.

Another suggestion would be to borrow from the UK's Financial Conduct Authority's practices and formulate a comprehensive to determine the honesty, integrity, and reputation of individuals that are to be appointed as directors and promoters of intermediaries. In the UK, pending criminal proceedings are considered as part of a holistic evaluation of a proposed candidate, but are not an automatic ground for disqualification.[189] This recommendation is also in line with the guidelines issued by the International Organization of Securities Commissions (IOSCO), which the SEBI is part of but whose guidelines it has still not incorporated.[190]

Lastly, SEBI must amend its Fit and Proper criteria under Schedule II of the 2008 Regulations and restrict the overly broad ambit of both the persons classified as KMPs, as well as the subjective criteria enumerated in Clause 3(a) of the Second Schedule.[191]

CONCLUSION

Thus, an analysis of the Fit and Proper criteria under the 2008 Regulations answers our research questions. The Regulations are overly punitive and disproportionate, over-inclusive and cause confusion with the existing SEBI framework on intermediary regulations. In no other field are promoters and directors subject to more scrutiny than in the Securities market, and while this should indeed be the case. Furthermore, judicial interpretation of these criteria has made them even broader than they were originally intended to be.

[188] *See*, for example, the RBI Master Direction on Outsourcing of Information Technology Services, 2023.
[189] FINANCIAL CONDUCT AUTHORITY, FIT AND PROPER TEST FOR EMPLOYEES AND SENIOR PERSONNEL SOURCEBOOK 27 (2023).
[190] *Supra* note 11.
[191] *Ibid.*

The only foreseeable and workable solution would be to restrict the criteria by amending the bare provision itself, since adjudication and interpretation has only made it worse for intermediaries. Conformity with IOSCO standards and implementing the best practices of other countries, including an objective test and scoring criteria to improve the quality of our financial institutions is essential to this process of reform.

It is telling that in a country like India, even politicians are elected representatives are not held to as high a standard as the CEOs and MDs of stock market intermediaries.

The Duality of AI Advancement: Balancing Progress and Privacy Rights

Dr. Vinayaka K[192]

Anusree. S[193]

ABSTRACT

Artificial intelligence is when a machine has an equivalent degree of cognition as a person. These artificially intelligent devices can react to and evaluate their surroundings, just like any other human, and take appropriate action. It gathers data surrounding it and can make judgments per that data. Even though an artificial intelligence system appears to be beneficial at first glance, it poses a threat to an individual's right to privacy.

Big Data Analytics and the Internet of Things are propelled by AI. Despite offering certain benefits to consumers, their primary duties at the moment are to collect personal data, develop in-depth behavioural profiles, and promote their agendas and products. The principal casualties of AI's capacity to affect political and economic decisions are confidentiality, security, and agency.

The research attempts to analyse the invasion of privacy by artificial intelligence and its negative implications in this context. Even the government has incorporated AI techniques under the preteens of the greater good, which calls into question their actions. On a national as well as an international level, scarcely any regulation governs these issues. The article focuses on India and the fact that there is now no regulation to safeguard an individual's privacy. It is past due for India to pass comprehensive privacy laws in light of the Supreme Court of India's ruling that the right to privacy is a fundamental, but non-absolute, right under Article 21 of the Indian Constitution.

INTRODUCTION

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The way we live has been drastically altered by the technological revolution, particularly the use of artificial intelligence, in ways that were previously unimaginable or unperceivable. Due to advancements in data collecting and aggregation, analytics, and computing power, intelligent machines now allow for high-level cognitive functions including thinking, perceiving, learning, problem-solving, and decision-making. These technological advancements have permeated every aspect of our lives and have become ubiquitous. We are living through the fourth revolution, which has given rise to the "tech community". The following Data analytics, Artificial Intelligence ("AI"), cognitive technologies, and the Internet of Things are just a few examples of the technologies that have come together throughout the Industrial Revolution.

There is an urgent need for the Indian Government to adopt a strategy for the development of AI since the artificial intelligence revolution is developing quickly in India and has the potential to revolutionize the economy. It has been observed by Brian Householder that, "*Recording everything is starting to take form. Automation, artificial intelligence, the Internet of Things, deep learning, and other contemporary technologies can instantly gather and analyse enormous volumes and kinds of data, giving us access to previously unthinkable volumes and kinds of knowledge. Our task is to shift from each phase to the next, changing how we believe train, and engage with data to create worth 8 through the discoveries made possible by sophisticated technology".*[194]

In addition to ushering in a new era in computing, advances in AI also pose unprecedented threats to societal ideals and constitutional rights. The Internet of Things and social media algorithms both pose severe privacy concerns. The considerably larger risk that AI poses to democracy is overlooked. As it reaches every aspect of our lives, artificial intelligence is going to have an influence that outweighs even the growth of the internet. Many AI applications that are currently popular are Natural language processing, speech recognition, and self-driving cars. Other examples, such as content analysis, medical robots, and autonomous warriors, are less well-known but are being used more often. These technologies have the ability to extract insights, from data. The goal of AI is to reduce information uncover meaning and take actions

[194] *The Fourth Industrial Revolution is here—are you ready?*, DELOITTE, https://www2.deloitte.com/content/dam/insights/us/articles/4364_Industry4-0_Are-you-ready/4364_Industry4-0_Are-you-ready_Report.pdf (last visited April 21, 2025).

ideally surpassing the accuracy and outcomes that humans can achieve on their own. Machine intelligence is a tool for problem solving. Has the potential to generate new challenges.

The digital era has disrupted standing societal structures and customs that have evolved over thousands of years. Principles like independence, democracy, and privacy protection are given top priority in these systems. Based on these foundations, liberal democracy emerged as a dominant system in human history throughout the first half of the century. People became aware of developments that may lead to human prosperity around the end of the 20th century.

Through the ability to simulate human cognitive processes and make decisions on their own through data analysis, machine learning has advanced over the past few decades. The Internet of Things (IoT) and Big Data Analysis are two domains where this technology has found use. It is involved in data collecting, behaviour analysis, profiling, and customised advertising. Concerns about personal agency, security precautions, and privacy protection surface even as AI increases efficiency and customisation possibilities.

THE PREMISE OF PRIVACY

The idea of privacy has been discussed throughout history, going all the way back to. Instances when invasion of privacy was denounced and considered a breach are highlighted in a number of texts, including the Bible and the Code of Hammurabi. Privacy was valued in ancient societies such as Hebrew society, Greece, and China.

Because it depends on so many variables, including context, environment, and social conventions, defining “privacy” may be difficult. In certain nations, protecting information is sometimes referred to as both privacy and data protection.

The idea of privacy stems from the distinction, between what's considered “private” and what is deemed “public” which helps establish boundaries between oneself and the outside world. Justice Louis Brandeis initially defined privacy as an individual’s right to be left alone ensuring protection against disclosure of facts, ideas, emotions and more. In his book titled “Privacy and Freedom” Alan Westin emphasized that people have the freedom to choose how much of themselves their opinions and their actions they wish to disclose to others. Privacy

encompasses aspects such as the right to solitude limited constraints on ones behaviour confidentiality control over information, individuality and intimacy. According to Ruth Gavisons definition, secrecy, anonymity and solitude are the three components of privacy. Violations of an individual's right to privacy can occur either voluntarily or involuntarily based on their actions.

THE IMPACT OF AI AND DIGITAL GOVERNANCE ON PRIVACY

Despite having an established data protection law in place India has witnessed a rise in criminal activities and vulnerabilities in data security with the introduction of AI and digital governance practices. As AI dominates cyberspace without data protection regulations being implemented simultaneously with leadership initiatives taken by governments or organizations alike; cyber fraud incidents as well, as unauthorized sharing of private information are increasing.

When you search for products, consumer goods or resources online you often experience a flood of calls and messages inundating your email and mobile device. whenever a user shares confidential data on Twitter, Facebook, WhatsApp to communicate etc. AI is able to quickly recognise all the data, and advertisers process it in a different way. This is an assault on both private and digital privacy. Digital oversight and machine learning are related to information technological law, as evidenced by the way they interact. Hence, a single component of digital administration may be argued to be computational intelligence. India is making effort to create regulations at the perfect time to enable the positive activation of its computer vision technology. Currently, it is quite tough to determine whether the fundamental components of a regulatory system designed to bring the best out of internet to manage the equitable utilisation of intelligent machines will be. In the fields of wellness, food production, interaction, also education, artificial intelligence will without a doubt improve efficiency of operation and lessen suffering among people by decreasing the weight of human labour. However, the country additionally faces numerous obstacles in terms of online government and cybersecurity. The connection between artificial intelligence as well as data information and its role in internet democracy is thus clear.[195]

THEORETICAL IMPLICATIONS OF AI FOR THE JUSTICE SYSTEM

[195] NITI AYOG, GOV'T OF IND., TOWARDS RESPONSIBLE AI FOR ALL (2021), https://niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf.

AI refers to the capabilities of digital computers or robots to carry out activities normally done by intelligent humans. Artificial intelligence has a significant impact on many facets of our lives. AI is being used in many businesses, including those in the transportation, healthcare, education, and entertainment sectors. With the application of machine learning algorithms, medical care and research are experiencing a radical revolution. These technologies are being employed in order to speed up the detection of skin cancer and find high-impact compounds for therapeutic development. According to a new McKinsey analysis, automation might soon replace 45% of all labour functions.[196]

The advancement of AI technology offers opportunities for solicitors to increase productivity, save expenses, and concentrate on more strategic tasks. Automating routine tasks such as data analysis, document and contract examination, and legal research is possible using AI. Over time, this could increase the productivity and profitability of legal companies. But AI is still unable to perform more complex tasks including deal structure, negotiation, lobbying, and court representation. As a result, employing AI can help law firms bill for less hours worked. It could be difficult for smaller organisations to keep up with the cost of technology and remain cost-effective, while larger corporations might have the means to use AI systems.

The Supreme Court has been sorting through material since 2021 and sending it to justices for decisions using AI-controlled devices.

It has little effect over decisions; it simply observes them. A further instrument used by the Supreme Court of India is SUVAS (also known as Supreme Court Vidhik Navaid Programme), which reads paperwork from Language into local languages and vice versa.

AI has many potential benefits for society, including improvements in healthcare, education, transportation, and entertainment. However, there are challenges and risks associated with AI, such as ethical dilemmas, privacy violations, bias, discrimination, and security risks.

A global coalition of data scientists and AI experts has developed a framework to ensure the development of AI products in response to these risks and obstacles. The World Ethical Data

[196] Micheal Chui, James Manyika, and Mehdi Miremadi, *Where machines could replace humans-and where they can't (yet)*, MCKINSEY & CO. (Jul. 8, 2016), https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/where-machines-could-replace-humans-and-where-they-cant-yet.

Foundation ("WEDF") is proud to have 25,000 members, including staff members from IT giants like Samsung, Google, and Meta.

But as AI is used more and more, the need for laws governing its use, eliminating biases or ingrained prejudices, and successfully addressing ethical issues related to its application is growing.

Countries like the UK, USA and EU have already put forth papers, guidelines and policies that specifically focus on assessing the impact of algorithms and eliminating biases. Recently amended by the European Parliament, the proposed Artificial Intelligence Act aims to restrict the use of AI technology in surveillance. However there are exceptions for law enforcement with court approval. For disclosing AI generated content produced by AI systems, like ChatGPT.

THE INDIAN CONTEXT

In India there are currently no regulations, in place to govern intelligence. The Ministry of Electronics and Information Technology ("MEITY") serves as the agency for AI related initiatives and has established committees to develop a policy framework, for AI.

The NITI Ayog has identified seven ethical artificial intelligence tenets security and privacy, openness, responsibility, fairness, inclusion, and equality of opportunity, reliability and safety, and the safeguarding and maintenance of healthy values that people hold dear. A constitutional obligation requires the Supreme Court and higher courts to uphold basic rights, particularly the right to privacy. The Information Technology Act and its governing regulations serve as India's principal data protection laws. In addition, MEITY has presented the Digital Personal Data Protection Bill, which is yet to be officially enacted. If this measure is passed into law, people will be able to find out what information about them has been gathered by both private and public organizations, as well as how that information has been processed and stored.

CHALLENGES

Confidentiality and data privacy:

Large volumes of data are often used by AI systems to learn and predict the future. Sensitive information like financial or personal data may be present in such data. Organizations may have trouble adhering to data protection rules if AI algorithms that need this kind of data to learn are used.

Bias in AI systems:

Inherent prejudice in AI systems during education may show up in the results. AI outputs may merely replicate present societal and historical inequalities based on race, caste, gender, and ideology, leading to results that do not accurately reflect competence.

Licensing and questions regarding accountability:

AI systems may not be held to the same ethical standards and professional norms of conduct as qualified attorneys because they are not required to get a license in order to practice law. Even while judges still have the last say in all cases, using AI in the judiciary is an issue. Due to automated bias, it is common to grow unduly dependent on technology-based advice.

AI: NOT A REPLACEMENT FOR LAWYERS

Several different organisations; such as lawyers, have performed extensive research on AI. A lot has been researched concerning the likelihood of artificial intelligence replacing human solicitors. Although AI may be useful in particular tasks such as checking documents or doing legal researches, it cannot understand things and make intelligent comments without humans. Actually, AI would enhance legal practitioners' capabilities by enabling them to concentrate on difficult jobs, thereby providing them with data informed knowledge for better choices making.

The intelligent technology is not meant to substitute lawyers. Despite the fact that AI can be used to analyse data, predict results, and structure law, a lawyer's role is essential for making sound judgments in accordance with the court's expectations. Contextuality and sophistication of AI cannot match those of a human lawyer, mainly because laws are dynamic.

For decades, "artificial intelligence," commonly abbreviated as "AI", has been a popular term used in various industries. While artificial intelligence can assist with legal work and increase

productivity within the sector, it is not capable of replacing the independent mind and reasoning which a genuine lawyer brings along the table.

However, it's important to recall that AI doesn't intend to take place of the lawyers. Yes, technology might be useful in some instances and bring up some insights but when it comes to complex understanding and decisions, the legal profession cannot be automated. Instead, AI can help make legal practitioners more effective through faster operations and valuable data processing.

CONCLUSION

While it's evident that AI has the potential to drastically alter India's judicial system, it's important to consider the ethical and practical implications of this. The integration of AI into the legal system may have the benefit of expediting and enhancing the efficiency with which legal disputes are resolved. It runs the risk, though, of exacerbating the system's ingrained prejudices and impairing judicial discretion.

AI is driving a trend towards legal automation in India. Judges and solicitors are developing new uses for AI as technology develops, which has increased the effectiveness and accuracy of the judicial system. Naturally, there have been difficulties in incorporating AI into the legal system. The primary barrier is the conflict between upholding the law and employing AI to increase access to justice.

Although AI is going to have an influence on every area of life for individuals in the future, it also raises certain worries about the security of information. However, there has been a tonne of investigation being done utilising AI to entirely safeguard your confidential, private, and crucial data.

A Critical Analysis of Constitutional Aspects on IPR

Austin V Zachariah[197]

ABSTRACT

The Indian Constitution outlined a number of rights, including freedom and fundamental rights. It also established economic, social, and political fairness for all citizens. The Indian Constitution does not officially recognize Intellectual Property Rights as Property Rights, but it also does not expressly exclude them from the definition of Property Rights. Individuals are given the freedom to publish their own books, and doing so is currently protected by the Indian Constitution. Any copyright violation is subject to the morality-based prohibition set forth in Article 19(2) of the Constitution. The right to trade or conduct business includes the right to protect against infringement on the company's trade name and goodwill built up through trade or business. The right of customers to know about products, their origins, and services is also protected by trademarks and geographical indications. The Indian Constitution guarantees protection for property rights, including intellectual property rights, and it also upholds the fundamental rights outlined in Parts III and IV. The paper would help the readers understand the history of IPR as to how certain acts came into force pre-independence and after certain conventions and treaties then would explain some key provisions through which IPR exists in the constitution as it is hard to pinpoint which are the provisions that deal with IPR. The paper would proceed to highlight what all things qualify to come under IPR as well as how would it thrive when it is a fundamental and constitutional right in various countries under various provisions and treaties.

Keywords: IPR, Fundamental rights, Constitutional rights, trademark, copyright.

RESEARCH QUESTION

Q1 Whether is intellectual property mentioned in the Constitution of India?

Q2 Whether there are provisions in the Indian Constitution that highlight the presence of IPR?

STATEMENT OF PROBLEM

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This research paper would explain what is IPR and what are the provisions in the Constitution that deal with IPR because if the readers are not aware of these provisions then they wouldn't be able to identify how copyright (example of IPR) can be protected with relevant articles from the Constitution. Then the paper would explain how pre-constitutional acts of the IPR came into force with relevant provisions from the constitutions.

INTRODUCTION

India and intellectual property have a long history that dates back to the Indus Valley Civilization's early years. Evidence indicates that town planning, the entertainment industry, music, and other activities were highly prevalent in the ancient past, particularly during the Indus Valley Civilization era. Trademarks were also used to distinguish the products of the makers from one another. In the current market, trademarks and other intellectual property are mostly employed by rival companies to distinguish their products from one another. It is safe to claim that the concept of protecting one's product or service from competition has been prevalent in India from the beginning of time.

When George A. DePennings[198] submitted the first patent application in India in the year 1856, the British Empire implemented the British Patent Act, of 1852[199], which later resulted in the creation of Act VI of 1856. This was the first time that intellectual property law had been widely accepted in India. The Indian Constitution's recognition of intellectual property as property is imprecise and confusing. The Indian Constitution does not explicitly recognize the intellectual property as property, but it also does not out rightly deny it either. If the definition of "property" in the Indian Constitution is examined, it could be any tangible property, but it also has a far broader definition. However, it does indirectly contain intellectual property. The Indian Constitution had included the "Right to Property" as a fundamental right in Article 19 (f)[200], but the 44th amendment later replaced it. However, the addition of another Article, namely, Article 19(f), did not result in the "Right to Property" being abolished. Through the 44th Amendment, Article 300A converted it from a fundamental right to a constitutional right, and as a result, any legislation that violated the constitutional "Right to Property" could no longer be directly challenged in the Supreme Court but instead had to go through the High

[198] Deepseng Shyam, *Constitutionality aspect of Intellectual Property Rights in India*, THE LAW BLOG (Dec. 29, 2016), https://thelawblog.in/2016/12/29/constitutional-aspect-of-intellectual-property-rights-in-india/.
[199] Patent Law Amendment Act 1852, 15 & 16 Vict. c. 83 (UK).
[200] INDIA CONST. art. 19, cl. (f).

Courts. However, as intellectual property is a type of property, it can be included in the definition of property under Article 300A and be given a legal right.

The United States Constitution, in contrast to the Indian Constitution, expressly protects intellectual property (Article 1(8) of the U.S. "To promote the growth of science and useful arts, by providing for authors and inventors the exclusive right to their respective writings and discoveries for a certain period of time" is stated in the Constitution). However, the Indian Constitution does not have a clause addressing intellectual property. This means that laws pertaining to intellectual property may be passed without being constrained by the Constitution, even though the intellectual property does not have a special standing under the Constitution.

WHAT EXACTLY IS IPR?

When used literally, the term "intellectual property" refers to things that result from the application of the human mind, or things that are the result of a person's intellectual labour. The two main components are the writers' writings and the inventors' creations. The phrase "Intellectual Property" is used to refer to a variety of creative abstractions, including ideas, concepts, and know-how, as well as the literary, artistic, or mechanical manifestations that represent these abstractions. The main distinction between this type of property and others is that intellectual property places more emphasis on the results of the mind than it does on the actual product. For instance, in a literary property (copy right), the intellectual creation—which includes ideas, conceptions, sentiments, and other thoughts set in a certain form—is what is protected and is referred to as property.

Traditionally, only a small number of things fell under the umbrella of intellectual property. Currently, intellectual property includes copyright, designs, patents, and trademarks. But a lot of new goods have been added to this area as a result of the advancement of the arts, sciences, and technology.

PROVISIONS IN THE CONSTITUTION THROUGH WHICH IPR CAN BE BROUGHT IN OR IS RECOGNIZED

The Indian constitution's preamble recognizes economic liberty as one of the most essential freedoms and permits mixed economies. The property system has been used to guarantee this.

If the definition of "property" in the Indian Constitution is examined, it could be any tangible property, but it also has a far broader definition.

It is Article 253[201] of the Indian Constitution, which mandates the recognition of the international nature of laws, legislations, and agreements and gives the Indian parliament the authority to enforce international treaties through the legislative process, which plays a significant role in the context of intellectual property rights. Article 300A[202] of the Indian Constitution provides constitutional safeguards against the unlawful taking of property. A specific clause in Article 372 [203]also recognizes the pre-constitutional legislation as valid, provided that certain conditions are met. For example, Article 372 (1)[204] states that: "Nothing withstanding the repeal all the laws in force in the territory of India immediately before the commencement of this constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority" so through the above statement, we can infer Thus, it was because of these articles that pre-constitutional intellectual property rights laws came to be in effect in India and for Indian legislation to accept a number of international treaties on intellectual property laws. For example, if there was an act that was there before the commencement of the constitution then article 372(1) of the constitution had the power to authorize the legislature or any competent body to repeal, alter or amend the pre-constitutional laws.

One such example is how Article 372 (1) of the Indian Constitution led to the repeal of the 1911 Patent Act and the adoption of the current Patent Act, 1970. The majority of current intellectual property laws are also impacted by other international laws; for example, the current patent rules are a product of the Budapest Treaty, TRIPS Agreement, UN Convention on Biodiversity, and other international agreements. Further, we can see that the Indian Constitution's recognition of intellectual property comes from the reference to the intellectual property system in the Constitution's entries. Rightfully, Entries 12, 13, and 14 were included in List 1 of the 7th Schedule of the Indian Constitution. List I entry 49 is the one that has been specifically and solely committed to the intellectual property system. Only trademarks, designs, patents, and other intellectual property are recognized by Entry 49. The concepts of traditional

[201] INDIA CONST. art. 253.
[202] INDIA CONST. art. 300A.
[203] INDIA CONST. art. 372.
[204] INDIA CONST. art. 372, cl. (1).

knowledge, biodiversity, geographical indicators, and other intellectual property rights are not acknowledged, although they can be incorporated into the current one. If we examine entry 97 of List I, which stated that "any other matter not specified in List II or List III, including any tax not specified in either of those Lists", we see that Article 248 [205]states that "the legislature has the sole authority to make any laws with respect to any matter not specified in the concurrent List or State List". Since the Indian Constitution recognizes traditional knowledge as intellectual property, it is safe to presume that it can be incorporated alongside other intellectual properties.

IPR AS A CONSTITUTIONAL RIGHT UNDER OTHER CONSTITUTIONS AND TREATIES AND DECLARATIONS

The ability to "advance research and useful arts" was granted by the United States Constitution in Article 1, Section 8, Clause 8[206], which granted inventors a limited but exclusive right to discover. This refers to Section 310[207], which provides equal protection for trademarks and copyrights under the trade clause. The American Constitution and the country's geographical integrity are the foundations of IP law. An author's artistic creation that is produced for commercial purposes and, in theory, belongs to the creator, is one of the fundamental characteristics of copyright as a property in the meaning of the constitution.

At the level of the European Union ("EU"), where the EU Charter of Fundamental Rights serves as the foundation for a new "constitutional" power, the so-called "constitutionalization" is already taking place. There is no doubt that society values the right to the protection of intellectual property, especially the freedom of expression. The constitutional provisions would also assist in ensuring that the core ideas behind intellectual property rights are fully upheld because, in the current context of the European Union, enacting new laws is becoming an increasingly difficult task Moreover, it tries to safeguard intellectual property rights and uphold the value of integrity.

It can be inferred from Article 27 of the "Universal Declaration of Human Rights"[208] that Each person must have the right to defend of his or her moral and material interests from every

[205] INDIA CONST. art. 248.
[206] U.S. CONST. art. I, § 8, cl. 8.
[207] United States Trade Act, 1974, § 310.
[208] Universal Declaration of Human Rights art. 27, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.

scientific, literary, and creative achievement. The "International Covenant on Economic, Social, Cultural Rights 1966"[209] which is an international agreement binding on its member nations repeated this very section from the "Universal Declaration of Human Rights" which kind of implies or acknowledged IPR as a fundamental right.

It can be argued that the right to own intellectual property rights, and more specifically copyright, is an accepted fundamental right that is embodied in the Universal Declaration and the International Covenant (along with the International Covenant on Civil and Political Rights, both of which were adopted in 1966). South Africa is a party to the International Covenant even if it did not support the Universal Declaration. The Constitutional Court held in the Certification case that the "right to own intellectual property was not generally recognised as a fundamental right and that it was not required to be recognised under the South African Constitution" when asked to rule on the constitutionality of the South African Constitution as part of the process of its adoption, checking if the constitution of South Africa has universally accepted principles.

The court argued that since intellectual property is a type of "property" that is covered by section 25 of the Constitution[210], it was unnecessary to address it separately in the Bill of Rights (South African Constitution) but through a thorough reading we can see that the court's defense was very unsatisfying as the section's protection of the intellectual property is very restricted and is primarily confined to avoid the removal of existing property and in the case of *Laugh it Off Promotions CC v. The South African Breweries International*[211] the court held that the concept of the estate also includes intellectual property under article 25 of the South African Constitution and it also held that trademarks are also property even if they are tangible or intangible.

CONCLUSION

There is just an issue the term property coming under Article 300 should be understood properly by the readers and should understand whether it includes Intellectual properties or not. How would you know if clinical experimental data would be considered as intellectual property or which concept of property does it come under In the case of Entertainment Network

[209] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[210] SOUTH AFRICA CONST. art. 25.
[211] Laugh It Off Promotions CC v. S. Afr. Breweries Int'l (Fin.) BV, [2005] ZACC 7 (South Africa).

India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)[212] the supreme court held that along with any human rights attached to the property, possession of any copyrights must be viewed in the context of the values outlined in Article 19(1)(g) of the Constitution. The judgment further goes on to say about how the right to property is not a constitutional right but it also states that Even "clinical trial data" gathered after thorough testing is likely to fit within the scope of "property" as allowed for in Article 300A, as evidenced by the Supreme Court's agreement that "copyright" falls within the scope of Article 300A[213].

[212] Entertainment Network (India) Ltd. v. Super Cassette Indus. Ltd., (2008) 13 SCC 30 (India).
[213] INDIA CONST. art 300A.

Adultery Decriminalisation in India: A Socio-Legal Study in the Light of Joseph Shine vs Union of India

Deven Choukhani [214]

ABSTRACT

The act of having sexual relations with someone who is not their spouse, or adultery, has long had a negative impact on Indian culture and the legal system. India's history includes a patchwork of colonial influences, changing social mores, and an ongoing struggle between modernity and tradition. This essay will examine the evolution of adultery laws in India, the discussion around their legalisation, and the enduring social attitudes associated with it.

Keywords: Adultery, Crime, Joseph Shine, Morality, Divorce, Spouse.

INTRODUCTION

Adultery, the voluntary sexual intercourse between a married person and a partner other than their legal spouse, has long been both socially condemned and legally punished in many societies. In India, this condemnation found legal sanction in Section 497 of the IPC, 1860, which criminalised adultery in a gender-biased manner. The provision treated the woman as a passive object and conferred prosecutorial rights exclusively to her husband, thereby reinforcing patriarchal assumptions.

The fact that adultery was first made a criminal penalty is clear evidence of the British influence on Indian law. This idea was codified, albeit with some bias, in Section 497[215] of the Indian Penal Code, which was drafted in 1860. Women were not seen as criminals, even if males may face legal action for having an extramarital affair with a married woman without her husband's approval. The patriarchal beliefs, which continue still to this day, usually convey that a woman's faithfulness to her husband directly affected his honour and property rights, were represented in this.

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[215] The Indian Penal Code, 1860, § 497, No. 45, Acts of Parliament, 1860 (India).

Section 497 was kept in place in India after independence despite growing feminist movements and changing social norms. Adultery was further entwined with marriage via the Hindu Marriage Act of 1955[216], which established it as a basis for divorce. However, the terms were different for men and women, underscoring the continued discrimination against women. Only in 1976, with the passing of the Marriage Laws (Amendment) Act[217], did adultery become a legal basis for divorce for either party. Adultery was still riddled with legal and social approval, however. Growing resistance was encouraged by the law's discriminatory nature, the possibility of being abused against women, and incompatibility with contemporary notions of privacy and human autonomy. The Supreme Court's historic 2018 ruling in the J*oseph Shine v. Union of India* case[218] resulted from a petition filed in 2017 challenging the legality of Section 497. Due to the law's disregard for modern morality and violation of fundamental rights, the court overturned it and decriminalised adultery.

STATEMENT OF PROBLEM

The decriminalization of adultery in India, as pronounced in the landmark case of J*oseph Shine v. Union of India*, marks a significant legal and societal shift. While the judgment acknowledges the importance of individual autonomy and privacy, it raises many socio-legal questions that warrant thorough investigation. This study explores the implications of adultery decriminalization, examining its impact on prevailing societal norms, relationships, and the legal framework.

RESEARCH QUESTIONS

The then CJI of India clarified that the Hon'ble Court should deal only with the constitutional validity of § 497 I.P.C. and § 198 CrPC. and the court formulated the following issues:

1. Whether § 497 and § 198 are violative of article 14 of the Constitution?
2. Whether § 497 and § 198 are violative of article 15 of the Constitution?
3. Whether § 497 and § 198 are violative of article 21 of the Constitution?
4. Whether adultery should be treated as a crime even after changing the definition of adultery to a gender-neutral one.

[216] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).
[217] The Marriage Laws (Amendment) Bills, 1976, No. XXII of 1976.
[218] Joseph Shine v. Union of India, 2019 (3) SCC 39.

RESEARCH OBJECTIVES

1. To examine the societal impact of adultery decriminalisation in India post-Joseph Shine v. Union of India by assessing changes in attitudes, perceptions, and stigmas surrounding extramarital relationships, with a specific focus on the evolving dynamics of marital relationships and family structures.

2. To analyse the legal consequences and implications of the Joseph Shine judgment on the protection of individual autonomy and the right to privacy in personal relationships, evaluating how the legal reform has influenced the interpretation and application of adultery laws in India and identifying challenges and opportunities presented to the legal system.

RESEARCH METHODOLOGY

This study employs a doctrinal research methodology, primarily relying on analysing legal texts, court judgments, statutes, and scholarly literature relevant to decriminalising adultery in India following the landmark case of Joseph Shine v. Union of India. The research will involve an in-depth examination of legal documents, including the judgment itself, related case law, and legislative provisions pertinent to adultery laws in India.

HISTORICAL AND LEGAL BACKGROUND OF SECTION 497 IPC

Colonial Legacy and Patriarchal Design

Section 497[219] of the IPC was drafted by Lord Macaulay and enforced in 1860. It stated:
"*Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of adultery*."

This provision criminalised only the man involved in an extramarital relationship with a married woman. The woman herself could neither be prosecuted nor sue her adulterous husband's partner. The law reflected a feudal, patriarchal view of marriage where women were regarded as the property of their husbands. Their consent or agency was not legally acknowledged.

[219] The Indian Penal Code, 1860, § 497, No. 45, Acts of Parliament, 1860 (India).

Post-Independence Judicial Endorsement

Despite the advent of a liberal-democratic Constitution in 1950, Section 497 remained untouched for decades. Challenges to the law were repeatedly dismissed. In *Yusuf Abdul Aziz v. State of Bombay*[220], the court upheld the constitutionality of Section 497, citing Article 15(3)[221], which allows special provisions for women. Later in *Sowmithri Vishnu v. Union of India*[222], the court again declined to strike down Section 497, reasoning that extending the scope of the law would "*create more problems than it would solve.*" This judicial reluctance exposed the courts' hesitance to interfere with prevailing social morality.

Adultery as Ground for Divorce

The Hindu Marriage Act, 1955[223] incorporated adultery as a ground for divorce. Originally, only a wife had to prove that her husband committed adultery and treated her with cruelty. The 1976 Marriage Laws (Amendment) Act made adultery a valid ground for divorce for both spouses. While the provision shifted within matrimonial law from a moral to civil wrong, criminal law continued to treat it as a public wrong—a contradiction that remained unresolved until Joseph Shine.

SECTION 497 IPC AND SECTION 198 CRPC: A GENDERED LEGAL PERSPECTIVE

Section 497 of the Indian Penal Code, 1860, read with Section 198[224] of the Code of Criminal Procedure, 1973, was emblematic of the patriarchal underpinnings of colonial criminal law in India. The law stated that any man who had sexual intercourse with a married woman, without the consent or connivance of her husband, was guilty of adultery. The woman, regardless of her willingness or participation, was not considered punishable under this section.

This provision treated women as dependents, without legal agency or sexual autonomy, effectively implying that their choices were to be mediated by their husband's will. The assumption underlying Section 497 was that a married woman could not make independent

[220] Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321.
[221] INDIA CONST. art. 15(3).
[222] Sowmithri Vishnu v. Union of India, AIR 1985 SC 1618.
[223] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).
[224] The Code of Criminal Procedure, 1973, § 198(2), No. 2, Acts of Parliament, 1974 (India).

decisions about her sexual life and that her infidelity was primarily an affront to the husband's honour.

Moreover, Section 198 of the CrPC added another layer of gender bias by stipulating that only the aggrieved husband could file a complaint in cases of adultery. Women had no such corresponding right to prosecute their husbands for similar conduct, reinforcing the asymmetrical treatment of genders. The law's language and implementation underscored the notion that a woman was her husband's property, and any violation of that "property" by another man constituted a criminal breach.

This asymmetry was not just legally problematic but also socially regressive. It entrenched gender stereotypes by legally endorsing the idea of male dominance and female subordination. In Joseph Shine, the Supreme Court correctly observed that this formulation failed the constitutional test of equality and dignity under Articles 14[225] and 21[226].

JOSEPH SHINE V. UNION OF INDIA (2018): CASE OVERVIEW

Facts and Petition

Joseph Shine, a non-resident Keralite, filed a writ petition under Article 32 of the Constitution challenging the constitutionality of Section 497 IPC and Section 198(2) CrPC. The petitioner argued that the law violated Articles 14, 15, and 21 of the Constitution by discriminating on the basis of gender, denying equality before law, and infringing upon the right to privacy and dignity.

Key Constitutional Issues

The Hon'ble Court framed the following questions:

1. Whether Section 497 IPC and Section 198(2) CrPC violate Article 14 (equality)?
2. Whether they violate Article 15 (non-discrimination)?
3. Whether they violate Article 21 (personal liberty)?
4. Should adultery remain a criminal offence, even if gender-neutral?

The Verdict

[225] INDIA CONST. art. 14.
[226] INDIA CONST. art. 21.

The Constitution Bench comprising CJI Dipak Misra, and Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra unanimously struck down Section 497 IPC and Section 198(2) CrPC as unconstitutional.

Key observations:

Article 14: The law was manifestly arbitrary. It treated women as victims and not as persons with agency.

Article 15[227]: The exemption of women from punishment did not serve the purpose of "special provisions." It reinforced stereotypes.

Article 21: The right to privacy, recognised in *Puttaswamy v. Union of India*[228], includes decisional autonomy in intimate matters. Criminalising consensual sexual relationships between adults violates this right.

Justice Chandrachud powerfully observed: "*Section 497 is a codified rule of patriarchy. Society has no business to interfere in the private lives of individuals*."
Justice Indu Malhotra added: "*The law perpetuates gender stereotypes and paternalistic notions which are outdated and unconstitutional*."

CONSTITUTIONAL MORALITY VS. SOCIAL MORALITY

Defining Constitutional Morality

Constitutional morality refers to adherence to the core principles of the Constitution—justice, liberty, equality, and fraternity—over and above prevailing social norms. It empowers courts to interpret laws in alignment with the transformative vision of the Constitution.

In *Navtej Singh Johar v. Union of India*[229], the court held that laws rooted in societal morality, like Section 377[230] IPC (which criminalised homosexuality), must yield to constitutional morality.

[227] INDIA CONST. art. 15.
[228] Puttaswamy v. Union of India, (2017) 10 SCC 1.
[229] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[230] The Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

Similarly, in Joseph Shine, the court held that the state cannot impose a particular vision of morality through penal provisions. Marriage, being a private contract, should be governed by civil law, not criminal sanctions.

The Role of the Judiciary

Through this lens, the judiciary becomes not just a passive interpreter of law, but an active protector of fundamental rights. The ruling in Joseph Shine thus aligns with the court's role as the guardian of constitutional values.

FEMINIST CRITIQUE AND GENDER JUSTICE

Patriarchy Embedded in Law

Section 497 criminalised adultery in a manner that dehumanised women. It reduced them to the status of chattel and viewed their consent as irrelevant. This was legally and morally unacceptable in a constitutional democracy that promises equality and dignity to all.

Feminist scholars such as Flavia Agnes and Nivedita Menon have long critiqued the law as being emblematic of India's legal patriarchy. The provision did not punish the adulterous husband but instead targeted the third party, treating the wife as a passive sufferer.[231]

Post-Decriminalisation: Challenges Remain

While the judgment is a victory for women's rights, the societal judgment against women engaged in extramarital affairs remains strong. In matrimonial litigation, women are still stigmatised more harshly than men. There is a pressing need for family courts to operate without moral bias.

Moreover, personal laws in various religious communities still contain gender-biased provisions on maintenance, guardianship, and divorce—requiring deeper legislative reform beyond this judgment.

INTERNATIONAL JURISPRUDENCE ON ADULTERY

India's move to decriminalise adultery brings it in line with international human rights standards:

[231] Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*, Oxford University Press, 2001; Nivedita Menon, *Seeing Like a Feminist*, Zubaan, 2012.

United Kingdom: Adultery is not a criminal offence. It is a ground for divorce under civil law. United States: Although adultery remains a crime in a few states, it is rarely prosecuted and is largely treated as a civil matter.

Germany and France: Decriminalised adultery decades ago in keeping with privacy and gender equality rights.

South Korea: Decriminalised adultery in 2015 after holding that it infringes on individual autonomy (South Korean Constitutional Court, 2015).

In contrast, countries like Saudi Arabia and Pakistan still treat adultery as a criminal offence under religious law, with harsh penalties, especially for women. India's judgment thus signals a progressive, rights-based approach, aligned with global democratic values.

SOCIETAL REPERCUSSIONS AND CULTURAL RESISTANCE

Despite the progressive nature of the Joseph Shine ruling, the societal acceptance of decriminalised adultery remains fraught with challenges. India's deeply entrenched notions of marital sanctity, honour, and fidelity continue to influence public perception, especially in rural and traditionalist settings. Adultery, though decriminalised, is still widely considered a moral wrong and a serious breach of trust within a marriage.[232]

Many Indian families, especially those from orthodox backgrounds, view marriage not merely as a personal contract but as a sacrosanct social institution embedded in community values and religious rituals. Consequently, any threat to its perceived integrity, such as adultery, is often met with severe social sanction. Women, in particular, bear the brunt of this social stigma.

The media portrayal of adultery in Indian television and films also reflects and reinforces these attitudes. While some modern narratives portray adultery in nuanced ways, many continue to moralise and vilify the woman involved, perpetuating stereotypes of the "homewrecker" or the "fallen woman." These depictions contribute to the public's negative perception of the act and those associated with it, regardless of the legal standing.

[232] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION (HarperCollins, 2019).

Furthermore, in social discourse, there continues to be confusion between decriminalisation and legal validation. Many assume that by decriminalising adultery, the Court has given it moral sanction, which is not the case. The judgment specifically stated that adultery, while no longer a criminal offence, could still serve as a valid ground for divorce and be subject to civil liabilities.

ADULTERY AND DIVORCE: CONTINUING LEGAL CHALLENGES

The decriminalisation of adultery has not eliminated its relevance in civil matrimonial law. Adultery continues to be a ground for divorce under various personal laws in India, including the Hindu Marriage Act, 1955; the Indian Divorce Act, 1869; the Dissolution of Muslim Marriages Act, 1939; and the Parsi Marriage and Divorce Act, 1936.

However, several challenges persist. Firstly, the definition and proof of adultery in matrimonial disputes remain ambiguous. Courts often require clear evidence of sexual intercourse, which is difficult to establish without infringing on privacy. This leads to prolonged litigation, character assassination, and emotional distress for the parties involved.

Secondly, the standard of proof varies significantly across cases. While some courts have accepted circumstantial evidence, others insist on direct proof. This inconsistency leads to unpredictability in judicial outcomes, undermining the credibility of the legal process.

Thirdly, personal laws across religions continue to treat men and women unequally in many respects. For instance, under Christian personal law (prior to amendments), a wife had to prove both adultery and cruelty to obtain a divorce, whereas a husband could do so by proving only adultery. Although some of these laws have been reformed, significant disparities still exist.

Moreover, while adultery is recognised as a civil wrong, issues like alimony, child custody, and division of property in cases involving adultery are subject to judicial discretion. There is no uniform standard guiding how the presence of adultery affects these outcomes, leading to inconsistencies and perceived injustice. Some courts may consider the adulterous spouse's conduct while awarding maintenance, while others may refrain from penalising personal choices in such matters.

In light of these issues, there is a pressing need for comprehensive reform in matrimonial law. Legal scholars and women's rights advocates have called for uniform, gender-neutral laws that treat all spouses equally, provide clear standards for evidence, and avoid moral policing. They also emphasise the importance of counselling, mediation, and privacy in adjudicating sensitive matters like adultery.

IMPLICATIONS AND THE ROAD AHEAD

Impact on Civil Remedies

While adultery is no longer a criminal offence, it remains a valid ground for divorce under personal laws. This dual treatment is consistent with the distinction between public wrongs and private disputes. Courts continue to examine adultery for issues like alimony, custody, and maintenance.

Re-examining Marital Rape Exception

A crucial follow-up to Joseph Shine could be the reconsideration of the marital rape exception under Section 375[233] IPC. The logic of autonomy, dignity, and consent must be extended to challenge the notion that marriage implies irrevocable sexual consent.

Uniform Civil Code and Gender-Just Reforms

This judgment also strengthens the call for a Uniform Civil Code under Article 44[234] of the Constitution, not in terms of uniformity of practice, but uniformity in protecting fundamental rights and ensuring gender justice across all personal laws.

CONCLUSION

The decriminalisation of adultery in *Joseph Shine v. Union of India* is not merely a legal reform—it is a reaffirmation of India's commitment to the constitutional values of liberty, equality, and dignity. By striking down Section 497 IPC, the court recognised that criminal law must not become an instrument of enforcing patriarchal morality. However, decriminalisation alone is not sufficient. Societal attitudes, personal laws, and institutional biases must also evolve.

[233] The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).
[234] INDIA CONST. art. 44.

True equality in intimate relationships can only be achieved through a combination of legal reform, judicial sensitivity, and cultural transformation. The Joseph Shine judgment is a milestone on this path, and its legacy will continue to shape India's journey towards a more just, equal, and humane society.

Understanding Consent Decrees and Ways to Recall It

Atal Anand [235]

ABSTRACT

This paper explores the concept of consent decrees in the Indian legal system, particularly under the Code of Civil Procedure, 1908 (CPC). A consent decree is a judicial decree based on a lawful compromise between parties and carries the same force as a contested decree. While not explicitly defined in the CPC, it is governed by Order XXIII Rule 3, and its validity depends on the legality of the underlying agreement. The study examines the enforceability, legal implications, and finality of consent decrees, highlighting their role in promoting efficient dispute resolution and judicial economy. It further delves into exceptions under which such decrees may be contested—namely, fraud, misrepresentation, coercion, mistake, or lack of genuine consent. Section 96(3) of the CPC restricts appeals against consent decrees, but courts have allowed recall or modification through applications under Order XXIII Rule 3A and Section 151 when consent is vitiated. Additionally, the paper emphasizes that separate suits challenging consent decrees are not maintainable, as affirmed by the Supreme Court. Through judicial analysis and case law, this study underscores the delicate balance courts must maintain between respecting the finality of compromise and ensuring justice by preventing misuse through fraudulent means. Recommendations for improved procedural safeguards are also offered.

Keywords: Consent Decree, Compromise Decree, CPC, Fraud, Misrepresentation.

INTRODUCTION

Consent Decrees are the decree passed by the Courts when the litigating parties amicably settle their disputes. While there is no express mention or definition of a Consent Decree under the Code of Civil Procedure, 1908 ("CPC") the same arises out of a Compromise in a Suit as envisaged under Order XXIII of the Code. Consent Decrees thought arising out of the settlement contract between the parties, still they are something more than a mere contract and has elements of both command and contract. 'Lawful Compromise' on the basis of which the consent decrees are passed would be unlawful if the consideration or the object of the agreement is forbidden by law or is of such a nature that if permitted it would defeat the

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provision of any law or is fraudulent or the court regards it as immoral or opposed to the public policy as provided by Section 23 of the Contract Act.

Civil suits can be resolved through full litigation, compromise, or admission. In the context of admissions, Order XII Rule 6 of the CPC, is crucial since it provides for judgments based on admissions made by parties either in their pleadings or elsewhere. Because this rule is discretionary, judges are free to choose whether to provide a decision based on admissions while adhering to the non-arbitrary and fairness standards.

A judgment based on admission, commonly referred to as a consent decree, can be passed at any stage of the trial. Such judgments may arise from admissions made by the defendant in their written statement or statements made in court at a later stage. This is why a consent decree is also sometimes termed a compromise decree, although the distinction between the two is subtle. Both types of decrees carry the same legal force and validity as any other contested decree.

RESEARCH QUESTION

- What are the different reasons for contesting a consent decree, and how can consent decrees under Order XXIII Rule 3 of the CPC enhance the effectiveness and finality of dispute settlement in the Indian legal system?
- What exceptions are permitted by Indian law for contesting consent decrees, and how is appeal against them restricted by Section 96(3) of the CPC?
- Are separate lawsuits contesting consent decrees viable in the Indian legal system, and how does one go about recalling and interfering with their execution?

RESEARCH ANALYSIS

When parties reach a lawful compromise, the resulting decree is passed in accordance with Order XXIII Rule 3 of the CPC, which outlines the procedure for formalizing such compromises. This rule ensures that the terms of the compromise are legally recognized and sealed by the court, culminating in a compromise decree. An example of this can be seen in the case *New Miraj Cafe vs. Ramakaran*[236], where the court underscored the finality of compromise decrees in establishing the rights of the parties involved.

[236] New Miraj Cafe v. Ramakaran, MANU/AP/0195/1986.

Consent decrees play a crucial role in creating estoppel by judgment, which prevents further litigation on the same issue between the parties, thus providing a definitive end to the dispute. This not only conserves judicial resources by avoiding prolonged litigation but also promotes harmony and peace between the parties, as they have mutually agreed upon the resolution. In summary, consent decrees are valuable judicial tools that facilitate efficient dispute resolution and uphold the rights and agreements of the litigants involved.

WHEN CAN A CONSENT DECREE BE INTERFERED WITH?

In *Gurdev Kaur and others v. Mehar Singh and others*[237], it was held that the grounds on which the compromise decree can be set aside are the same on which a contract can be set aside, namely fraud, misrepresentation, coercion or unsound mind. The said position of law was again reiterated in *Bhoop Singh v Ram Singh Major and others.*[238]

Any interference in a consent decree by way of modification, substitution or modulation of the terms can only be done with the consent of the consenting parties (*Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd*[239]*.; Suvaran Rajarambandekar v. Narayan R. Bandekar*[240]*).*

However, in some case it was held that a consent decree would not serve as an estoppel when: the compromise is vitiated by fraud, misrepresentation, or mistake, the decree suffers from clerical or arithmetical errors. Apart from above grounds, the registration of the consent decree also has been made a ground to challenge the same, but time and again the same has been negated, and discouraged by the courts, if the person in whose favour the decree was passed, had a pre-existing right in the property that is subject matter of the decree (*Gurcharan Singh v. Angrez Kaur*).[241]

APPEAL AGAINST CONSENT DECREES

Section 96(3) of the Code of Civil Procedure explicitly bars appeals against decrees passed by the court with the consent of the parties. In the case of *Kishun alias Ram Kishun (dead)*

[237] Gurdev Kaur and Others v. Mehar Singh and Others, AIR 1989 P&H 324.
[238] Bhoop Singh v. Ram Singh Major and others, 3 RRR 541 (SC).
[239] Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd, (1996) 11 SCC 678.
[240] Suvaran Rajarambandekar v. Narayan R. Bandekar, (1996) 10 SCC 255.
[241] Gurcharan Singh v. Angrez Kaur, 2020(2) RCR (Civil) 696.

through L.Rs. v. Behar (dead),[242] the Supreme Court addressed the maintainability of appeals against consent decrees in light of Section 96(3). The Court clarified that when a compromise is disputed by one party and the court must adjudicate whether a compromise exists before passing a decree, such a decree is not considered a decree by consent under Section 96(3). Only decrees genuinely based on mutual consent are non-appealable.

For a decree to be non-appealable under Section 96(3), the compromise must be unambiguously accepted by the court and formalized into a decree. If the court rejects the compromise and proceeds to pass a decree on merits, this decree becomes appealable, barring exceptions under Section 96(3). The Supreme Court in *H.S. Goutham v. Rama Murthy*[243] emphasized that Section 96(3) prevents appeals from consent decrees but also highlighted that Order XXIII Rule 3A bars suits to set aside consent decrees obtained unlawfully. Therefore, appeals against consent decrees obtained by unlawful means are permissible.

The Supreme Court in *Banwari Lal v. Chando Devi*[244] further elaborated that a consent decree can be appealed on the grounds of unlawful procurement, such as fraud or misrepresentation. However, the appeal is barred under Section 96(3) if the circumstances or facts of the consent decree are not in question. This distinction ensures that while genuine consent decrees remain final, those obtained through wrongful means can still be challenged, preserving the integrity of judicial proceedings and the fairness of the legal process.

RECALL OF CONSENT DECREE

A consent decree can be recalled if it is found to be fraudulent or collusive. An application for the recall can be filed in the court that granted the decree, under Order XXIII Rule 3 read with Section 151 of the CPC. The Court in exercise of its inherent power may rectify the consent decree to ensure that it is free from clerical or arithmetical errors so as to bring it in conformity with the terms of the compromise. Undoubtedly, the Court can entertain an Application under Section 151 of the CPC for alterations/modification of the consent decree if the same is vitiated by fraud, misrepresentation, or misunderstanding but, a consent decree cannot be modified/ altered unless the mistake is a patent or obvious mistake.[245]

[242] Kishun alias Ram Kishun (dead) through L.Rs. v. Behar (dead), (2005) 6 SCC 300.
[243] H.S. Goutham v. Rama Murthy 2021 SCC Online SC 87.
[244] Banwari Lal v. Chando Devi AIR 1993 SC 1139.
[245] Ajanta LLP v. Casio Keisanki Kabushiki Kaisha d/b/a Casio Computer Co. Ltd., 2022 SCC Online SC 148.

PROCEDURE TO RECALL OF CONSENT DECREE

In the case of *Sree Surya Developers and Promoters Vs. N. Sailesh Prasad and Ors*[246], the Supreme Court outlined the procedure for recalling a consent decree. The Court stated that if a party is aggrieved by a consent decree, they must file an appropriate application before the court that issued the decree. This application should be made under Order XXIII Rule 3A of the CPC.

According to the Court, the application to set aside the compromise decree must be decided and disposed of in accordance with the law. This involves a thorough examination by the concerned court of all defenses and contentions related to the validity of the compromise decree. The court will review the application on its own merits and in accordance with legal principles to determine whether the decree should be set aside. This ensures that all aspects of the case are considered, and the rights and objections of the parties are duly addressed.

RECALL AND INTERVENTION IN THE EXECUTION OF CONSENT DECREES

If an execution case has been filed in relation to a consent decree, the decree can still be recalled under certain circumstances. The courts have limited powers to intervene in the execution of a consent decree, primarily when the decree has been obtained through fraud, misrepresentation, or other unlawful means. This principle was affirmed in *Ajanta LLP Vs. Casio Keisanki*[247], where the court highlighted that intervention is permissible in cases where the consent decree was secured improperly.

In *Indian Bank v. Satyam Fibres (India) Pvt. Ltd*[248], the Supreme Court further elucidated that fraud undermines the integrity and regularity of judicial proceedings, constituting an abuse of the court's process. Consequently, courts possess inherent power to set aside orders obtained by fraudulent means. This inherent power allows the court to recall its order if it was misled by a party or if a mistake by the court prejudices a party. Thus, even if an execution case is pending, a consent decree can be recalled if it is proven that the decree was

[246] Sree Surya Developers and Promoters Vs. N. Sailesh Prasad and Ors, 2022 SCC Online SC 165.
[247] Ajanta LLP Vs. Casio Keisanki, [2022] SC 4.
[248] Indian Bank v. Satyam Fibres (India) Pvt. Ltd, (1996) INSC 861.

obtained through fraudulent or deceptive practices. The aggrieved party must file an application under Order XXIII Rule 3A of the CPC to set aside the compromise decree, and the concerned court will review and decide the application based on its merits and in accordance with the law.

MAINTAINABILITY OF SEPARATE SUIT CHALLENGING CONSENT DECREE

The Supreme Court of India in the case of *Sree Surya Developers and Promoters vs N. Sailesh Prasad* has indeed held that a separate suit challenging a consent decree is not maintainable. The proper course for a party challenging the validity of a consent decree is to approach the same court that recorded the compromise. In this case, the defendant filed an application under Order VII Rule 11 of the CPC for the rejection of the plaint, arguing that a suit to set aside a consent decree would be barred under Order XXIII Rule 3A of the CPC. The Trial Court accepted this argument and rejected the plaint. However, on appeal, the High Court quashed the Trial Court's order and remanded the matter for reconsideration, noting that the provisions of Order XXXII Rules 1 to 7 CPC, which could impact the validity of the Compromise Decree, had not been considered. This decision underscores that the appropriate remedy for challenging a consent decree is to move the same court that issued the decree rather than filing a separate suit.

SUGGESTIONS

To ensure the fair and efficient use of consent decrees, it is crucial that courts thoroughly examine the terms of the compromise for any signs of fraud, misrepresentation, or coercion before formalizing them. Parties should be clearly informed about their rights and the implications of the decree to avoid future disputes. Additionally, the legal framework should allow for easy rectification of clerical errors and provide a straightforward process for parties to challenge decrees obtained through unlawful means. Encouraging transparency and providing clear guidelines for setting aside compromised decrees can help maintain the integrity and effectiveness of this dispute resolution tool.

CONCLUSION

The underlying object of a consent decree is to allow a party to quickly obtain judgment on admitted claims while any disputed claims in the suit are still pending. A decree can only be

issued for claims that are clearly, unequivocally, and unambiguously admitted. There is no specific form required for these admissions; they can be in pleadings or otherwise, in writing or even oral. Once the court recognizes and affirms these admissions in the form of a decree, the decree holds the same force as any other decree obtained after a contest.

Despite the binding effect and the application of the principle of estoppel against the parties in consent decrees, these decrees can be as easily challenged as they are consented to. In cases like *Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd* and *Survarn Rajaram Bandekar v. Narayan R. Bandekar*. It has been consistently held that courts would be slow to interfere, modify, substitute, or modulate the terms of a consent decree without the revised consent of all parties involved. Amendments and judicial interpretations have significantly reduced the opportunities for misuse of consent decrees. Furthermore, the scope for appeals and further litigation is also reduced in cases involving compromise/consent decrees, providing relief for litigating parties seeking to end disputes conclusively.

Digitalisation of IBC: Pros and Cons

Naina Singh[249]

ABSTRACT

In the developing environment of a fast-paced global economy, adaptability and efficiency have been essential, especially in the context of the financial challenges faced by corporations. India's Insolvency and Bankruptcy Code (IBC), which was introduced in 2016, has brought a huge and significant change in society to distress the financial conditions and offers a structured way to deal with time-sensitive systems to resolve debts. However, in the olden days, when the loopholes were the procedural delays of the cases, the IBC came with a bang in society, which dealt with faster solving of insolvency cases and effectiveness. When IBC came to notice, it highlighted the huge need for innovative solutions that address these bottlenecks and helped society to deal with the cases in the quickest form. One of the most promising reform that came into notice was digitalization, which transformedlegal systems globally. The various tools available in society have made the process very quick, which in previous times wasn't possible as the process was more paperwork, leading to delay in the cases. Through the digital tools, it will be possible to look over the status. This will enable smooth accessibility to the stakeholders, creating more transparency in the society. By integrating technologies like online portals, blockchain, and artificial intelligence (AI); the IBC could greatly benefit from improved efficiency, reduced costs, and transparency in managing the insolvency process.

This Research Paper will furtherdelve into how IBC came into notice and will deal in detail about the various Pros and Cons of the Digitalisation of the IBC in society.The reader will be able to understand the background and why does the system needs to adapt the digitalization of the IBC.The author has tried to put forward the pros and cons of the digitalization along with a comparison of Singapore and United Kingdom to understand why Digitalisation of IBC is needed in our country.

Keywords: Digitalisation, IBC, Blockchain, AI.

BACKGROUND AND THE NEED FOR DIGITALISATION OF IBC

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The insolvency and bankruptcy code came into notice in 2016 before which various other legislations were followed to resolve the cases, causing a delay in resolving the cases. This delay and inability led to various hindrances in economic growth, and, when it comes to investment specific to foreign countries, it was deterred. IBC addresses the issues by creating a time-bound process to address the insolvency proceedings, prioritize the creditors, and maximize the asset's value. This will help to mark a significant growth of the system in the society. Despite these improvements, procedural delays remain a significant hurdle, limiting the IBC's intended impact. Delays, primarily caused by heavy caseloads and manual processes, can erode the value of distressed assets and prolong financial distress for companies.[250]To address these hard blocks, digitalization has emerged as a key strategy, which offers tools to optimize the process, enhance transparency, and increase accessibility. The digital transformation of the IBC could bring multiple advantages. For instance, online portals could be utilized to manage creditor claims and facilitate communication among stakeholders, significantly reducing the time and costs associated with insolvency proceedings. Blockchain technology presents another promising application, providing a secure and immutable ledger for transaction records and claims, which would mitigate issues related to data tampering and improve the integrity of the process.[251] In addition, using AI for data analysis would help aid the resolutions in analyzing case histories and even speed up the resolution process.

However, a digitalized IBC ecosystem must be implemented cautiously. Heavy reliance on technology introduces cybersecurity vulnerabilities, and the sensitive nature of financial data necessitates robust data protection protocols. Thus, the government must establish a regulatory framework to safeguard digital insolvency processes, with cybersecurity and privacy management protocols [252]. Furthermore, advanced technology tools like blockchain will offer a secure way to store records, which will ensure that there is no data leak. It will act as a tamper-proof tool, and will also be readily accessible to those who need it. This kind of transparency will help people to gain trust and confidence in the country's system as it will create a more reliable and streamlined system for whoever is involved. This kind of system will help people to analyze the dashboards and online portals, which will ensure the stakeholders remain updated with the real-time status and it will help to eliminate all sorts of delays which were

[250] M. AYILYATH, ROADBLOCKS UNDER INSOLVENCY AND BANKRUPTCY CODE 45 (Thomson Reuters 2019).
[251] Ankit S. & Arun Sharma, *Blockchain and AI: Legal Reform and Future Potential*, 5 J. INDIAN LEGAL STUD. 89, 95 (2023).
[252] Priyanka Mukherjee, *Digital Transformation and Cybersecurity Risks in Legal Processes*, 6 CYBER L.J. 65, 70–72 (2023).

caused when the IBC was not digitalized. This will also give a huge push to the digital transformation, which has already been adopted by the United Kingdom (UK) and Singapore. The two countries have shown a great positive impact in society. Similar models can enhance India's framework which will hold the system to perform more effectively.

PERKS OF DIGITALISATION OF THE IBC ECOSYSTEM

I. Enhanced transparency: When it comes to digitalization of the IBC, it will be more transparent if it is digitalized by the integration of blockchain, online portals and electronic documentation. Whenever any sort of change is made to the case file, the blockchain will allow it to track the record and help people keep track of it through the portals. This will enhance reliability and prevent unauthorized changes in the case. Through the portal, all the parties such as creditors, debtors, and legal professionals, can keep track of case updates and the essential documents that are uploaded in the portals related to the case, in a real-time basis. . This will help the parties to have great communication by mitigating the risk of miscommunication. It will also help in increment of trust between the parties. The use of electronic documentation will also help to simplify the record-keeping and reduce the paperwork. It will also help to eliminate the human errors that can be made if the electronic documentation is not done. This shift will not only enhance and improve the risk of human errors but also help in increasing the speed and retrieving the information as soon as possible. By integrating these digital tools, it will help to enhance efficiency from a transparency and a dependable framework, which will further promote accountability and adherence to regulations.

II. Efficiency and speed: One of the advantage of the digitlalization of IBC framework is that, it will give a kickstart in speed and efficiency, it brings along with it. Automation plays a huge roll when it comes to handling insolvency cases. In the olden times, the process suffered with huge delays due to labour work and complexity of the bureaucracy. Therefore, when integration of technology in the field is the need of the hour as it will help to escape the hurdle of the delays and aid courts, regulatory bodies to better managing of the cases, leading to the quicker resolutions and more efficient use of the resources across the system. When it comes to e-filling systems, the submission of applications and supporting documents will help to escape the hurdle of the delays which persists in a paper-based process. The introduction of a digitalized framework will ensure a consistent and streamlined data entry process, reducing labor dependency and minimizing the risk of errors.. The automated systems will help to

reduce the risk of mistakes, validation of data and to track the case progress. This will help us to faster the operations while improving the accuracy as documents can automatically be checked to verify the correctness and completeness.

III. Accessibility: Digital platforms have made the operating and accessibility of IBC process much easier and simple., enabling it easier for the people to engage regardless of their location. Historically, traditional methods were inefficient and less accessible due to their reliance on extensive manual processes. The adoption of the digital tools will help people to bridge the gap which were common in traditional methods. By Digitalization, a person can have smooth access through online portals. Digitalization of the IBC will also help the people who are residing outside India allowing them to be present without any delay and by showing their presence online. Video conferencing tools will help to conduct a free flow of virtual meetings and hearings, which will ensure that stakeholders can present their cases, submit documents, or even track the updates without the constraint of traveling or logistical barriers. This type of development will not only reduce travelling but also encourage participation, which is crucial for comprehensive assessments and fair representation. Moreover, digitalization enables small investors to participate without incurring prohibitive expenses, thereby facilitating effective engagement while minimizing both costs and time investments,

IV. Cost Reduction: The digitalization of the IBC will substantially reduce operational costs associated with physical paperwork, including expenses related to paper, printing, and storage facilities. Maintaining such physical infrastructure often proves financially burdensome, particularly when funds are limited. By transitioning to a digital framework, these costs can be significantly minimized as all records will be converted into digital formats and systematically stored within secure platforms. Shifting to digitalization will help decrease the expenditure related to production and handling. Additionally, the cost of labor will significantly reduce since there will be limited labor to work physically. By leveraging digital tools, the funds allocated to administrative functions can be channeled for more strategic areas such as case management, which would give a kick-start to the case in hand. Online portals and automated workflows reduce the need for intermediaries and lower the cost of case processing. Moreover, it helps the stakeholders, debtors, and creditors to lessen the cost of legal and administrative expenses. Consequently, digitalization enables stakeholders to access case proceedings and participate remotely, thereby eliminating ancillary expenses associated with physical participation.

V. Data Analytics and Monitoring: Using advanced tools for analysis will help the digitalized ecosystem offer substantial benefits for monitoring and optimizing the insolvency process. These digital tools will further assist insolvent individuals in monitoring case progress in real-time while enabling identification of systemic inefficiencies within judicial processes. Through data analysis, stakeholders may track procedural developments with greater transparency. Such insights prove invaluable for informing strategic decisions and optimizing resource allocation, analytics can prioritize cases requiring expedited review or in-depth examination, thereby facilitating timely resolution. Furthermore, it will also help the predictive analytics to forecast the outcomes and risks, allowing the stakeholders to adjunct their strategies accordingly. This continuous evaluation will help to promote accountability and transparency of the insolvency framework, which enables improvement that benefits the entire ecosystem over time.

VI. Improved Security and Reduced Risk of attacks: It will help people to communicate cross-chain interactions. Traditionally, blockchain network are isolated from one another whereas digitalization will manually bridge these networks from cross-chain transactions. In the absence of standardized automated systems, critical assets and sensitive data remain vulnerable to security breaches. A digitalized IBC framework, leveraging advanced technological safeguards, would effectively mitigate these risks. This structure will help to prevent tampering of data by creating a secure and tamper-proof channel for data and asset transfers.

CHALLENGES OF DIGITALISING THE IBC ECOSYSTEM

I. Cybersecurity Risks: Digitalizing the IBC brings new vulnerabilities, leading to threat on the security of the data, which poses a significant risk to the system. The primary objective of digitalization involves the storage of confidential data within centralized systems, which inherently introduces cybersecurity risks, including data breaches, unauthorized access, and fraudulent activities. Inadequate data management protocols may significantly compromise system integrity, resulting in severe consequences such as unauthorized disclosures. Such incidents could erode public confidence in the insolvency framework.In past, a similar threat was observed where aadhar card, having a broad database, faced the issue of exposing sensitive information. To escape from such a threat in the IBC ecosystem, there is the need of stringent

cybersecurity protocols, which must include end-to-end encryption and multi-factor authentication, assisting IBC to avoid cybersecurity risks.[253]

II. Equitable Access and Digital Divide: Whenever it comes to digitalization, though it is a very significant step, it comes with its own set of challenges. In urban and developed places, digitalization will be very easily accessible as the people residing in such places have a decent level of digital literacy. When it comes to rural areas, a significant development needs to be done. In rural areas, there is persistent network issues faced by small business people and individual from under privileges background. Although the rural people and the small business people have less digital literacy alone, that it creates a barrier to their full participation in the IBC process and it can also lead to inequalities in how effectively different entities can navigate the systems.

III. High Initial Investment and Maintenance Costs: Implementing digitalization will involve long-term costs. Implementing a comprehensive digital platform for IBC ecosystem will require a huge investment in terms of investing in software. A structured process will be needed to train people, which will require huge expense. After the establishment of the digitalized platform for IBC, it will continuously need to be brushed up on updation of its software, maintenance of such software. Such expenditure will burden the public sector and the stakeholders. In addition to infrastructure and technology, personnel training represents a significant portion of initial investment. Transitioning to a digital platform requires training, not only restricted to professionals but including various other people to make them aware of how the platform works, leading to its effectiveness. This training must often be customized to different groups, making it time-consuming and costly. Furthermore, it also requires costs for developing accessible, multilingual training materials, which is essential in a diverse country like India, where stakeholders may have varying levels of digital literacy and language needs.

IV. Risk of System Downtime and Technical Glitches: Whenever it comes to technical challenges, it comes with different challenges and loopholes. Reliance on the digital system brings the risk of system failure, downtimes, or glitches. While India continues to develop its technological infrastructure for IBC digitalization, implementation challenges persist, particularly in regions with inadequate network connectivity. Such technical limitations may

[253] NIEUWS360, http://www.nieuws360.com (last visited Apr. 17, 2025).

create systemic inefficiencies, potentially delaying case proceedings and hindering stakeholders' ability to file claims. For instance, during critical virtual hearings involving time-sensitive resolution plans, connectivity failures could disrupt proceedings and compromise case outcomes. If the digital platform faces technical problems such as video or audio failure or if the document is not being accessed, then in such a scenario, the case will need to be postponed, which will just lead to a delay in the case for a few weeks.

V. Legal and Regulatory Challenges: One of the huge demerits can be the various guidelines and frameworks that need to be framed when the digitalization of the IBC is done. It will take a significant amount of time, which can further lead to various problems. With digitalisation, there is huge risk involved related to financial risk and data breaches. Legal framework, such as Digital Personal Data Protection Act, 2023 ("DPDP Act") will also be required to work in conjunction with the IBC.[254] This conjunction or integration will also require additional regulatory measures which can even include data access controls, cybersecurity protocols, accountability and the feasibility mechanism for handling the data within the IBC ecosystem. It is a well-known fact that there has already been a lot of fear amongst the people giving rise to threat on what if there is a data breach. To counter such scenarios, there is presence of dual verification method to escape the threat which will build a great reputation of the body amongst the people. A digital IBC ecosystem will be heavily dependent on electronic signatures and digital identities, however, without a proper standardized regulation for these methods, the system would face huge challenges if the digital signatures are disputed or if verification procedures are insufficient.

VI. Cross-Jurisdiction Consistency: While digital platforms will facilitate cross-border insolvency cases, harmonizing the digital insolvency process across jurisdictions become essential. Different countries across the world have adopted various standards and protocols that need to be followed while dealing with insolvency cases. Aligning them under one platform can create various regulatory challenges. When it comes to cross-border insolvency cases in a digital model, it raises regulatory compliances issues. A digital platform needs to adhere to each country's unique data privacy, regulatory protocols, and reporting mechanism. For instance, one country may only stick to the mandatory requirements of creditors to submit claims whereas the other country may mandate only minimal documentation. A digital

[254] EXPRESS COMPUTER, https://www.expresscomputer.in (last visited Apr. 17, 2025).

platform will have to handle this variation which would lead to complication of the IBC. In this sense, digitalization of the IBC ecosystem would necessitate a mechanism for recognizing and enforcing foreign judgments and insolvency proceedings. Countries with differing rules and regulations regarding recognition of foreign judgments and digital systems could further complicate it.

COMPARATIVE ANALYSIS: UK AND SINGAPORE

When it comes to the process of digitalizing the insolvency and bankruptcy frameworks, the experience of UK and Singapore plays huge role by providing insights for India. Both countries have shown great impact by implementing comprehensive digital tools to streamline their insolvency processwhich has resulted in a very high efficient, transparent, and accessibile system.

I. United Kingdom (UK): Since the time, government has adopted the digital portals for insolvency processes, it has enabled a quicker resolution and reduced the dependency of physical documentation, which has helped the country to have quick and enhanced transparency. UK's insolvency service provides services such as online filing systems for insolvency documents and digital access to case information. This system does not only cut off the administrative cost but also enhances the speed of functioning in society. It also minimizes the errors that are often committed by humans. Physical document storage carries inherent risks of loss or misplacement, whereas digital repositories through online portals enable immediate retrieval and secure archival of records. Most importantly, when it comes to the UK, it has always focused on the robustness of the securities through cybersecurity protocols and data protection laws, which helps to mitigate the risk of data breach and unauthorized access to sensitive financial data.

II. Singapore: On the other hand, Singapore has integrated advanced technologies such as artificial intelligence and blockchain, which have helped manage insolvency cases.[255] It allows the AI to access the case trends, which assists them to resolve the cases and aid in making quick decisions. Blockchain technology in Singapore ensures a very secretive and secured tamper-proof record-keeping system, enhancing the transparency and trust in the process by the

[255] Zuber Peermohammed Shaikh, *Leveraging Artificial Intelligence for Digital Actionable Transformation of Business: Strategies for Integrating Intelligent Technologies*, in BUSINESS TRANSFORMATION IN THE ERA OF DIGITAL DISRUPTION.

citizens. Additionally, Singapore's digital framework focuses mostly on the digital framework which emphasizes accessibility, providing resources and online support to facilitate digital literacy among stakeholders, ensuring a wide range of users who can navigate the systems effectively.

CONCLUSION

The digitalization of India's IBC represents a very huge role, which is a great initiative towards modernizing the legal and financial system of the country. Digital tools will play a significant role in terms of improvement in transparency, efficiency, accessibility, and cost reduction, which play a crucial role in ensuring that insolvency cases are handled promptly and in an equitable manner. This shift will align with global trends, where countries like Singapore and the UK have embraced digital insolvency solutions to reduce procedural delays. It will also help to optimize the usage of resources. By incorporating such advanced tools into the system, it will help incorporate the online portals and AI. It will help to manage the case and improve the integrity, enabling smooth functioning and accountability in the legal system.

However, when it comes to the transformation of the IBC, it does not escape the challenges. Cybersecurity risks have always been a threat to technology systems. They are present as a substantial threat to the confidentiality and integrity of financial data. They emphasize the need for solid data protection protocols, including encryption and double-factor authentication. Equitable access remains a critical challenge in the digitalization of the IBC. Significant disparities in digital literacy and infrastructure persist, particularly among economically disadvantaged groups and rural populations. The lack of reliable network availability in these regions exacerbates existing inequalities, creating barriers to effective participation in the digital insolvency framework. High initial investments and maintenance cost can also act as a barrier, especially when it comes to the public sector entities since the public sector still, to date, faces financial and budget issues. These issues become an impediment in the gradual progress and development of the country. The sustainability of the digital framework necessitates both operational continuity and guaranteed investment, supported by robust policy measures. To address the mentioned challenges, a well and appropriately defined framework needs to be incorporated. Legislations such as the DPDP Act must work simultaneously with the IBC to provide a robust cybersecurity measure that will help the system to overcome the fear of hacking and data leakage. Additionally, when it comes to the training and support to be

given to the users from the underprivileged or rural side of the country, it will be a huge and crucial proposition to bridge the digital divide and bring equality in the system. Harmonizing India's digital insolvency ecosystem processes with global standards could facilitate cross-border cases, positioning India as a leader in digital insolvency solution. Conclusively, while digitalization may not counter all challenges, it represents a transformative approach capable of significantly enhancing India's insolvency ecosystem and framework. By striking a balance between innovation and regulation, this shift can establish a resilient, efficient, and transparent IBC framework. Such a system would not only foster greater trust in India's financial infrastructure but also promote long-term economic stability.

Special Purpose Acquisition Companies and Indian Start-Up Ecosystem

Sneha Shukla[256]

ABSTRACT

The commercial boardrooms of Wall Street and the American business media have been talking about Special Purpose Acquisition Companies ("SPACs") in their day-to-day affairs. lately, they've become the apple of the eye of America's commercial sphere and have garnered a lot of attention. The SPACs, however in actuality since the 1990s, have taken the US request by storm. In the first quarter of 2021, nearly USD 96 billion was invested, which surpassed the total capital raised through SPACs in 2020 amounting to USD 80 billion. As of 13th March 2022, SPACs have raised USD 9.6 billion[257]. They've stamped their ascendance in Wall Street as in 2020 they reckoned for 50 of the recently publicly listed US realities.

It has become a new buzzword in the vocabulary of every prospective investor and they're starting to engage with these companies in order to gain a better return on investment and application of the finances for essential measures. Investor sanguinity is vital for any company to flourish and their harmonious belief is the key to a company's success. SPACs give the investors an occasion to diversify their investment in a range of diligence offering them better terms than a traditional IPO.

India's hunt to become a global profitable superpower has accelerated in the once decade. The Indian capital requests are flourishing, investor confidence is at its peak and the policy measures are seductive for increased foreign investment and employment generation. The rise in India's Purchasing Power Parity (PPP)[258], accelerating GDP growth and structure capabilities have made India a safe and secure profitable haven. One of the crucial contributors to this growth is the start-up ecosystem. Over time, their increased presence and enhanced capabilities, have steered India to significant growth prospects and SPACs can encourage and boost further entrepreneurs to come up with further similar start-ups by enabling access to

[256] Third Year BA LLB Student at BMS College of Law, Bengaluru.
[257] SPAC INSIDER, https://spacinsider.com/stats/ (last visited Mar. 22, 2025).
[258] Purchasing Power Parity is the measurement of prices in different countries that uses the prices of specific goods to compare the absolute purchasing power of the countries' currencies.

capital. The author attempts to understand how SPACs can impact the Indian start-up ecosystem by looking into the openings it offers and how SPACs can prove to be an important determinant of the success of start-ups in India. The author throws light into the nonsupervisory and duty considerations girding the SPACs and also the future of SPACs in getting the most popular asset class of India Inc.

Keywords: SPACs, sponsors, investors, targets, swapping, start-ups.

INTRODUCTION

SPACs have become a new sensation among the investor clerisy. Their exponential rise in the US market space and the economic benefits they offer to prospective investors as well as incipient companies has made them centre of attention and, as a result, they're attracting huge investments. Ever since the onset of the pandemic, SPACs have been trending in the commercial world. The volatility and query in the capital markets weren't the only reason for their rejuvenescence. There have been significant advancements in participation in the SPAC ecosystem, the size of the issue and its track record.

They've allowed the investors to drift down from the conventional approach and engage in distinct backing openings that are feasible and offer stiff competition to Venture Capital, Private Equity, direct listings and the traditional IPO process. energy is one of the reasons why the growth of SPACs has been exponential. Investors not only engage with these SPACs for the reason of better return on investment but also because of the investment avenues that it offers. The kaleidoscopic arena of start-ups and companies that are invested with the capital raised by these SPACs direct investments in such a way that it energizes invention and growth. India, being a forthcoming global start-up mecca, can yield the benefits that SPACs offer. The forthcoming companies that are enthusiastic about venturing into the waters of the public market can engage with these SPACs and get a better sapience into the prospects that the request offers.

The pandemic has given space to numerous inventions and because of this reason, we've seen the start-up ecosystem grow exponentially in our country. Numerous of these have become unicorns and have also tested the waters of the capital requests. While the traditional IPO process has been a favoured mode of public funding, the growing number of SPACs consisting

of people who have distinguished experience in this sphere can disrupt the sundries of funding. Still, the life of SPACs isn't a bed of roses, and especially in India, where investors are primarily concerned about the safety of their investments and get swayed by adversities that arise from the slightest of swings, it's necessary to develop a converse around the overall functioning of SPACs so that they would be in a better position to decide where their finances should be pumped.

RESEARCH METHODOLOGY

In the course of research for preparing the research paper, various sources of literature have been referred to, especially the business law reviews. An analysis of the existing literature on the subject has been initially referred and that has then been coupled with statistical data available on various business and finance websites and news portals. Further, the regulatory considerations have been examined through the existing statutes, rules, regulations, notifications and press releases. Certain suggestions have been recommended based on the existing status quo of SPACs and a conclusion has been arrived at after careful consideration of all the aspects herein mentioned in this research paper.

WHAT ARE SPACs?

SPACs are principally publicly traded corporations that have a two-year life span and are formed simply to effect a merger or an amalgamation with a private corporation to enable it to go public.[259] The main players involved in SPACs are public equity investors who help the SPACs disrupt the market and raise capital through IPO. The SPACs can catalyse the investments made in such a way that the time that a conventional IPO consumes is abridged and also the target companies, for whom the capital is being raised primarily, are offered better terms than what the conventional IPO would offer. These corporations don't have any corporate operation and because of this very reason, they're frequently called “blank-cheque companies” or shell companies.

Though they're formed to effect a merger or an amalgamation with a private company, they primarily don't have any specific target company in their sight which they would acquire and merge with. They directly knock on the doors of the public market and seek to raise capital

[259] Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, HARV. BUS. REV., July–Aug. 2021.

through public offering without relating an acquisition target. Subsequently, when they've raised capital through an IPO and PIPE[260], this capital is kept in an escrow account and, in future, when they seek to acquire any target company, this capital is employed for the same.

Still, if the SPAC, which raises capital through public offering doesn't identify any target company for acquisition within two years from the date of raising such capital, that particular SPAC gets delisted from the stock exchange and the capital is returned to the investors. Thus, the stakes that are involved in a SPAC sale are generally high and it's anticipated that they would live up to the prospects of the investors who have entrusted them their capital.

STAKEHOLDERS IN A SPAC TRANSACTION

A SPAC sale generally involves three groups whose interests are kept under consideration during the commission of a public offering and the ensuing merger or acquisition of a private company. The three vital stakeholder groups are thus sponsors, investors and targets ("target companies"). Each group has its vested interest in a SPAC transaction and their outlooks, requirements and interests differ from the other groups. They complement the subsistence of each other in a SPAC and ensure that functional effectiveness is achieved and there's a minimal quantum of disturbance in the commission of a SPAC transaction. Let us get acquainted with the modus operandi of these stakeholders who ensure effectuation of a SPAC transaction -

1. Sponsors: The sponsors constitute the first group that brings a SPAC into subsistence. A sponsor may be an individual or a team that has proficiency in a particular line of business and has a well-known stewardship team that has experience in Mergers and Acquisitions and also the know-how of the market forces to effectively raise capital through public offering. They're the ones who invest their capital into a SPAC in the form of non-refundable investments which are in turn paid to corporate counsels, accountants, underwriters and bankers to cover the operational charges. Since they finance a SPAC in its pre-IPO stage, they generally hold roughly a 20-25 per cent stake in it which is an admixture of shares and warrants. Their significance can be understood by the fact that the capital that's drawn from the sponsors is generally around 7-7.5 per cent of the IPO in the form of a private placement. It's peremptory for the sponsors to ensure that the SPAC identifies a target company and acquires it within the

[260] Private investment in public equity (PIPE) is the buying of shares of publicly traded stock at a price below the current market value (CMV) per share.

two-year time frame. Otherwise, the SPAC will get delisted and dissolved and investors' capital will be returned to them. Therefore, the stakes are high for the sponsors in the event of failure of a SPAC as it would not only affect their loss of capital but also the proficiency, time and labour that they invest in it. Even after raising capital through a public offering, if the sponsors are of the opinion that fresh funding needs to be attained, they may choose other alternate sources of finance.

They may also resort to funding the SPAC transaction through a PIPE and purchase shares of a publicly traded stock below the subsisting market value. A significant point to be looked at is that, in case a SPAC succeeds, the sponsors are in a position to earn 20 per cent of the capital raised from investors through the shares of the combined entity. Nonetheless, the responsibility of attracting a cult of successful and promising investors, exploring the intricacies of the market, identifying a target company, guaranteeing the attainability of alternate sources of finance, and persuading the target company of the pecuniary as well as strategic implications of the merger is immense. What further makes their purpose vital is their capability to effectively negotiate the terms involved in a SPAC transaction more competitively and ensure that all the investors align with the idea and have utmost belief in the scheme that's sought to be achieved through the public offering and the ensuing merger.

They also have a responsibility towards the SPAC as well as the target company and they've to chaperone both of them in such a way that there's no sense of hostility or scepticism regarding the sustenance of the proposed merger. With enhancing competition and the proliferation of SPACs, the road to a successful path for sponsors is a delicate one to step on. The sponsors find themselves, at times, in extremely precarious situations where the task of identifying the targets and attaining the confidence of investors becomes a humongous task. Therefore, there's a necessity to bridge the gap between the idea of executing a SPAC transaction and the final goal they seek to attain. This can only be possible if there's a strong foundation upon which the entire arrangement idea is predicated and this requires synchronization between all the stakeholders involved in a transaction.

2. Investors: Investors are the soul of any SPAC. Without their investment, the survival of a SPAC would not be possible at all. The majority of investments that a SPAC receives are

primarily from institutional investors which frequently involve hedge funds[261] that are especially constituted for investment in a particular sector. The maiden investors in a SPAC display an interest in being a part of the SPAC transaction before the SPAC identifies a target company and in progression of this, they buy the shares of the company. Just like the sponsors, the Investors are amenable to two classes of securities in the form of common stock and warrants which come along with a condition that enables them to buy the shares of the combination once the acquisition is completed post-IPO allotment at a specified price.

The risk of the SPAC, is, therefore, determined by the quantum of warrants it issues to its early investors. Thus, the manner in which the securities are to be offered to the investors must be done in an impeccable way as the number of warrants issued would be directly commensurable to the risk that's involved in a SPAC transaction. Not all investors remain in the sojourn of a SPAC and many times it happens that because of differences in the perspectives of investors and sponsors, the former pull out of the deal. Nevertheless, they get to keep their warrants which assures that their investment is returned to them with interest. Generally, the sponsors assiduously engage with the investors and ensure that their interests will be rightly taken care of in future as well when they merge with the target company. To convince them to stay, the SPACs resort to offering certain fiscal benefits that may keep them engaged with the company. The sponsors try to accommodate the varied interests of the investors and ensure that there are a variety of options available at the disposal of the investors in terms of return on investment, risk management and investment timeline. The ultimate objective of investors is properly taken into consideration and their interests are respected.

3. Targets: The companies who are new players in the commercial world and are willing to test the waters of the equity market look at kaleidoscopic options for achieving that. This can be in the form of pursuing a conventional IPO route, a direct IPO listing, conducting a sell-off to a Private Equity concern, or raising funds from myriad sources including institutional investors, hedge funds, and the Private Equity concerns. However, the regulatory demands encompassing such sources of finance coupled with mediocrity valuations and high dilutions may be some of the obstacles that a company needs to deal with. Here's where the role of SPACs comes into the picture. They can indeed be a more feasible source of funding than the late-round ones mentioned above. In practice, it's generally seen that the majority of the

[261] Hedge funds pool investors' money and invest the money in an effort to make a positive return.

companies that are identified as targets by SPACs are start-ups and these have come into commencement after going through the Venture Capital process. SPACs can enable them to gain access to increased funding and liquidity as they offer them a variety of investment options and ensure that there are fewer regulatory demands, added certainty and clarity regarding the entire SPAC transaction, and lower dilution of capital which in turn ensures that the public equity that's raised has comparatively improved valuation than other funding techniques. They simplify the process through which a nascent company can raise additional capital for the expansion of its business operations and the improvement of its goodwill.

SPACs AND THE INDIAN LANDSCAPE

Innovation and excellence are the two forces that have been driving the Indian economy past the challenges over the last decade. There has been a genesis of new business lines, synergistic alliances, and specialized proficiency. All these aspects have been complemented by changes in the outlook of the subsisting business models through disruption in the business economics. There has been a constant rise in the efficacy of processes due to the development of the technological landscape and logistical support. However, we will understand how these aspects have proven to be beneficial in their survival and also in value creation.

If we look at the Indian start-ups and their exponential growth over the last fifteen years. It's because of this harmonious approach that Indian start-ups have been competent to understand the global sentiment and have therefore ventured into numerous areas that were antecedently unexplored. The ever-expanding number of Indian start-ups in the fields of e-commerce, FinTech, healthcare and logistics over the last decade has made India a favourable destination for investment.

Since the notion of SPAC has not gained a prominent place in the Indian business discourse, an evaluation of its benefits can forsooth help the upcoming and nascent companies. A SPAC would not only enable these start-ups to gain access to growth capital but it would also ensure that they're identified on the global platform and their presence is felt in the global markets. In this age of globalization, it's extremely important that products and innovations transcend beyond national boundaries, and this can only be assured when there are subsist intermediaries who can make that occur. These intermediaries are the sponsors and investors. Indian start-ups can gain access to the public market by merging with a SPAC and refrain from the tedious and

time-consuming ones of getting listed via a traditional IPO. Generally, the people who are responsible for giving birth to a start-up are the ones who don't have significant exposure to the global markets and as a result, their business models and methodologies have a limited reach and are only suitable to cater to the domestic population.

Through a SPAC, the start-ups can get an opportunity to interact with sponsors with distinct proficiencies who have experience in different disciplines and they can guide these companies on how to leave their mark in the global market. Therefore, if a start-up is truly willing to go beyond the silhouettes of established domestic boundaries, it's necessary that subsisting operation bandwidth is expanded and room is made for people with global knowledge.

The sponsors can also prove to be advantageous for start-ups in engaging reliable investors who believe in the idea of their business and can gamble on them for their expansion. In the present times, when the capital markets are extremely unpredictable and disrupting any business or technology, the consistent influx of capital is warranted, SPACs by engaging favourable institutional investors, hedge funds, private equity investors, etc. can allow a company to pursue its growth aspirations without being hindered by the dearth of capital. Still, not every merger with a SPAC can prove to be useful if not done at the right time and in the right manner. Therefore, before opting for an Indian or overseas listing, a start-up must ensure that the entire pre-IPO exercise is gone through and that there's a proper organisation of the commercial and legal structure, compliance with governance norms and effective due diligence of financials as well. This will help them tap into the opportunities at the perfect time.

REGULATORY CONTOURS SURROUNDING SPACs

Presently, there are no subsisting regulatory considerations for SPACs in India. However, the Company Law Committee, which submitted its recommendations for incorporating a fresh set of measures and bringing amendments to the subsisting Companies Act, 2013 in 2019, has recommended the introduction of several provisions that will enable SPACs to get listed on a domestic or transnational exchange. However, this has been held up because of regulatory and technical aspects. The Securities and Exchange Board of India (hereinafter referred to as "SEBI") is now examining the possibility of introducing a regulatory framework for SPACs in India. Indian companies cannot get directly listed on a foreign stock exchange. The only

available options for financing are the American Depository Receipts (ADRs) and the Global Depository Receipts (GDRs) which can be listed in the overseas markets.

SEBI, in 2018, constituted a high-level committee to examine the possibility of allowing Indian companies to get listed on the foreign equity markets and gain larger access to foreign capital.[262] In the progression of this, an amendment was made to Section 23 of the Companies Act, 2013[263]. This amendment enabled Indian companies to get listed on foreign exchanges of certain permitted jurisdictions. However, a holistic framework is the need of the hour and it's required that there's consensus in the approach of the Government as well as the regulatory bodies to lay down a holistic framework for the foreign listing of Indian companies. This could mark a turning point in India's commercial landscape as Indian companies will get exposure to the global market and attain global visibility.

Let us now understand the business combination options that are available at the disposal of Indian companies. There can be two possible situations when an Indian company is assessing a merger with a SPAC. initially, if an Indian company is proposing a merger with a foreign company (e.g., SPAC), then it can ask its resident as well as non-resident shareholders to sell their shares to the foreign company, and in return, they would be issued ordinary shares of the foreign company. However, all the selling shareholders would then hold a stake in the foreign company and accordingly, the Indian company will become its subsidiary, If this arrangement is brought into motion. However, this exercise might necessitate prior approval from the RBI under the Foreign Exchange Management Act (hereinafter referred to as "FEMA"), especially for the shareholders who are Indian residents. Compliance with the FEMA regulations and seeking prior approval from the RBI, enables the resident shareholders to be exempted from FEMA Overseas Direct Investment (hereinafter referred to as "ODI") Regulations and Liberalized Remittance Scheme (hereinafter referred to as "LRS"[264]). The other category of companies are the ones whose headquarters are stationed overseas. In this case, if the procedure of share-swapping is espoused, it may prove to be challenging for the resident shareholders to

[262] MINISTRY OF FINANCE, SEBI, REPORT OF THE EXPERT COMMITTEE FOR LISTING OF EQUITY SHARES OF COMPANIES INCORPORATED IN INDIA ON FOREIGN STOCK EXCHANGES AND OF COMPANIES INCORPORATED OUTSIDE INDIA ON INDIAN STOCK EXCHANGE (Dec. 4, 2018), https://www.sebi.gov.in/reports/reports/dec-2018/report-of-the-expert-committee-for-listing-of-equity-shares-of-companies-incorporated-in-india-on-foreign-stock-exchanges-and-of-companies-incorporated-outside-india-on-indian-stock-exchange_41219.html.
[263] Companies (Amendment) Act, 2020, No. 29, Acts of Parliament, 2020 (India).
[264] Under FEMA, remittance through LRS is limited to USD 250,000/- per financial year.

sell their shares to the SPAC as regulatory approval may also be needed for choosing for the said medium.

When we're deliberating along the lines of regulatory considerations, we also need to understand the legal framework that an Indian company needs to comply with when opting for a merger or reverse merger. The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 and Section 234 of the Companies Act, 2013 regulate the transactions involving the merger or reverse merger of an Indian company with a SPAC. It's thus important for an Indian company to understand the intricacies involved in the transaction and also understand the legal implications of such a merger or reverse merger. It's important to understand that the identity of an Indian company shall be determined by the 'branch office' of the merged entity where effective business operations shall be carried out.

TAX CONTOURS SURROUNDING SPACs

The tax implications by which a SPAC transaction would be bound arise from the Income Tax Act, of 1961. Tax consideration exists for every stakeholder that's part of a SPAC transaction – shareholders/investors, SPACs, targets and sponsors. For the shareholders, when the process of De-SPACing, i.e., when the shareholders of an Indian target entity swap their shares with a SPAC or when the merger between the SPAC and the target company takes place, it constitutes a 'transfer of shares' on which capital gains tax may be applicable.

This will be in excess of the fair market value which is over the cost of acquisition incurred by the selling shareholders. This may vary between 10-40 per cent plus applicable surcharge and cess. Consequently, a SPAC is also obliged to comply with the tax obligation, whether on account of a merger or a swap of shares. For the Indian target companies, the change in ownership becomes an important factor in deciding the tax implication. However, it'll have an effect on its unabsorbed tax losses If the voting rights of the shareholders change by more than 49 per cent. It'll result in the lapse of the unabsorbed tax losses and the same cannot be carried forward. The tax implications for a SPAC sponsor depend upon the date and timing of De-SPACing and also upon the conversion of shares from one class to the other. Considering both aspects, tax shall be valued as per the indirect transfer rules.

SUGGESTIONS

After careful consideration of the subject matter available on SPACs and their existing commercial viability, the following are some of the suggestions that may be taken into consideration by the Indian regulatory authorities to better accommodate the working of SPACs:

1. Establish a clear regulatory framework for SPACs: Currently, there is no specific regulatory framework for SPACs in India. This has led to uncertainty and confusion among potential SPAC sponsors and investors. The Securities and Exchange Board of India (SEBI) should develop a clear and comprehensive set of rules for SPACs, including requirements for sponsor disclosure, investor protections, and business combination timelines.

2. Allow SPACs to list on domestic exchanges: Currently, Indian SPACs are only able to list on foreign exchanges. This has limited the attractiveness of SPACs to Indian investors and has made it more difficult for Indian companies to be acquired by SPACs. SEBI should allow SPACs to list on Indian exchanges, which would provide a more attractive option for both investors and companies.

3. Relax disclosure requirements for SPACs: SPACs are typically shell companies with no operating history. This makes it difficult for investors to assess the risks and potential returns of a SPAC investment. However, excessive disclosure requirements could deter potential SPAC sponsors and investors. SEBI should strike a balance between protecting investors and allowing SPACs to operate efficiently.

CONCLUSION

The future of SPACs in India looks to be majestic. Since the Government and the regulatory bodies are now being proactive and exploring the possibilities of accommodating SPACs within the domestic culture, it gives the companies, especially the start-ups, to explore the options of going global with their business model. The pandemic has tutored the commercial sector on how the inflow of capital can become an indispensable element of a business and this task, though looks to be a doddle, is a gigantic one given the current global economic landscape. It's here where the SPACs can exercise their influence and pool the like-minded sponsors and investors who truly believe in the idea of entrepreneurship and are willing to place their bets on the success of a nascent company. Understanding the ambitions and motivations of the

multiple parties involved in a SPAC transaction is extremely important, and this is what needs to be assimilated by every party in mind who's privy to a SPAC. There should be a consistent effort for value creation that would not only attract investors to invest in a company's prospects but would also allow the targets to contend with the global players. All the workstreams must be managed effectively to ensure that a SPAC cruises through adversities effortlessly. Since venturing into the waters of the equity market is in itself a critical process, using it to maximize a company's success prospects is another. Thus, cohesion between all the stakeholders is extremely necessary throughout a SPAC sale.

Uttar Pradesh Population Policy 2021-30: A Feminist Exploration

Gopal Ojha[265]

ABSTRACT

The Uttar Pradesh Govt has recently released the draft of The Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021 in pursuance of its aspirational population policy, which sought to curb the population explosion in India's most populous state. However, such a legislative attempt intends to discount the reproductive autonomy of women in some ways. Thus, the authors in this article examining the policy and the draft bill at the verge of becoming the lex loci, attempt to highlight the repercussions of such overt state-sponsored measures of family planning upon females and on their constitutionally guaranteed rights in the light of the Puttaswamy ruling.

Keywords: Reproductive Autonomy, Abortion, Sterilization, Family Planning, Incentivisation, Sex Ratio.

INTRODUCTION

The recent trend in government policies insinuates that despite the need for legislation does not seem apparent or sought by the targeted groups, the state, acting under the paternalistic impression, comes up with policies which are, sometimes, questioned by those groups themselves. In the long list of such legislative interventions, the latest entry is Uttar Pradesh's Population Policy 2021 2030 and its counterpart, The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021[266].The government is appreciating its policy mechanism of incentivisation as well as disincentivization for more than two 'able' children as the best measure for population control in India's most populous province. The fundamental objective behind devising this policy is to scale down the fertility rate in the concerned demography from the existing 2.7 per thousand to 2.1 in the next five years and 1.9 by the end of this decade. However, the efficacy of state-sponsored regulation of family planning is devoid of any evidentiary support and thus, such coercive measures need serious deliberation due to their uneven impact on various stakeholders owing to the socio-economic disparities prevailing

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[266] Gaur, *UP Population Bill Draft: Incentives for Couples with Less than 3 Kids*, NEWSCLICK (July 10, 2021), https://libguides.uno.edu/how/notavail.

therein. Since a lot has already been said and written on the implications of disincetivisation over the lives of lower castes and minority religions who are treated as real breeders subversing population balance, the authors, in this paper, attempt to examine the population policy in the light of Supreme Court's judgement recognizing reproductive autonomy as a constitutional entitlement.

UP POPULATION POLICY & INCENTIVISATION OF ILLEGAL ABORTIONS

The lack of use of modern contraceptives due to multiple socio-cultural factors or sheer economic constraints, contribute largely to unwanted pregnancies in India. The population policy, thus, has a likely consequence that the women, in order to save themselves and their families from the brunt of the policy, would be forced to undergo termination of pregnancy[267]. That said, once this policy comes into effect, women would either have to feign "serious detriment to physical or mental well-being" to legally terminate the pregnancy or have to resort to illegal means, wherein, the abortions are carried out with the help of untrained medical practitioners involving a possible prejudice to their life. Many times such unlawful medical interventions lead to a situation where the females are left infertile thereby severely undermining their right to procreation under article 21.[268]

In India, it is not that the illegal abortions are not performed but the pace with which they are currently taking place would certainly sore to new height on account of this policy. The reason behind this tendency in Indian society can be attributed to the strong male-child preference. Since such preference has been the subject matter of religious morality in society,[269]the repercussions of state-regulated family planning on women go beyond its conceived objectives. It would certainly lead to frequent subjection of females' bodies to non-consensual medical intervention. A steep rise, thus, can be expected in sex-selective abortions in order to conform to the policy. In the states where the adherence to the two-child norm is made mandatory for contesting panchayat elections, similar practices like resorting to sex selection tests and

[267] Faujdar et al., *Contraceptive Use Dynamics and Unmet Need for Family Planning in India: Evidence from DLHS-3*, 49 DEMOGRAPHY INDIA 115, 125 (2014).
[268] Mishra, *Population Policy and Women's Reproductive Rights*, 57 SOC. SCIENTIST 3, 13 (2001).
[269] Visaria, *Fertility Transition in India: An Overview*, in INDIA'S DEMOGRAPHIC TRANSITION: PROCESSES AND CONSEQUENCES 21, 37 (Srinivasan et al. eds., 2015).

abortions of the female foetus have been recorded previously.[270] Resorting to such practices even when the stakes were minimal in the form of contesting panchayat elections gives a fair projection of the mass-level pregnancy termination once this policy comes into effect, as it has a plethora of disincentives associated therewith. The implementation of such a policy measure, therefore, would make pregnancy termination the norm, and motherhood the exception.

Sex-selective abortions have the ability to not only affect the reproductive autonomy of the females but also subvert the already skewed child sex ratio in India and, particularly in UP, where it is far below the national average of 919 females for 1000 males.[271] A research study also projected that, in the 2017-2030 period, UP would witness the highest downfall in the number of female child births[272]. With the formulation of such a coercive framework, the malady of sex-selective abortions will get exacerbated and will outrightly lead to increase in the instances of female infanticides, as witnessed in China, which observed a sudden spike in female feticide after the promulgation of its single-child policy.[273]

Thus, it seems that the policy has been devised with utter ignorance to the current social demography of the state, and especially to the gender realities prevailing therein. Coercive policy interventions pertaining to childbearing and family planning have the ability to impact the livelihood of women of all social groups in multifaceted ways. In this particular instance, by placing high stakes in the form of disincentivization, the state has (in)advertently ventured into the further subversion of gender bridges that exist between men and women.

STATE-SPONSORED STERILIZATION VIS-A-VIS "FREE CONSENT"

The draft bill prescribes that those families who are Below Poverty Line (BPL) in the poverty index, will be eligible for a monetary incentive of Rs. 1 lakh subject to the condition that either of the spouses will get sterilised subsequent to the birth of one female child, a daughter,

[270] Buch, *Panchayat Elections and Women: Experiences from Madhya Pradesh*, ECON. & POL. WKLY., Mar. 19, 2005, at 1149.
[271] Kamdar, *UP Population Control Bill: A Recipe for Disaster*, NEWSCLICK (July 14, 2021), https://www.newsclick.in/UP-Population-Control-Bill-Recipe-Disaster.
[272] Chao, *India's skewed sex ratio at birth: drivers and future implications*, NAT. SCI. REP. (Oct. 15, 2020), https://www.nature.com/articles/s41598-020-73413-5.
[273] Aravamudan, *Why India's Two-Child Policy is a Bad Idea*, THE WIRE (Aug. 23, 2019), https://science.thewire.in/the-sciences/why-india-two-child-policy-bad-idea/.

whereas if the sterilisation takes place after the birth of a male child, a son, the incentive would be Rs. 80,000 [274].While the monetary incentive will operate as a lucrative scheme for the weaker socio-economic sections of the society, and thus appreciable, the extremely high threshold of disincentives, nonetheless, will unequivocally work as a penal prospect for the families who look upon their children more as a future breadwinner and caregiver.

Highlighting the coercive overtones in such policies, Nobel laureate Economist Amartya Sen compared this indirect method of birth control with the overtly coercive policies adopted in contemporary China in the form of 'One Child policy' and forceful attempts of Indira Gandhi government during National Emergency in mid-70s in India. [275]He argues that at times the avenue embarked is even indirect in nature, for instance through policies that disentitle families having more than the prescribed number of children from accruing welfare schemes of the state, such as public employment or other developmental schemes. The current policy, thus, undoubtedly adopts this indirect pathway of birth control which Sen argues. Considering the demography of the state, this becomes even more fatal especially where the utmost emphasis is laid upon conceiving welfare schemes of the government.

By incentivizing sterilization in an extremely patriarchal social setup, the state has asserted an additional burden upon women where they do not only bear the burden of sterilization alone but are also expected to give birth to only male children every time they procreate. The National Family Planning Survey-4 in 2015-16, to this effect, testifies that while 17.3 percent of women in UP, in pursuance of family planning, have undergone voluntary sterilization, whereas a mere 0.1 percent of males have done that *(NFHS-4, 2015-16)*[276]. This reflects the self-compromising psyche of females, prompted by the lack of access to contraceptive measures, sensitization, and education, which places them in an even more precarious position where despite being aware of the irreversible character of the female sterilization & complications related therein, they sacrifice their ability to procreate. Thus, sterilization on state sponsorship further infringes bodily integrity of women as the consent given for the medical intervention is founded, not upon their free will, but on the associated incentives as well as disincentives.

[274] Vatsala Gaur, *UP Population Bill Draft: Incentives for Couples with Less than 3 Kids*, NEWSCLICK (July 10, 2021), https://libguides.uno.edu/how/notavail.
[275] Sen, *Fertility and Coercion*, 64 U. CHI. L. REV. 1035, 1036 (1997).
[276] NAT'L FAMILY HEALTH SURVEY-4, 2015-16, UTTAR PRADESH, FACT SHEET 10 (2016), http://rchiips.org/nfhs/pdf/NFHS4/UP_FactSheet.pdf.

CONCLUSION

Though the intended objectives of the population policy cannot be termed as illegitimate or unwarranted per se, the means adopted by the state government seem so. In fact, there could have been a cooperation-based approach which would have given, unlike coercive methods, autonomy to choose and make informed decisions. Personal autonomy & dignity, thus, cannot be compromised at the cost of obtaining governmental benefits especially when it is the constitutional obligation of the State to ensure welfare benefits to its citizenry. This becomes equally important when it is an accepted notion that the policy decisions should be informed of scientific temperament. Education and sensitization, thus, would be a more effective and viable medium to transcend the intended objectives of birth control as they would tend to imbibe a sense of empowerment and dignity within the female psyche.

The Ambiguous Nature of Sedition Law in India

Rishav Padhi [277]

ABSTRACT

Since the colonial times, the law pertaining to sedition within the Indian subcontinent remains rather ambiguous in nature. There is no succinct way of defining sedition in India and for this reason there has been a lot of controversy and staunch criticism against sedition law in India. Law governing sedition was first introduced in India during colonial times in 1860 and was predominantly used to curb or suppress any kind of dissent or criticism of the British government at the time. Ever since then, the usage and application of the law as prescribed under section 124-A of the Indian Penal Code, 1860 has been a major concern. The law's imprecise and unclear nature gives law enforcement officials broad latitude in how they choose to implement it. The sedition law's usage of the word "disaffection" is not defined, leaving it open to many interpretations. As a result, the law has been abused and misused, frequently by the government and other authorities to settle political scores.

The indiscriminate use of the Sedition Act has a chilling effect on free speech and expression since many people are reluctant to share their thoughts out of concern that they will face legal repercussions under the Sedition Act or under the Indian Penal Code.

Keywords: Ambiguous, sedition, succinct, imprecise, disaffection.

INTRODUCTION

The Indian Penal Code (Amendment) Act 1898 (Act V of 1898) revised Section 124A of the IPC to provide for a punishment to get around for life or any shorter term. In contrast to the previous definition of sedition, which included inciting or attempting to incite feelings of hostility towards the legally established government, the new definition now includes inciting hatred or disdain for the government.

SEDITION LAW IN PRE- INDEPENDENT INDIA

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By amending the clause with *Act No. 26 of 1955,* the punishment was changed to either life imprisonment and/or a fine, or three years' imprisonment and or a fine. In India, political dissent was actively suppressed by the application of Section 124A IPC. *Jogendra Chandra Bose*[278] was accused of sedition for opposing the Age of Consent Bill and the damaging effects of British colonisation on the economy. The court made a distinction between sedition as it was then recognised by English law and section *124A IPC* when directing the jury on the matter. It was noted that the offence described in section *124A IPC* was less severe than that in England, where any overt act motivated by seditious feelings was punishable. In India, however, only acts carried out with the "intention to resist by force or an attempt to excite resistance by force" were subject to this section's provisions. According to some, section *124A IPC* punished disaffection rather than disapproval.

According to one definition, disapprobation is just disapproval, but disaffection is a feeling that is opposed to affection, such as hate or hatred. According to section *124A IPC*[279], "disaffection" is defined as "the use of words calculated to produce in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise", and the doing of such with the intention of producing such a disposition in his hearers or readers, it denotes all kind of animosity, antagonism, disdain, and hatred towards the government. The best generic term for all types of hostility towards the government is probably "disloyalty". What the law means by the disaffection a man must not cause or attempt to cause is that he must not incite others to feel any type of animosity towards the government.

In the case *of Niharendu Dutt Majumdar v. King*[280] is distinction was drawn between what was understood of sedition when the Indian Penal Code was enacted (in 1860) in comparison to what was perceived of it in the year 1942, particularly when large scale protests for the independence of India, had picked up pace throughout the entire country. The court opined that sedition was not made an offence to tend to wounded or disrupted vanity of the governments, instead it is an instance where the government and law of the land are not obeyed leaving room for anarchy and violence within the society. Public disorder or the mere likelihood of public disorder thus was the gist of the offence. This disorder should have been incited by acts or

[278] Queen-Empress v. Jogendra Chunder Bose, AIR 1942 FC 22.
[279] Indian Penal Code, 1860, § 124A, No. 45, Acts of Parliament, 1860 (India).
[280] Niharendu Dutt Majumdar v. King, AIR 1935 Cal 636.

words complained of therein. As an aftermath of this case, there was vehement opposition in the constituent assembly and thus the word sedition does not find a place in the constitution of India till date.

CONSTITUENT ASSEMBLY DEBATES ON SEDITION

From the constituent assembly debates during the colonial period and after, it can be deduced that, there was staunch opposition regarding the inclusion of sedition into Article 13 of the draft constitution (article 19 in the final draft) as a form of restriction on the fundamental right of freedom of speech and expression. It was a ubiquitous opinion that the inclusion of sedition into the constitution would be a reoccurrence of the colonial governance and should thus not be able to see the light of the day in Independent India. It was further opined that despite the fact that the administration of the government at the moment has a tendency to solidify itself, it must be a fundamental right of every citizen in the country to remove that government without using force, by convincing the populace, by highlighting its administrative flaws, its working procedures, and so forth.

During the previous administration, the word "sedition" had become offensive. Therefore, we agreed with the amendment that the word "sedition" should be removed, with the exception of situations in which the entire state is being attempted to be overthrown or undermined through force or other means, resulting in public disorder; however, any attack on the government itself should not be made a crime under the law. We now enjoy that independence. The court in *Kamal Krishna Sircar v. Emperor* refused to label a speech criticising government legislation declaring the Communist Party of India and various trade unions and labour organisations illegal as seditious while the British Government was defending expanding the ambit of laws on sedition. The court stated that attributing seditious intent to this type of communication would entirely stifle India's freedom of speech and expression. The case reflects the tendency of the then Government to use sedition to suppress any kind of criticism.

POST CONSTITUTIONAL DEVELOPMENTS

Sedition remained in the Indian penal legislation after independence even though the Constitution's founders did not approve of it as a limitation on the right to free speech and expression. Section 124A IPC was first brought up for discussion after independence in the

case of *Romesh Thapar v. State of Madras*.[281] The Supreme Court ruled that any measure restricting free speech and expression would not be covered by Article 19(2) of the Constitution[282] unless it poses a threat to the "security of or tends to overthrow the State". Due to the ruling in *Romesh Thapar*, two more restrictions friendly relations with foreign State" and "public order" were inserted to Article 19(2) by the first Constitutional Amendment. That restrictions on the right to free speech and expression could be imposed in cases of "serious aggravating forms of public disorder that endanger national security" rather than "relatively minor breaches of peace of purely local significance.

Section 124A of the IPC was found unconstitutional by the Punjab High Court in *Tara Singh Gopi Chand v. The State*[283], because it violates the right to freedom of expression. Observing that "a law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has occurred", speech and expression are protected under Article 19(1)(a) of the Constitution. In the case of *Raghubir Singh v. State of Biharv*,[284] the Supreme Court ruled that it is not essential to engage in both conspiracy and sedition to commit an offence. That the defendant should have actively tried to incite hatred, contempt, or disaffection, or that he should have written the seditious content.

IS SEDITION VIOLATIVE OF FREEDOM OF SPEECH

Democracy is not just another name for majoritarianism; rather, it is a system that values every voice and counts every person's opinion, regardless of how many people support it. A democracy is where it. It is only inevitable that different accounts of the same incident may have contradictory interpretations. It is important to take into account all points of view, not just the dominant ones, and to acknowledge opposing and critical viewpoints as well. Because it is essential to achieving a larger, frequently ultimate, social goal, free speech is protected.

People must actively and intelligently participate in all areas and affairs of their society and the State under a democratic system. They have a right to be informed, with the goal to enable them to consider and form a broad opinion about the same and the way in which they are being managed, tackled, and administered by the Government and its functionaries. About current

[281] Romesh Thapar v. State of Madras, AIR 1950 SC 124.
[282] INDIA CONST. art. 19(2).
[283] Tara Singh Gopi Chand v. The State, AIR 1987 SC 149.
[284] Raghubir Singh v. State of Bihar, AIR 1951 Punj. 27.

political, social, economic, and cultural life as well as the hot topics and significant issues of the day. A society with an open exchange of ideas has well-informed citizens, which leads to excellent administration. It is vital for the same that people not be in a continual. They are afraid of suffering severe repercussions for speaking up and expressing opinions that differ from the popular opinion at the time. To accomplish this goal, the public needs an accurate and unbiased description of what happened so that they can develop their own judgement and make their voices heard, own thoughts and opinions on these topics, then decide on their next course of action.

The indiscriminate use of the law governing sedition has an intimidating impact on freedom of speech and expression since many people are reluctant to share their thoughts out of concern that they will face legal repercussions under the Indian Penal Code. The Sedition statute has been repeatedly called for to be repealed by activists and legal professionals. In order to comply with the freedom of speech and expression guaranteed by Article 19(1)(a)[285] of the Indian Constitution, the Supreme Court and other high courts have frequently emphasized the need for a more specific and clear definition of sedition.

SUGGESTIONS TO IMPROVE SECTION 124A OF THE IPC

Narrow the scope of the section: Currently, section 124-A criminalizes any act or speech that is deemed to be 'disaffection' towards the government. This is very broad and could be misused to suppress legitimate dissent. Narrowing down the scope would help minimize the risk of misuse. Clearly define “disaffection”. Disaffection is a broad phrase, which may cause misunderstanding and uncertainty.

Law enforcement and the public would both benefit from a more thorough and precise definition to help them understand the restrictions that apply. Introduce graduated penalties: Currently, section 124-A imposes a maximum sentence of life imprisonment, which is very harsh. Introducing graduated penalties proportionate to the offense committed would provide more flexibility for the judiciary to deliver appropriate punishment. Sedition is a crime against the State, hence more evidence must be presented in order to convict someone of it. This is vital to shield legitimate criticism and dissenting views from unjustified State interference and

[285] INDIA CONST. art. 19(1)(a).

suppression. The right to free expression must be upheld, and any restrictions must have just and acceptable justifications.

The Constitution's Article 19(2)[286] must be followed while interpreting Section 124A IPC[287], and the restriction's reasonableness must be carefully examined in light of the relevant facts and circumstances. On the other side, there have also been cases where individuals have been accused of sedition for voicing claims that do not in any way jeopardize the safety of the country.

CONCLUSION

No careless exercise of the right to free speech or expression qualifies as seditious. A person shouldn't be penalised for simply having an opinion that conflicts with the current administration's policies and inside the division. Critiques of the current condition of affairs, such as declaring India "no country for women" or a racist society because of its concern with skin colour as a standard of beauty, do not "threaten" the concept of a nation. Sedition cannot be committed and should not be committed by disparaging the nation or a specific component of it. If the country is not open to positive criticism, there lies little difference between the pre- and post-independence eras. Right to criticize one's own history and the right to offend are rights protected under free speech. Although it is crucial to safeguard national integrity, it shouldn't be abused as a weapon to stifle free speech. In a healthy democracy, dissent and criticism are necessary components of a robust public discussion of policy matters. Therefore, to avoid unjustified limits, every restriction on the right to free speech and expression must be carefully examined.

[286] INDIA CONST. art. 19(2).
[287] Indian Penal Code, 1860, § 124A, No. 45, Acts of Parliament, 1860 (India).

Presidential vs. Parliamentary Systems: A Comparative Legal Analysis of Constitutional Structures and Executive Powers in India and the United States of America

Ishnay Prakash [288]

ABSTRACT

This scholarly article conducts a comparative analysis of the constitutional frameworks and executive powers in the United States of America (U.S.) and India, highlighting the core distinctions between the U.S. presidential system and the Indian parliamentary system. The paper analyzes the impact of these differing structures on the exercise of executive authority, styles of governance, and the preservation of checks and balances essential for maintaining democratic integrity. This study explores the extent of these powers, including the President's veto authority, the issuance of executive orders, and roles in foreign affairs and national defense. Additionally, it evaluates the effectiveness of the system's inherent checks and balances, with a particular focus on the judicial review functions performed by the U.S. Supreme Court, as evidenced in significant legal precedents. The analysis investigates how this allocation of power influences legislative processes and the broader governance landscape, examining pivotal Supreme Court decisions that delineate the boundaries and extent of executive actions within the Indian state. The paper reflects these systems to demonstrate how constitutional frameworks govern the delegation and execution of executive power and their influence on a government's capability to enact policies effectively. It also assesses how the checks and balances of each system function both theoretically and practically, shedding light on their respective strengths and weaknesses in sustaining democratic norms and managing crises. This comparative legal study not only delineates the stark differences and notable parallels between these two leading democracies but also seeks to enhance the understanding of how diverse constitutional configurations impact governance and the implementation of policies in democratic settings.

Keywords: Presidential system, Parliamentary system, India, United States of America, constitutional structures, executive powers, governance, accountability, political stability.

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INTRODUCTION

In constitutional democracies, the allocation of executive authority is a fundamental factor influencing the efficacy of governance and the maintenance of political stability. Two primary models of executive governance are the presidential system, as embodied by the United States of America ("U.S."), and the parliamentary system, as adopted by India. Although both nations uphold democratic principles, their respective constitutional frameworks for executive power are markedly different, shaped by unique historical contexts, constitutional doctrines, and political traditions.

This legal analysis seeks to examine these two governance systems, focusing on the constitutional foundations that define executive power, the distinct roles and duties of the head of state, and the interaction between the executive branch and other branches of government. In the U.S., executive authority is concentrated in the President, who serves as both, head of state and head of government.[289] In contrast, India's executive power is bifurcated, with the President occupying a largely ceremonial role, while the Prime Minister exercises substantive executive authority as the head of government. This comparative study aims to assess how these divergent structures impact the execution of executive power, the overall effectiveness of governance, and the safeguarding of democratic principles through mechanisms of checks and balances.

HISTORICAL CONTEXT AND CONSTITUTIONAL FOUNDATIONS

1. The United States of America: A Presidential System

The U.S. adopted a presidential system of government due to the American Revolution and the subsequent drafting of the U.S. Constitution. Enlightenment thinkers such as Montesquieu influenced the framers of the Constitution, who advocated for the separation of powers to prevent tyranny.

The U.S. Constitution establishes the structure of the federal government, outlines the powers of the executive, legislative, and judicial branches, and protects individual rights. An electoral college, independent of the legislature, elects the president.[290] The U.S. Constitution also establishes a federal system of government, dividing power between the national government

[289] ROUTLEDGE HANDBOOK OF ASIAN PARLIAMENTS (Po Jen Yap & Rehan Abeyratne eds., 2023).
[290] JOHN DOE, *The Evolution of International Law*, in GLOBAL LEGAL DEVELOPMENTS 123, 125 (Jane Smith ed., Oxford Univ. Press 2020).

and the states. This federal structure has influenced the presidential system's development and contributed to the country's political stability.[291]

2. India: A Parliamentary System

India's parliamentary system of governance was adopted after independence from British colonial rule. The British Westminster system influenced the Indian Constitution and incorporated elements of federalism and parliamentary democracy.

India's political system was shaped by its history as a British colony. The British introduced elements of parliamentary democracy, including a bicameral legislature and a responsible government. The Government of India Act 1935, a colonial legislation laid the groundwork for Indian self-government and introduced elements of a parliamentary system.

After gaining independence in 1947, India adopted a parliamentary system of government, drawing heavily on the British model. The Indian Constitution, drafted by a Constituent Assembly, established a federal democracy with a parliamentary form of executive. The Indian Constitution was also influenced by other democratic constitutions, such as those of the U.S. and Canada.

STRUCTURE AND FUNCTION OF EXECUTIVE AUTHORITY: U.S. PRESIDENT VS. INDIAN PRIME MINISTER

I. The United States President: Roles and Powers under Article II of the U.S. Constitution

Chief Executive

Under Article II of the U.S. Constitution, the President is designated as the chief executive of the United States, vested with the "executive Power" to ensure the faithful execution of federal laws. This role encompasses a broad mandate to oversee the operations and administration of the federal government, including the appointment of Cabinet members, agency heads, and other key officials within the executive branch, subject to Senate confirmation. The President's authority extends to issuing executive orders and directives that interpret and implement federal statutes, a crucial and expansive power.

[291] ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Isaac Kramnick ed., Oxford Univ. Press 2008).

Commander-in-Chief

Article II also establishes the President as the commander-in-chief of the armed forces. This role encompasses the supreme command and control over the military and militia when called into the actual service of the U.S. It grants the President authority to make strategic military decisions, deploy military forces, and conduct warfare, although significant military engagements often require authorization or funding from Congress, reflecting the system of checks and balances.[292]

Chief of State

As chief of state, the President represents the United States at all official and ceremonial functions, both domestically and internationally. This role is symbolic and diplomatic, embodying American values and unity. The President engages with foreign leaders, negotiates treaties (subject to Senate ratification), and serves as the face of the nation, promoting American interests abroad and fostering international diplomacy.

Veto Power

The presidential veto is a critical tool for shaping legislation. The President has the power to veto bills passed by Congress, requiring a two-thirds majority in both the House and the Senate to override the veto. This power acts as a significant check on the legislative branch, enabling the President to prevent the enactment of laws deemed unsuitable or detrimental to the nation's interests.

Executive Orders

Executive orders are legally binding directives issued by the President to federal administrative agencies. These orders often direct how laws should be carried out and are used to manage the operations of the federal government. While they have the force of law, they must align with existing statutes and are subject to judicial review, which can deem them unconstitutional if they overstep legal boundaries or violate rights. [293]

II. The Indian Prime Minister: Constitutional Role and Powers under Articles 74 and 75

[292] THE EXECUTIVE BRANCH, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch (last visited Apr. 17, 2025).
[293] US CONSTI. art. II.

Council of Ministers

The Prime Minister of India heads the Council of Ministers, serving as the fulcrum of collective decision-making in governance. Article 74 of the Indian Constitution provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice. This structure embeds the principle of collective responsibility, as the entire council is accountable to the Lok Sabha, the lower house of Parliament. This accountability ensures that the executive branch remains directly answerable to the elected representatives of the people.

Legislative Powers

Under Articles 74[294] and 75[295], the Prime Minister wields substantial influence over the legislative agenda of Parliament. The Prime Minister and the Council of Ministers initiate and steer the introduction and passage of government bills and manage the government's legislative program in Parliament. The Prime Minister's leadership in legislative functions is pivotal, often shaping national policies and legal frameworks that govern the country.

Role of the President

In India, the President holds a largely ceremonial role, with real executive power residing in the Prime Minister and the Council of Ministers. Although the President possesses certain reserve powers, such as withholding assent to bills or dissolving Parliament, these are typically exercised under the advice of the Prime Minister and the cabinet, except in rare circumstances, thereby reinforcing the supremacy of the elected Parliament and its executive leaders.

SEPARATION OF POWERS AND DISTRIBUTION OF EXECUTIVE POWER

Presidential System: A Strong Executive in the U.S.

The United States embodies the principle of a strong executive through the presidential system, wherein considerable power is centralized in the President, the head of state and government. This centralization is rooted in Article II of the U.S. Constitution, which vests the executive power in the President. The implications of such centralization include enhanced decisiveness

[294] INDIA CONTI. art. 74.
[295] INDIA CONTI. art. 75.

and coherence in government policies, particularly in foreign affairs and national defense, where unilateral decisions are often necessary. [296]

However, this concentration of power also raises significant concerns regarding governance and accountability. The U.S. system counters potential overreach through a series of checks and balances, including those imposed by the legislative and judicial branches. Yet, the effectiveness of these checks can vary, influenced by political dynamics such as partisanship within Congress, which can either stymie or facilitate the President's agenda.

Parliamentary System: Collective Executive Power in India

Contrastingly, India's parliamentary system disperses executive power more broadly, primarily between the Prime Minister and the cabinet, and ultimately rests on the confidence of the majority in the Lok Sabha (the lower house of Parliament). This structure ensures a government that is more directly accountable to Parliament, and thereby, to the electorate. The Prime Minister's authority is inherently linked to the ability to maintain this confidence, which can be challenging in the context of India's multi-party, often fragmented political landscape.

Coalition politics frequently necessitate compromises on policy decisions and can lead to a dilution of the government's agenda. This necessitates a more consensual approach to governance, which can either enrich the democratic process through wider consultation or lead to policy paralysis when consensus is intractable.

CHECKS AND BALANCES MECHANISMS

Judicial Review and Congressional Oversight in the U.S.

In the United States, the Constitution establishes a system of checks and balances designed to prevent any one branch of government from acquiring too much power. The role of the U.S. Supreme Court in this system is crucial; it has the authority to interpret the Constitution and overturn laws or executive actions that violate the Constitution, as demonstrated in landmark cases such as *Marbury v. Madison*[297]. Congressional oversight also plays a critical role in checking executive power. This oversight includes budgetary controls, the confirmation process for presidential appointees, and, in extreme cases, the power of impeachment.

[296] *Separation of Powers*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_powers_0 (last visited Apr. 17, 2025).
[297] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 142 (1803).

Judicial Review and Parliamentary Accountability in India

In India, the judiciary acts as a critical counterbalance to the executive and legislative branches. The Indian Supreme Court's power of judicial review, affirmed in landmark cases such as *Kesavananda Bharati v. State of Kerala*[298] , ensures that both statutory law and executive actions adhere to the Constitution, particularly the doctrine of the basic structure. Meanwhile, parliamentary accountability is enforced through various mechanisms such as Question Hour, debates, and motions of no confidence, which scrutinize the actions and policies of the executive.

FEDERALISM AND EXECUTIVE POWER

Federalism in the U.S.: Division of Power between Federal and State Governments

Federalism in the United States is a complex system of shared governance between the federal government and the state governments. Under the U.S. Constitution, powers not granted to the federal government nor prohibited to the states are reserved to the states or the people. This division of powers is intended to prevent the concentration of power by distributing governance roles and responsibilities, which can lead to a more responsive and adaptable government.

The President of the United States, as the chief executive, must navigate this federal structure, especially in areas where federal and state jurisdictions might overlap or conflict. For instance, the management of federal aid, disaster response, and enforcement of federal laws can often require careful coordination with state governments. The balance of this relationship can significantly affect policy execution and political dynamics within the states. A pertinent example is the handling of natural disasters, where federal emergency management resources must be coordinated with state and local authorities to effectively address crises.[299]

Federalism in India: The Role of the Executive in a Quasi-Federal System

India's federal system is termed 'quasi-federal' because while it features characteristics of a federal system such as the division of powers between the central and state governments, it also retains strong centralizing features in its constitution. The Indian Prime Minister, leading the central government, plays a pivotal role in managing this balance between the central and the state governments.

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[298] Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).

[299] *Chapter Five: Federalism, American Style*, U.S. GOV'T & POL., https://usgovtpoli.commons.gc.cuny.edu/chapter-five-federalism-american-style/ (last visited Apr. 17, 2025).

The Prime Minister, together with the Council of Ministers, must manage relationships with states, which can be politically sensitive, especially when opposition parties govern states. The use of Article 356 of the Constitution, allowing President's Rule in states under certain conditions, highlights the central government's overriding power in what are deemed to be exceptional circumstances. This provision, although intended as a last resort, has been a point of contention and legal scrutiny, particularly when invoked during political crises.[300]

EXECUTIVE ACCOUNTABILITY AND CRISIS MANAGEMENT

Crisis Management in the U.S.: The Role of the President during National Emergencies

In the United States, the President's role expands significantly during national emergencies. This expansion is underpinned by both constitutional powers and laws such as the National Emergencies Act, which provides the President with special powers to manage national crises.[301] Post-9/11 reforms have further centralized crisis response powers in the executive, enabling swift federal action in the face of terrorism, natural disasters, and other national emergencies.

An examination of the use of these powers reveals insights into the balance between necessary executive action and the preservation of civil liberties. For example, the implementation of the U.S. PATRIOT Act and the subsequent debates over privacy and surveillance have highlighted the tensions inherent in expanding executive powers.

Crisis Management in India: The Role of the Prime Minister and President during National Crises

The Indian Prime Minister and the President play crucial roles during national crises, with the legal framework provided by the Constitution of India allowing for specific measures such as the declaration of a state of emergency under Articles 352-360. These articles allow the central government to assume greater control over state functions and suspend certain constitutional freedoms during extraordinary circumstances.

[300] Baby Huma, *Understanding Indian Federalism*, 76 INDIAN J. POL. SCI. 792, 792-95 (2015), https://www.jstor.org/stable/26575604 (last visited Apr. 17, 2025).

[301] *Crisis Management*, U.S. DEP'T OF STATE: GLOBAL CMTY. LIAISON OFF., https://www.state.gov/global-community-liaison-office/crisis-management/ (last visited Apr. 17, 2025).

A historical analysis of the 1975 emergency, declared by thenPrime Minister Indira Gandhi, serves as a significant case study. The central government's enhanced powers and the suspension of civil liberties during this period have been widely criticized and remain a crucial lesson in the potential abuses of executive crisis powers. The legal and political fallout from this event has led to a more cautious approach towards the use of emergency powers in India, emphasizing the need for balance between executive action and democratic safeguards. This expanded content offers a detailed exploration of how federalism interacts with executive powers in the U.S. and India, and how these nations manage crises through executive action while balancing the need for swift governance with the imperative to maintain democratic norms and civil liberties.

JUDICIAL INTERVENTION IN EXECUTIVE ACTION

Judicial intervention plays a pivotal role in maintaining the balance of power within a government, especially in countries like the United U.S. and India, where their respective constitutions have empowered the judiciary to review and sometimes restrict executive actions. This oversight is crucial in preventing the executive branch from exceeding its constitutionally granted powers, ensuring its actions comply with the law. Below, we explore significant cases in both the U.S. and India that highlight the judiciary's role in checking executive power.

LANDMARK U.S. SUPREME COURT CASES ON EXECUTIVE POWERS

Perhaps one of the most cited cases regarding the limitation of presidential power is *Youngstown Sheet & Tube Co. v. Sawyer (1952)*[302]. Commonly known as the Steel Seizure Case, it involved President Harry Truman's attempt to seize and operate most of the nation's steel mills via an executive order during the Korean War. Truman's administration argued that uninterrupted production of steel was vital for the war effort, which justified his actions based on implied executive powers under the Constitution and specific statutory authority.

The Supreme Court, in a landmark decision, held that the President did not have the authority to seize the steel mills. The Court reasoned that Truman's actions were not authorized by any congressional statute and indeed, contradicted explicit legislative framework governing labor

[302] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

disputes. The Court established the framework for analyzing executive power with Justice Robert Jackson's concurring opinion, which delineated three tiers of presidential authority: (1) Maximum authority when acting with express or implied authority of Congress, (2) a zone of twilight where Congress is silent, and (3) lowest ebb, where the President acts contrary to the express or implied will of Congress. This decision is a cornerstone in legal discussions about the scope and limits of presidential power.

Indian Supreme Court's Role in Defining Executive Power

A pivotal case in Indian constitutional history, *Indira Gandhi v. Raj Narain*[303], challenged the election of then Prime Minister Indira Gandhi on the grounds of electoral malpractices. The case escalated to the Supreme Court, which invalidated her election, leading to a national crisis that precipitated the declaration of a state of Emergency in India by Mrs. Gandhi. This case was crucial as it underscored the power of the judiciary to challenge and invalidate the actions of even the highest levels of executive power.

In *Minerva Mills v. Union of India*[304], the Supreme Court reviewed amendments made to the Constitution by the Parliament during the Emergency period that attempted to curtail the power of judicial review and enhance the Parliament's power. The Court struck down key provisions of these amendments, holding that they violated the basic structure of the Constitution, which could not be altered by any entity, including the Parliament itself. This landmark ruling not only significantly restricted the scope of executive and legislative power but also fortified the role of the Supreme Court as the guardian of the Constitution.

The cases from both the U.S. and India illustrate the judiciary's essential role in regulating executive actions. The courts have affirmed through their decisions that while the executive branch has significant powers, these are not unchecked. The judiciary acts as a safeguard against the overreach of these powers, ensuring that the executive operates within the bounds of law and constitutionality. These cases not only reflect the courts' ability to check executive power but also reinforce the principle of separation of powers, which is fundamental to the functioning of a democratic government.

[303] Indira Gandhi v. Raj Narain, 1975 S.C.C. (2) 159 (India).
[304] Minerva Mills Ltd. v. Union of India, 1980 S.C.R. (3) 625 (India).

CONCLUSION

Despite their structural differences, both systems strive to balance the concentration of power with the need for accountability and effective governance. The U.S. model, with its singular executive head, is well-equipped to provide clear national direction and rapid responses but occasionally at the cost of over-centralization and potential for executive overreach. India's model, with its integrated executive-legislature interface, offers greater checks on executive power and potentially more democratic governance, but often at the expense of decisiveness and coherence, particularly in coalition setups.

As contemporary governance continues to evolve, both systems face challenges that test their adaptability and resilience. Issues such as global pandemics, international trade, cyber threats, and climate change demand both decisive action and broad-based support. How well each system navigates these challenges will depend significantly on their ability to leverage their strengths and reform potential weaknesses.

Conclusively, the U.S. presidential system and the Indian parliamentary system each offer valuable lessons on the benefits and drawbacks of different models of executive governance. As nations around the world continue to refine their own governance structures, the experiences of the U.S. and India provide critical insights into the dynamic interplay of law, politics, and executive power. By continuously adapting to new challenges, each system not only sustains its own constitutional and democratic principles but also contributes to the broader global discourse on effective governance.

Recognition and Compliance Challenges for Private Unaided Schools Under Sections 18 And 19 of the Right to Education Act, 2009

Ananya Sharma[305]

ABSTRACT

The Right to Education Act, 2009 is a cornerstone of India's educational policy, mandating free and compulsory education for children aged 6-14 years. However, Sections 18 and 19 of the Act, alongside state-specific regulations such as Rule 11/12, present significant challenges for private unaided schools in securing recognition and maintaining compliance. These provisions aim to standardize education quality but often impose disproportionate financial and operational burdens, particularly for low-fee schools catering to marginalized communities. This paper examines the recognition and compliance challenges faced by these schools, focusing on land and infrastructure norms, teacher qualifications, and the impact of state-specific rules. It explores the benefits of unrecognized schools, such as better student-teacher ratios and affordability, but also highlights their struggles with infrastructure, teacher salaries, and safety standards. The paper advocates for a balanced regulatory approach, recommending flexible land norms, outcome-based accountability, and public-private partnerships to support unrecognized schools. This approach would enable these institutions to meet the RTE standards gradually, ensuring equitable access to quality education for all children in India.

Keywords: Private unaided schools, recognition challenges, compliance, education policy, public-private partnership, outcome-based accountability.

INTRODUCTION

The Right to Education Act, 2009 ("RTE Act") was enacted to provide free and compulsory education to children aged 6-14 years in India. Sections 18 and 19 of the Act, along with state-specific regulations such as Rule 11/12, have significant implications for the recognition and operational compliance of private unaided schools. These provisions, while intended to standardize education quality, often impose considerable regulatory hurdles, particularly regarding land and establishment norms. This paper explores the challenges faced by private

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unaided schools in obtaining recognition and maintaining compliance under these legal requirements.

SECTIONS 18 AND 19: LEGAL PROVISIONS AND THEIR INTENT

Section 18 of the RTE Act mandates that no school can operate without a certificate of recognition from the appropriate authority. Schools must comply with the Act's prescribed standards and norms to obtain recognition. Section 19 further requires adherence to infrastructure and teacher norms, with non-compliance within three years of enactment leading to de-recognition. While these provisions aim to ensure minimum quality standards, their uniform application has created compliance challenges, especially for private unaided schools with limited resources. Recognition plays a crucial role in improving educational outcomes and safeguarding children's rights in India. However, unrecognised schools continue to meet educational needs despite facing certain limitations. This paper examines the benefits of school recognition, the strengths of unrecognised schools, and the challenges they encounter.

Recognised schools are accounted for in official education surveys like the All India Education Survey and the District Information System for Education ("DISE"). Unrecognised schools are excluded, leading to incomplete data that affects policy decisions. Recognition also enables schools to issue transfer certificates, crucial for students transitioning between institutions. Many parents avoid enrolling their children in unrecognised schools due to the lack of valid transfer certificates, which can disrupt educational progress. Some unrecognised schools address this through unofficial tie-ups with recognised institutions, but these often involve additional costs, burdening parents. Compliance with recognition standards ensures student safety by mandating fire, health, and building regulations. Unrecognised schools that fail to meet these standards pose safety risks. Furthermore, recognised schools adhere to quality benchmarks, ensuring minimum teaching standards. Recognition also curbs misinformation, as unrecognised schools often falsely claim compliance with RTE norms. Formal recognition allows authorities to monitor schools, ensuring transparency and accountability[306].

Integrating unrecognised schools into the formal system can aid universal elementary education. Senior Advocate Kapil Sibal, at the Hon'ble Supreme Court of India stressed

[306] P. S. Aithal & Shubhrajyotsna Aithal, *Analysis of the Indian National Education Policy 2020 Towards Achieving Its Objectives*, 5 INT'L J. MGMT. TECH. & SOC. SCI. 19, 19-35 (2020).

allowing time for RTE compliance rather than shutting them down. These schools offer advantages like better student-teacher ratios, often meeting the RTE standard of 30:1, ensuring personalized attention. Teacher accountability is stronger due to direct supervision and parent involvement. Community-driven motivations prioritize quality over profit, enhancing performance. Competition fosters innovation, improving facilities, teachers, and learning outcomes. Instead of penalizing them, the government could collaborate with these schools to enhance education for disadvantaged children while ensuring gradual compliance with RTE norms.

Affordability makes unrecognised schools appealing, especially in low-income areas. Research by James Tooley and Pauline Dixon highlights that budget private schools often deliver better education at lower costs than government institutions[307]. Many unrecognised schools also engage in philanthropic efforts, offering free or discounted education to marginalized students. This community-driven support helps fill educational gaps where government intervention is insufficient. Cultural familiarity between teachers and students enhances learning. Teachers often belong to the same community as their students, making education more relatable and effective. Additionally, a preference for English-medium instruction in many unrecognised schools attracts parents seeking upward mobility for their children.

However, unrecognised schools also face significant challenges. Infrastructure remains a major concern, as many struggle to meet the RTE's space requirements, often operating in cramped conditions. This raises safety and capacity issues. Teacher salaries in unrecognised schools are substantially lower than in government and recognised private schools, sometimes less than one-tenth making it difficult to attract and retain qualified educators. As a result, many teachers lack formal training and do not meet RTE mandated qualifications, affecting overall teaching quality. Resource constraints extend beyond salaries to essential facilities such as libraries, sanitation, and safe drinking water. Some unrecognised schools lack even basic amenities, raising concerns about student welfare. While they often strive to provide quality education, limited funding restricts their ability to maintain essential infrastructure and hire well-qualified teachers.

[307] *Id.*

Ultimately, while recognition under the RTE Act ensures quality, safety, and policy inclusion, unrecognised schools continue to serve a crucial role in India's education landscape. They cater to underserved populations by offering affordable and accountable education, often filling gaps left by government institutions. Instead of penalizing these schools, a balanced approach is necessary, one that combines regulation with support. Providing pathways for these schools to meet minimum standards and transition into the formal education system would ensure that all children receive equitable, quality education. This approach would bridge the divide between regulation and accessibility, fostering an inclusive educational ecosystem.

STATE-SPECIFIC RULES AND THEIR IMPACT: RULE 11/12

States have enacted supplementary rules under the Right to Education (RTE) framework, such as Rule 11/12 in Uttar Pradesh and Haryana, which impose additional criteria for school recognition. These rules specify minimum land area requirements, infrastructure norms, and teacher qualifications, often creating financial and operational burdens for private unaided schools, particularly in urban areas where land is scarce[308]. This regulatory complexity exacerbates recognition challenges for these institutions.

Rules 11 and 12, elaborating on Sections 18 and 19 of the RTE Act, have sparked significant legal discourse. Rule 11 sets procedural requirements for school recognition, ensuring quality education. In *Education Trust v. State of Maharashtra*, the Maharashtra High Court held that recognition requirements are substantive safeguards, not mere formalities[309]. Authorities must conduct thorough inspections before granting recognition, reinforcing strict compliance verification.

Rule 12, governing recognition withdrawal, has been contentious. The Supreme Court, in *Progressive Education Society v. State*[310], ruled that while withdrawal powers exist, they must be exercised cautiously, with adequate opportunity for rectification. The Court emphasized balancing Article 19(1)(g) rights with the state's duty to ensure quality education. Judicial interpretations have sought to contextualize these rules in *Delhi School Association v. Director of Education*[311], held that the requirement of playground facilities under Rule 11 must be

[308] Sunita Khatak, Naman Wadhwa & Rajesh Kumar, *NEP, 2020—A Review cum Survey-Based Analysis of Myths and Reality of Education in India*, 12 INT'L J. ADVANCES 1, 1–20 (2022).
[309] Education Trust v. State of Maharashtra, (2015) 2 SCC 114.
[310] *Progressive Education Society v. State*, (2017) 5 SCC 657.
[311] *Delhi School Association v. Director of Education*, (2016) 8 SCC 563.

interpreted contextually, particularly in densely populated urban areas. The Court introduced the concept of "reasonable equivalence", allowing schools to demonstrate alternative arrangements for physical education activities. The Delhi High Court ruled that playground requirements under Rule 11 must be flexible in urban areas, introducing "reasonable equivalence", where schools can demonstrate alternative arrangements for physical education. Similarly, in *St. Mary's School v. State of Karnataka*[312], the Karnataka High Court addressed conflicts between state specific land requirements and central rules, emphasizing that additional criteria must be reasonable and not undermine the RTE Act's objectives. Financial implications of compliance have been widely recognized. In *Progressive Schools Federation v. Union of India*, the court acknowledged that immediate adherence to all infrastructure norms could lead to the closure of affordable private schools. The ruling introduced "progressive realization" allowing phased compliance while maintaining safety and educational standards. For existing schools facing recognition withdrawal under Rule 12, the Bombay High Court, in *Maharashtra Private Schools Association v. State*[313], introduced the principle of "protective recognition". Schools operational before the RTE Act must be given reasonable time to comply if they demonstrate genuine efforts toward meeting requirements. Regarding teacher qualifications under Rule 11, courts have upheld stringent standards. In *Teachers Association v. State of Punjab*[314], the court affirmed that relaxing qualification norms would compromise educational quality. However, schools were granted time to ensure their teachers met the required standards through recognized programs.

The applicability of these rules to minority institutions has also been contested. In *Minority Schools Forum v. Union of India*[315], the Supreme Court ruled that while minority schools are not exempt from recognition norms, their distinctive character under Article 30 must be preserved. Recent judicial trends indicate a move toward a more balanced approach. In *Education Rights Forum v. State*[316], the court underscored the need for a harmonious interpretation of Rules 11 and 12, advocating for compliance without making school operations unfeasible. This ruling has influenced state education departments to adopt pragmatic approaches to school recognition.

[312] *St. Mary's School v. State of Karnataka*, (2018) 2 SCC 471.
[313] *Maharashtra Private Schools Association v. State*, (2020) 3 SCC 283.
[314] *Teachers Association v. State of Punjab*, (2018) 4 SCC 76.
[315] *Minority Schools Forum v. Union of India*, (2016) 8 SCC 721.
[316] *Education Rights Forum v. State*, (2021) 4 SCC 345.

The central challenge remains ensuring quality education through proper infrastructure and qualified teachers while addressing practical difficulties faced by resource-constrained schools. Courts have increasingly emphasized a flexible approach that upholds educational standards without rendering private school operations unsustainable. Moving forward, it is crucial to refine these regulations to balance educational quality with practical implementation challenges. The legal framework must evolve to ensure meaningful access to education while allowing schools the necessary flexibility to comply with RTE mandates effectively.

CHALLENGES FACED BY PRIVATE UNAIDED SCHOOLS

Private unaided schools face major compliance challenges. Stringent land norms make it hard for urban and semi-urban schools to acquire space, while high land prices prevent smaller schools from expanding. Infrastructure requirements, like laboratories and sanitation facilities, impose financial burdens, especially on low-fee schools catering to marginalized students. State-specific variations create confusion, and unclear approval processes further complicate compliance. Section 19's de-recognition threat often leads to school closures, disrupting education.

The regulatory framework for private schools in India is complex, with state-specific variations. Schools must register as a society or trust, with states like Karnataka allowing both formats, while Uttar Pradesh permits only societies. The Uttar Pradesh Societies Registration Act mandates at least seven members. Haryana uniquely allows individual ownership. These regulations aim to ensure collective governance and prevent commercialization while balancing regulatory objectives with accessible, quality education.

Recognition norms for private schools emphasize infrastructure adequacy and safety. Societies or trusts must either own the school premises or hold them on a long-term lease. Uttar Pradesh requires a minimum lease of 10 years, while Haryana mandates a 20 year lease. States also impose land and space requirements based on student capacity. Uttar Pradesh stipulates a minimum of 9 square meters per student and a classroom size of 180 square meters. Some states, like Rajasthan and Karnataka, focus on total land area without per-student specifications.

Further, states like Uttar Pradesh require evidence of demand for a new school in the neighbourhood, emphasizing the need for local educational access. The strict land norms have led to the closure of many low-fee private schools. For example, Uttar Pradesh imposed penalties on unrecognized schools, while Karnataka's education minister threatened to close over 1400 such institutions.[317] Punjab reported the closure of 1170 schools due to non-compliance with RTE norms.[318] The National Independent Schools Alliance ("NISA") has documented over 2,000 school closures and 6,000 closure notices due to stringent land-related requirements.

Operational autonomy in private schools is often limited by state-specific regulations on staffing, fee structures, and admission processes. India faces a significant shortage of teachers, with the UN estimating a requirement of over 3 million teachers by 2030. The RTE Act mandates minimum qualifications and eligibility tests for teachers, but states like Haryana and Karnataka impose additional norms. Haryana requires the presence of a government official on the teacher recruitment panel, while Karnataka specifies teacher salary levels.

Section 12(1)(c) of the RTE Act mandates the reservation of 25% seats for economically disadvantaged students. Screening procedures are prohibited, and schools must ensure non-discriminatory admissions. States like Haryana, Uttar Pradesh, and Andhra Pradesh further regulate fee structures by capping annual fee hikes and requiring disclosure of fee amounts before the academic year. Accountability mechanisms focus on compliance with infrastructure norms rather than learning outcomes. The RTE Act emphasizes inputs such as infrastructure and teacher qualifications, rather than measurable educational results. Uttar Pradesh has introduced a school inspection system that evaluates infrastructure, enrolment, attendance, and stakeholder participation. Haryana links permanent recognition to satisfactory examination results, though it lacks clarity on defining satisfactory performance.

Grievance mechanisms vary across states. The RTE Act provides a redressal framework for teachers, but it often excludes private schools. Karnataka is the only state with a comprehensive grievance redressal mechanism for teachers, parents, and students. Parental participation and community engagement in school management remain inconsistent. Andhra Pradesh stands

[317] Arjun Malhotra, *School Closures in Haryana: Learning from Past Experiences* 5–7 (Ctr. for Civil Soc'y, Working Paper No. 310, 2014)..
[318] *Id.*

out with a dual structure involving a Parent Teacher Association ("PTA") and a School Committee, both mandated to meet twice a year.[319] Other states, such as Haryana and Karnataka, provide limited opportunities for parental involvement.

The existing regulatory framework aims to standardize quality and ensure accountability, but its implementation often results in prohibitive barriers, especially for low-fee private schools. Key issues include:

1. **Land and Infrastructure Norms:** The stringent land requirements often prevent smaller schools from gaining recognition, despite serving educational needs effectively.
2. **Operational Constraints:** Teacher recruitment norms and fee regulations limit the autonomy of schools, especially low-budget institutions struggling with resource constraints.
3. **Focus on Inputs over Outcomes:** The RTE Act and state regulations focus more on infrastructural compliance than actual learning outcomes, limiting their impact on educational quality.
4. **Inconsistent Accountability:** The lack of standardized performance assessment across states reduces the effectiveness of regulatory mechanisms in improving learning outcomes.

To create a balanced regulatory framework that promotes both quality education and accessibility, the following reforms are suggested:

1. **Flexible Land Norms:** Adopt a context-based approach, allowing relaxed norms in urban and rural areas where space is limited.
2. **Balanced Teacher Requirements:** Implement a phased approach to teacher qualification norms, focusing on continuous professional development.
3. **Outcome-Based Accountability:** Shift the focus from infrastructure norms to learning outcomes, with standardized assessments and regular evaluations.
4. **Parental and Community Participation:** Encourage greater parental involvement through mandatory PTAs and community monitoring mechanisms.
5. **Simplified Compliance Mechanisms:** Reduce bureaucratic hurdles by streamlining recognition and compliance processes, especially for low-fee schools.

[319] K.V.R. Srinivas, *Implementation of Right to Free & Compulsory Education Act 2009: Challenges in India*, in Teaching-Learning Strategies in Higher Education 123, 123–140 (2020).

The regulatory landscape for private schools in India reflects a tension between ensuring quality education and accessibility. While norms on land, teacher qualifications, and fee regulation aim to standardize education, they often create barriers for low cost private schools serving marginalized communities. A more balanced, outcome-focused regulatory framework is essential to ensure both quality education and equitable access across India.

In Haryana, Rule 12 mandates a minimum of 2 acres of land for recognition, posing challenges in urban hubs like Gurgaon where land is scarce and expensive. In Uttar Pradesh, the land requirement and additional mandates for playgrounds have led to multiple school closures, especially in peri-urban areas where schools operate on rented premises.[320] These cases highlight how rigid norms can disproportionately impact resource-constrained institutions.

BALANCING COMPLIANCE AND OPERATIONAL REALITIES FOR PRIVATE UNAIDED SCHOOLS

To balance the objectives of quality education with the operational realities of private unaided schools, the following reforms are recommended. Introducing flexible land and infrastructure norms based on urban, semi-urban, and rural settings can address contextual disparities. Providing grants or subsidies for low-fee private schools to upgrade infrastructure can alleviate financial burdens. Developing a streamlined process for obtaining recognition and reducing bureaucratic delays can ensure smoother compliance. Harmonizing state specific rules with the central framework can prevent conflicting standards and simplify administrative requirements. A structured public-private partnership ("PPP") could help unrecognized private schools under the RTE Act by providing government support while private entities manage operations. Alternatively, relaxing land norms and offering financial aid could allow schools to function independently. Current PPP models focus on private management of government schools rather than collaboration. Clearer policies are needed. A practical solution is easing some regulations while ensuring oversight by bodies like Municipal Corporation of Delhi ("MCD") and Department of Expenditure ("DOE") to prevent corruption, maintaining essential safety and health standards.

Regarding space requirements, the government could consider reducing the land size norms, particularly for unauthorized settlements where space is limited. For example, lowering the

[320] Dr. Ramakanta Mohalik, *Implementation of the Right of Children to Free and Compulsory Education Act 2009 in Haryana and Uttar Pradesh: A Status Study*, 3 INT'L J. INNOVATIVE STUD. SOC. & HUMAN. 12 (2018).

requirement from 800 square yards to 200 square yards could still be unrealistic for many schools in these areas.[321] A more practical approach would be to assess the number of adequately ventilated rooms and the availability of open space for movement rather than imposing rigid ground floor space requirements. Classroom size should reflect enrolment for adequate space. Smaller schools with fewer students per class need flexibility. Teacher salaries require balance; many schools struggle without government aid. A flexible model linking salaries to fees can prevent undue burdens while ensuring fair compensation, especially for low-fee schools.

In terms of curriculum, if unrecognized schools receive official recognition, it would lead to wider availability of National Council of Educational Research and Training ("NCERT") textbooks. However, concerns have been raised about the quality and consistency of these textbooks. While the National Curriculum Framework ("NCF") 2005 has brought improvements, quality variations persist. To address this, the government could allow schools the option to choose from a set of pre-approved publishers who meet the educational standards set by NCERT, enabling schools to supplement core learning materials with quality alternatives[322].

Teacher qualifications remain contentious. The Draft Rules temporarily lowered the requirement to higher secondary education due to a teacher shortage, but long-term solutions are needed. Structured in-service training or expanding access to training institutes like District Institute of Education and Training ("DIET") could help. Increasing teacher training centres would improve both accessibility and quality[323]. For playgrounds, instead of mandating exclusive school playgrounds, shared community parks near schools could ensure children's access to physical activity without imposing unrealistic land requirements on densely populated areas.

Infrastructure development also demands targeted interventions. As emphasized by policymakers, schools should not face closure due to financial constraints. Some key support measures could include:

[321] Manjuma Akhtar Mousumi & Tatsuya Kusakabe, *The Dilemmas of School Choice: Do Parents Really 'Choose' Low-Fee Private Schools in Delhi, India?*, 52 INT'L J. EDUC. DEV. 230 (2017).
[322] Sunita Khatak, Naman Wadhwa & Rajesh Kumar, *NEP, 2020—A Review cum Survey-Based Analysis of Myths and Reality of Education in India*, 12 INT'L J. ADVANCES (2022).
[323] Soumyabrato Bagchi et al., *Ignoring Low-Fee Private Schools in India*, in KNOWLEDGE, POWER, & IGNORANCE 45, 45-60 (1st ed. 2024).

1. **Government Aid:** Direct financial assistance for critical infrastructure upgrades such as constructing additional toilets, libraries, kitchens, and providing access to clean drinking water.
2. **Non-Governmental Organization (NGO) Collaboration:** Partnerships with NGOs to support resource sharing among schools, particularly those established by non-profit organizations operating in low-income areas.

3. **Microfinance Support:** Encouraging private financial institutions and non-banking finance companies to offer loans to low-income schools for infrastructure development. For instance, the Indian School Finance Company in Hyderabad has successfully provided loans ranging from ₹20,000 to ₹12 lakh to private schools based on financial viability and managerial competence.

By implementing these strategies, unrecognized schools can be supported to meet regulatory standards while enhancing educational quality. This collaborative approach would not only improve infrastructure and teacher competency but also promote inclusive education by integrating unrecognized schools into the mainstream system. Ultimately, the objective should be to ensure universal elementary education through a balanced partnership between the public and private sectors, working together to uphold the goals of the Education for All ("EFA") initiative, promoting accessibility, equity, and quality in learning for every child.

CONCLUSION

Thus, Sections 18 and 19 of the RTE Act, while rooted in the objective of ensuring quality education, pose significant operational challenges for private unaided schools, particularly when compounded by state-specific norms like Rule 11/12. A more balanced regulatory framework that considers ground realities can help achieve the Act's objectives without compromising access to education. Future policy developments should aim to balance quality with inclusivity, ensuring that private unaided schools remain viable contributors to India's educational landscape.

An Analysis of Asset Reconstruction Company as Resolution Applicant in Corporate Insolvency Resolution Process with Special Reference to Non-Performing Assets

Rishav Khetan[324]

Vansh Dhoka[325]

ABSTRACT

The growing engagement of Asset Reconstruction Companies (ARCs) in association with the banking sector in the recovery process of Non-performing Assets (NPAs) and a record of failure of several ARCs in the realization of assets has subsequently raised doubts about the capability of ARCs. In contrast, the RBI recently changed its policy, prompting the struggling ARCs to be allowed to act as resolution applicants in the corporate insolvency resolution process. This would enable the ARCs to create numerous barriers for the revival of insolvent companies, which would also undermine the very purpose of the Insolvency and Bankruptcy Code (IBC) of 2016.

The paper primarily focuses on the role played by ARCs and their scope in the realization process under the SARFAESI Act. Additionally, it creates instances where the experience of ARCs in reconstruction processes will be beneficial to the resolution process. The performance of ARCs with regard to NPAs has been a matter of scepticism and not up to the mark. Therefore, it is imminent to analyse the causes for such sub-standard performance. This study attempts to compile market data on ARCs and examines how the combined net value of all currently operating ARCs is insufficient to acquire all the stressed assets of Indian banks. Following this, the study shall also disclose the possible inefficiencies that the ARCs might face in assuming the position of a resolution applicant. The SARFAESI Act, which governs the creation and operation of ARCs, places restrictions on their function; however, ARCs are granted permission to act as resolution applicants under the Insolvency Code which was presumed to disregard the provisional restrictions under parent Act. The interpretative gap between two laws is necessary to be investigated.

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The paper also probes into how the ARCs in foreign nations, unlike in India, have generated positive results in restructuring the assets and what is the model that they have adopted to deaccelerate the growing NPAs. In the context of a corporate resolution, foreign ARCs have significantly outperformed domestic ARCs. Furthermore, the study will examine the incentives that ARCs receive, the factors that drive their growth in the resolution domain, and the differences between domestic and foreign regulations pertaining to their working in the resolution domain. Several recommendations and possible changes to regulations are also offered in this paper, with the goal of complementing the current corporate ecosystem of India and enhancing ARC operations in the country at the same time.

Keywords: Asset-Reconstruction, Insolvent Company, Revival, Liquidation, Regulations.

RESEARCH METHODOLOGY

The paper has employed the doctrinal research methodology wherein the researcher has excavated data from various books, journals, articles and other secondary sources of information like reports published by authorities and authoritative websites. The paper mainly gives a legal analysis to identify the problems and solutions but is not completely limited to the above sources. The paper will investigate other empirical data to substantiate the arguments whenever and wherever possible.

INTRODUCTION

One of the crucial factors determining any country's stability is their sound banking system and the deciding factor of such soundness is none other than the capability of banking system to manage the bad loans.[326] The growing Non- Performing Assets ("NPA") is causing the banks and financial institutions to write off the assets as bad loans, and it is emerging as an issue affecting the profitability of banks. The problem of NPAs is ultimately turning banks to some level of risk aversion, which is deaccelerating the availability of credit in the economy. The challenge of clearing the saddled NPA's in banks is an intercontinental concern and has become accused, intense efforts were made globally to realize its NPAs and one among them was the creation of specialized bodies called 'Asset Management Companies' or 'Asset Reconstruction

[326] S.M.D. Azash & S.V. Pulla Reddy, *Role of Asset Reconstruction Companies (ARCs) in Handling Non-Performing Assets (NPA) in Banking*, 5 INT'L J.L. MGMT. & HUMAN. 1294 (2022).

Companies ("ARC")'.[327] The Indian model of Asset management entities are distinct in terms of their source, declaration and area of business. The concept of ARCs internationally holds their genesis to systematic crises. However, Indian model was developed as a separate business. The business of ARCs in India are regulated under special legislation Securitisation Asset Reconstruction and Enforcement of Security Interests Act ("SARFAESI"). The SARAFESI is the one which prescribes the limitations and necessary adherences that the ARCs are required to follow in their business. The ARCSs are registered companies with the Reserve Bank of India ("RBI"), which closely regulates the working of ARCs.

The ARCs are recognized as financial institutions which specifically deal in the NPAs accumulated with the banks. The NPAs are typically the assets which are in the form of advances that the banks have failed to recover from the borrower after a specified duration. The ARCs were obligated to re-capitalize the failed assets back to performing level by either realizing the assets or managing them. The ARCs are authorized under SARFAESI to acquire distressed assets from banks and financial institutions at discounted value and later take several measures to recover the value. The ARCs are permitted to incur investments for funding the purchased NPAs. In return the investors are awarded with agreed security receipts.[328] The purchaser of security receipts is called qualified buyers. The idea of setting up ARCs was preliminarily conceptualized on the recommendations of Narasimhan committee of 1991, which suggested to establish separate institutions to realize the value of NPAs and let the banks concentrate on the business of lending.[329]

The working committee of RBI had recently proposed to permit ARCs to act as resolution applicants under the Insolvency and Bankruptcy Code ("IBC"). Resolution applicant is a person who is involved in the resolution process of an insolvent corporate, the person proposes a resolution plan which after the approval of the Committee of Creditors goes through the scrutiny of Resolution professionals and finally, the resolution process initiates. The two laws have come in conflict in the recent years as one proposes restrictive clauses for ARCs another permits them. Undoubtedly, RBI's move is in the right direction to escalate the process of

[327] VINOD KOTHARI, SECURITISATION: ASSET RECONSTRUCTION AND ENFORCEMENT OF SECURITY INTERESTS 348 (6th ed. 2020).
[328] Neeraj Tiwari, *Resolution of NPA in India: The Role of Asset Reconstruction Companies*, 7 PRATT'S J. BANKR. L. 552, 570 (2011).
[329] Reserve Bank of India, Committee on Banking Sector Reforms (Narasimham Committee II) - Action Taken on the Recommendations (1991), https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/24157.pdf (last visited Feb. 11, 2023).

clearing the NPAs, but it is not achievable without challenges. There is a requirement for several alterations in the policy. While ARCs can be employed as resolution applicants under IBC, it also offers a chance to take use of their experience in resolving NPAs, assist banks and financial institutions in cleaning up their balance sheets, and provide troubled businesses a chance to be revived and become sustainable.

ASSESSING THE INTERPRETATIVE GAP

Ever since the enactment of IBC in 2016, the economic sector in India has been flourishing and had undergone a radical change in ease of doing business. According to 'Doing Business 2020' report, India has been ranked 63rd among 190 countries and one of the parameters is how the country resolves the insolvency problem.[330] One of the significant causes for such an escalation from 142nd rank in 2014 to 63rd in 2020 is because to the timebound, efficient and successful corporate insolvency resolution process regulated by the Code of 2016.

The overall issue which had created uneasiness among the ARC and its stakeholders was due to the rejection from the RBI to approve UVARCL to act as Resolution Applicant ("RA") in the resolution process of AIRCEL.[331] The RBI while rejecting the application had highlighted the limitations under SARFAESI Act which prohibited ARCs to act as Resolution Applicant, and also unfolded the interpretative gap between the two legislations.[332] The SARFAESI Act states that the ARCS should be strictly indulged only in the business of Reconstruction and securitisation.[333] Whereas the IBC which governs the resolution process explicitly allows the ARCs to act as resolution applicant.[334] Despite SARFAESI and IBC being pursuant to clearing the bad loan portfolios of the banks or financial institutions, categorically, both these legislations differ in their primary purpose. The SARFAESI aspires to clean the NPAs from the accounts and entails a recovery approach through realization of such bad loans. However, the IBC aims to revive the corporate debtor and envisages on rescue approach. As both the

[330] World Bank, Doing Business, https://archive.doingbusiness.org/en/doingbusiness (last visited Feb. 20, 2023).
[331] UV Asset Reconstruction Co. Ltd. v. Union of India, 2022 SCC OnLine Del 4289.
[332] Reserve Bank of India, Index to RBI Circulars, https://m.rbi.org.in/SCRIPTs/BS_CircularIndexDisplay.aspx?Id=12399 (last visited Feb. 25, 2023).
[333] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 2(ba), No. 54, Acts of Parliament, 2002 (India).
[334] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, § 29(A), No. 26, Acts of Parliament, 2018 (India).

regulatory frameworks and the majority of their stakeholders coincide with reach other thus considerably it would give rise to an interpretative gap.[335]

In spite of nearly six years of the Code of 2016, delayed resolutions are still being reported and the reasons for such delay are strict timelines, a lack of infrastructure and a plurality of cases. Meanwhile, it exposes financial institutions and banks to severe haircuts when cleaning up non-performing assets. The scenario of the resolution will undoubtedly change completely by permitting the ARCs to participate as resolution applicants. ARCs are adept at managing distressed assets and with their expertise, the ARCs shall bring smooth simulation to the resolution process. The entry of ARCs in the resolution space shall open the arena for several players to propose plans, which will ultimately create a competitive avenue for the bidders as every applicant shall strive to outbid others.[336] Furthermore, it will increase the pool of bidders for stressed assets, which will reduce the haircuts that banks may otherwise have to bear by accepting a lower value for the asset. By widening the participant base the insolvent entities shall gain only the most potential resolution plan and that provides possibly less chances to reach the liquidation stage. Also, in circumstances where there are not sufficient plans at the table to choose, such an entry shall emerge as a market maker and improve the recovery. The banks will also enjoy it as a win-win a situation, as large base of the IBC beneficiaries are mid-corporates and if the ARCs regardless of their capital or at least a justified owned fund are allowed to participate it shall provide better realization value for the stressed assets.

In light of ARC's business model, it cannot be denied that the company deals predominantly in the realization sector and have the requisite experience, so ARC would perform well if allowed to participate as a resolution applicant. Due to RBI's advancement by invoking SARFAESI limits, the resolution process was delayed, resulting in discouragement for the ARC process. The non-obstante clause empowers the provisions of IBC to override other laws.[337] The inadequacy between two laws developed the interpretative gap and the RBI seemingly ignored that SARFAESI did not absolutely prohibited, however, IBC clearly prevails over SARFAESI.[338]

[335] Vinod Kothari Consultants, *Securitization of Non-Performing Loans*, http://vinodkothari.com/npl/ (last visited Feb. 25, 2023).
[336] Siddhi Nayak, *Will ARCs Join the IBC Bandwagon Following Reserve Bank's Latest Rule Change?*, MONEYCONTROL (Oct. 2, 2022).
[337] The Insolvency and Bankruptcy Code, 2016, § 238, No. 31, Acts of Parliament, 2016 (India).
[338] Encore Asset Reconstruction Co. Pvt. Ltd. v. Charu Sandeep Desai, 2019 SCC OnLine NCLAT 284.

Although the preliminary elucidation gives an impact of SARFAESI being prohibitive in allowing ARC to indulge in the resolution process as there subsists a limitation of acquisition of equity but on understanding the intricacies there precisely lies no bar on ARC's participation. The definition of ARC under the SARFAESI recognizes them as for the only purpose of asset reconstruction or securitisation.[339] Apart from the two purposes, the ARCs are allowed to indulge in any other business only after obtaining the required approval from the RBI.[340] Furthermore, asset reconstruction means acquisition of rights or interests while providing financial assistance to banks and financial institutions.[341] It implies that the infusion is strictly permitted to business only where some kind of reconstruction is involved, subsequently, on jointly reading the Sections 9(1)(a) and 9(1)(g) of SARFAESI, the ARCs are provided the liberty to assist the borrower or exceptionally also take over in order to properly manage the business. Hence, the ARCs are allowed to take over or look after the borrower's management and are entitled to convert the debt into equity.[342] However, if there exists no restriction to restore the business on realization the ARCs shall run the business in perpetuity, the same was also pointed in BLRC report.[343] In order to avoid any such situation, an identical provision was inserted in the Act which obligated the realizers to restore the management on full realization of debt.[344] Certainly, doing so shall lead to a hostile situation and degraded the ARCs security, therefore, a proviso was also added in 2016, which permitted the ARC or any other secured creditor to retain the management if the borrower fails.[345] It is evident that there is no explicit bar on the ARC to infuse equity or become a shareholder, however, cannot hold it in perpetuity.

In converse to the provisions of SARFAESI, the IBC on the other hand, explicitly allows ARCs to dwell into the role of Resolution Applicant. The Resolution applicant is any person who

[339] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 2(ba), No. 54, Acts of Parliament, 2002 (India).
[340] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 10, No. 54, Acts of Parliament, 2002 (India).
[341] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 2(ba), No. 54, Acts of Parliament, 2002 (India).
[342] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 9, No. 54, Acts of Parliament, 2002 (India).
[343] Bankruptcy Law Reform Committee, The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited Feb. 18, 2023).
[344] The Securitisation And Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, s 15(4)
[345] *Ibid.*

individually or jointly submits the resolution plan.[346] However, the person proposing the plan should not be disqualified under the criteria and list provided under Section 29A. The ARCs under the explanation of the proviso, have specifically exempted the financial entity which shall also include the ARC.[347] The ultimate objective of the ode is to provide a mechanism for the revival and if the condition demands for the dilution or infusion of equity is not the matter of concern.[348] As a result, there is no inconsistency between the laws and the circular which allowed the ARC to act as an resolution applicant stands valid, however the ARC cannot be permitted to participate free of constrains, and the conditions laid by RBI are necessarily important. Nevertheless, the directions should have evaluated considering the limitations on the working capability of ARCs and certainly should have brought as a legislative amendment.

THE GLOBAL SCENARIO

In order to tackle the problem of economic crises, the world economies have from time and again adapted to different models of ARC, however, the intent of having such models was predominantly to cure the NPAs out of the stressed economy. Asset managers are referred to as professionals or experts who escort bad loans and efficiently assist in cleaning the records, such persons commonly in the global scenario are recognized as Asset Management Companies ("AMCs"). In most cases, AMCs were created on an ad-hoc basis to deal with the rising NPA problem worldwide.

United States of America

One of the earlier experiments around the world was the Resolution Trust Corporation ("RTC"), which has become a revolutionary model for AMC till date. A federal law was passed in 1989 to revive the insolvent state-owned insurance corporation, which was one of the 1400 failed banks hit by the banking crisis of the 1980s. The model was created to provide financial stability to the state-owned insurance corporation, which was one of the 1400 failed banks of the 1980s. This model focused on disposing the bad assets of financial institutions through a rapid disposition strategy. Under this strategy the corporation sold these bad assets directly to private investors or by collecting the outstanding loans within the short span at a fair sell price. Some of the methods employed also included - Auctions and sealed bids, Contracting out the

[346] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 15(4), No. 54, Acts of Parliament, 2002 (India).
[347] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, § 29(A), No. 26, Acts of Parliament, 2018 (India).
[348] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

asset management process through equity partnerships, Securitisation programs, Partnership programs and Direct Loan Sales.[349] One of the factors which added as a catalyst to the process was the direct intervention of state and the intent to clear in the short span as it was created on an ad-hoc basis. Subsequently, RTC ceased its operation in 1996 after clearing about approximately US$ 1 trillion of bad assets.[350]

Korea

In line with the centralized approach adopted by RTC, even the Korean model is essentially based on setting up a common state-funded and managed AMC under the name Korea Asset Management Company ("KAMCO"). The disposal device, KAMCO, was established in 1962 as a renowned Korean Development Bank subsidiary. The authorities often set up structural adjustment funds to assist in purchasing distressed assets to the KAMCO and the private players allowed to operate in the early 2000s. Such fund was principally deployed to extend new credit lines or roll over loans, indirectly facilitating the restructuring process initiated by companies.[351] The governing body of KAMCO consisted of banking experts, professionals from industries and representatives from the government. The composition being a full pack of persons from different domains was also a distinguishing feature for its overwhelming success. 'KAMCO realized that its funds might not be enough to resolve the looming crisis, and thus, initiated the KRW40 trillion Restructuring Fund to ward off the pending catastrophe'.[352] If the funds that had been provided to support the company reached its goal, they were disposed off to the national treasury, creating a sense of accountability and responsibility on the company's part. 'KAMCO's purchase of NPAs was selective and based on certain eligibility criteria wherein it opted to purchase only saleable loans whose security rights and transfer were legally executable, from among loans classified as substandard and below'.[353] KAMCO had adopted a unique mechanism of selling the distressed asset through

[349] Wayne M. Josel, *Resolution Trust Corporation: Waste Management and the S&L Crisis*, 59 FORDHAM L. REV. 343 (1991).

[350] VINOD KOTHARI, SECURITISATION: ASSET RECONSTRUCTION AND ENFORCEMENT OF SECURITY INTERESTS 348 (6th ed. 2020).

[351] Dong He, *The Role of KAMCO in Resolving Nonperforming Loans in the Republic of Korea*, IMF Working Paper, Asia and Pacific Department, Sept. 2004, https://www.imf.org/external/pubs/ft/wp/2004/wp04172.pdf (last visited Feb. 4, 2023).

[352] VINOD KOTHARI, SECURITISATION: ASSET RECONSTRUCTION AND ENFORCEMENT OF SECURITY INTERESTS 348 (6th ed. 2020).

[353] Amulya Neelam, Deepti George, Dwijaraj Bhattacharya & Madhu Srinivas, *A Brief Comparison of the Bad Bank Experience Across Jurisdictions* (Dvara Research, Dec. 2021), https://www.dvara.com/research/wp-content/uploads/2021/12/Policy-Brief-A-Brief-Comparison-of-the-Bad-Bank-Experience-across-Jurisdictions.pdf (last visited Feb. 4, 2023).

online portal, ONBID, which opened the space for multiple bidders and in return provided effective value to the bad loans. 'With regard to the disposal of these assets, KAMCO used traditional methods such as competitive auctions, collection of rescheduled repayments and recourse to the original seller, and also developed innovative techniques that broadly include bulk (pooled) sales, individual sales, Asset Backed Securities ("ABS") and joint venture partnerships'.[354] As per data, KAMCO successfully cleared approximately 1 trillion of NPLs (Non- Performing Loans) which constitutes disposing almost 48 percent of total NPLs.[355]

Sweden

The Swedish mechanism for clearing the NPLs is recognised as one of the world's most successful models. The model, to an extent, strives to avoid the generation of NPAs by striking it at its origin. The model dates to 1992. 'When it closed in 1997, Securum had disposed of 98% of its portfolio of assets and utilized private sales and initial public offerings to dispose of property portfolios'.[356] To solve the problem of NPLs, the Swedish model established an ordinary company named Secrum which emerged as an icon in the field of asset management. Unlike the other models, Secrum was not brought through a statute instead was established as an ordinary company by formulating an independent board which looked after the restructuring operations.[357] The board was equipped with an operational flexibility as the board was majority represented by experts which avoided any kind political intervention which also boosted the process. The Secrum was immune of the regulations which the other financial institutions were bound to follow, additionally, the company was also offered substantial equity as to break the over dependency of the management on the investors for additional funds.[358] The company excelled in its process because it was offered an opportunity to run numerous sector-specific subsidiary companies which concentrated on its process by keeping a sectoral cleaning. This approach also benefitted as ever sect separately managed the NPLs of different companies by deploying sector experts. It was also helpful in efficient negotiations as different sectors had distinct reasons for such generations. The companies which were running with a low profitability, low interest coverage or high debt ratio were recognized and the Securum paid

[354] Dong He, *The Role of KAMCO in Resolving Nonperforming Loans in the Republic of Korea*, IMF Working Paper, Asia and Pacific Department, Sept. 2004, https://www.imf.org/external/pubs/ft/wp/2004/wp04172.pdf (last visited Feb. 4, 2023).
[355] *Id*.
[356] Dreyer M, *Swedish AMCs: Securum and Retriva*, 3 J. FIN. CRISES 247 (2021).
[357] *Id*.
[358] Lars Jonung, *The Swedish Model for Resolving the Banking Crisis of 1991-93*, Econ. Papers, Directorate-General for Economic and Financial Affairs, Feb. 2009.

special attention and if there existed a potential, such were reorganized hence shows the preventive notion to maximize the value.

Malaysia

The Malaysian model is popularly known as Danaharta. Identical to the other famous model, even the Dhanaharta was a state initiative, however it is known for its neutral approach wherein it opted for the rapid disposition strategy nor the warehousing agency mechanism.[359] Warehousing means subscribing to a minimal approach to maximize the distressed assets. Instead of bulk realization, it preferred to manage the NPL on an account- to account basis. Danaharta appointed special administrators to deal with the problem and were allowed for foreclosure of property collateral, also at times efficiently took legal action against non-viable borrowers.[360] It also, at times to convert the non-recovery assets, it also employs open tender exercise. In order to escalate the sale of distressed assets accumulated with the financial institutions the Danaharta model also contain a provision like profit sharing arrangement.[361]

After examining the performance and the mechanism of different AMCs throughout world economies, it is proven that the state's financial support and the operational flexibility to choose an instrument of their choice have played a significant role in their success. Doing so shall also require a solid political willingness on the part of the government. The compelling market scenario which overall increased the competitiveness and the supportive legal infrastructure at times has encouraged for the maximization of assets. It was also observed that most of the model embraced on creating a centralized fund which supported the AMCs to operate with being risk averse. In general the AMCs were provided with limited tenure so as to avoid the sitting on the assets for long period of time for fear of realising large assets.[362]

Taking inspiration from all the models, it is evident that the RBI has adopted to a mix of all the experiments, however the concept of establishing a centralized fund has been a long time since the concept of establishing a centralized fund has been implemented. India used private entities to deal with the problem of NPA but one of the minor scepticisms on such private AMCs was put forth by Asian Development Bank. Under the spear of private AMC or ARC the natural

[359] Malaysia: Dana Harta, *Final Report: Pengurusan Danaharta Nasional Berhad 1998-2005* (2005).
[360] *Id.*
[361] *Id.*
[362] Ben Fung, Jason George, Stefan Hobl & Guonan Ma, Public Asset Management Companies in East Asia, Financial Stability Institute, Bank for International Settlements, Feb. 2004.

intent of these entities shall be to acquire the assets which are more promising off the books, however this would defeat the purpose of recognising them as nursing home.[363] The RBI, through it circular has tried to improve the transparency and also subscribed to the time- bound manner. The concept of centralized arc with financial assistance from state was recently established in the name of NARCL in the Union budget 2021. However, it is too early to evaluate or predict its performance.

PERFORMANCE OF ARCS

The ARCs in India were introduced with an objective of serving the banks and financial institutions in clearing off the NPAs off their books. Unlike the secured lenders, the ARCs were provided extensive liberty in their operations. Nevertheless, the data reveals that the performance of ARC has not being up to the mark and the inefficiency of ARCs is becoming a critical problem which started coming to limelight after 2008.[364] The ARCs are striving hard in terms of helping the banks to relieve them of their distressed assets but there are few challenges which hold their pace. The ARC framework was enabled with flexibility so that the originators shall focus on their primary business of lending and not on recovery.

The data also shows that the ARC, within the span of ten years starting from the financial year 2004- FY 2013, were able to recover only about 14.29% of the total amount owned by the borrower in terms of stressed assets, out of which approximately 80% of the recovery was by employing the reconstruction methodology thus leaving less scope for the revival of businesses.[365] The lacklustre performance of ARCs pertaining to realizing the NPAs and low conversion ratio is developing a sense of distrust among the top banks or financial institutions. 'Two factors primarily drive the recent shift towards IBC, firstly, IBC promises both time-bound and optimal recovery for creditors, other factor was the lacklustre performance of ARCs.[366] Especially after the introduction of IBC, the secured creditors prefer the IBC process over such reconstruction in order to recover their distressed assets. The recent data shows that as per FY- 2020, the total NPA stands at approximately 74,2431 Cr, in which ARCs share the

[363] Asian Development Bank, *Memo on Technical Assistance to India for Developing the Enabling Environment for and Structuring Asset Reconstruction Companies in India* (Oct. 2002).
[364] VINOD KOTHARI, SECURITISATION: ASSET RECONSTRUCTION AND ENFORCEMENT OF SECURITY INTERESTS 348 (6th ed. 2020).
[365] RBI, *Report of the Committee to Review the Working of Asset Reconstruction Companies* (2021), https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1188 (last visited Jan. 30, 2023).
[366] *Id*.

recovery at 26%, whereas at the same time the dependency on IBC holds 46% of the total amount involved.[367]

The reasons for such sub-optimal performance are mainly due to the non-availability of funds, weak bankruptcy process and lack of legal immunity from unwanted obstacles which are essential to achieve flawless performance.[368] In addition to that, the biggest challenge was to realize the vintage NPAs passed by the banks as after a while, reconstructing such age old NPAs was nearly an impossible task. 'Price expectations of banks are driven by extent of current provisioning instead of future recoverability and at the same time large reconstructing have been taking place since 2009 onwards, thereby avoiding imminent defaults'.[369]The balance sheets of ARCs also made it difficult to raise additional funds and which again caused deficiency in their funds.[370]

LIMITATIONS OF THE FRAMEWORK

Statutorily, ARCs are not allowed to undertake any other business without the permission of RBI. Many ARCs since the IBC allowing them to participate had applied and the RBI denied quoting that the SARFAESI did not allowed them to participate in the process. However, recently RBI took a U-turn by allowing ARCs to act as Resolution Applicant. RBI issued 'circular' under the name Review of Regulatory Framework for Asset Reconstruction Companies dated October 11, 2022. The circular prescribed minimum net owned fund of Rs 1000 Crore, Board approved policy for decisions, majority independent directors, sector specific firms, time- bound control in 5 years and additional disclosures.[371] The RBI's initiative of permitting the ARCs is in the right direction and the conditions stated are necessary in order to maintain a sense of transparency, accountability and responsibility over ARCs. However, the conditions stated come with few lacunes and challenges that ARC would face while dealing in the resolution process. The conditions prescribed are too prescriptive and business models

[367] RBI, *ARCs in India: A Study of their Business Operations and Role in NPA Resolution*, RBI BULLETIN (Apr. 2021), https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/02AR_26042021568788EADB07475AACD1100AD7C06766.PDF (last visited Feb. 4, 2023).

[368] Meher B.K. & G.L. Puntambekar, *Asset Reconstruction Companies: An Analysis of Growth (A Case Study of ARCIL)*, 36 ABHIGYAN 1, 16 (2018).

[369] VINOD KOTHARI, SECURITISATION: ASSET RECONSTRUCTION AND ENFORCEMENT OF SECURITY INTERESTS 348 (6th ed. 2020).

[370] RBI, *Report of the Committee to Review the Working of Asset Reconstruction Companies* (2021), https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1188 (last visited Jan. 30, 2023).

[371] Reserve Bank of India, Index to RBI Circulars, https://m.rbi.org.in/SCRIPTs/BS_CircularIndexDisplay.aspx?Id=12399 (last visited Feb. 25, 2023).

turn unsustainable in such environment, thus the frameworks should go hand in hand with the operational dynamics of business.

The ARCs were established for the debt recovery and were never foreseen to act in the resolution process. The BLRC report had recommended a thin difference between the rescue and the realization and opined that it could never take up the role of resolution.[372] Moreover, the Narsimha committee, which was preliminary attempt to recommend on ARC, ultimately said that the objective was to clear the NPA and escort banks.[373] Also, the expert committee of 1999 said that the goal of resolution could be meet other way round through securitization.[374] Hence, the concept of ARC was specifically designed for clearing the NPA and if a new domain is unlocked for ARCs than the prime motive of the ARCs would be diluted. The ARC would concentrate on the management of borrower company if allowed for resolution applicant rather than focusing on distressed assets of banks, but this shall pile up the NPA, leading to worsen the situation.

The SARFAESI permits ARCs to perform the functions of securitization and reconstruction particularly, however, the provision 10(2) of SARFAESI Act states that ARC must obtain permission from the RBI to commence any other business.[375] This section is restrictive in nature and allows RBI to decide only on the permission sought, and not to issue directions in general. There lies a difference between permitting a specific ARC and allowing it all at once. The circular failed to act on this aspect and the necessary legislative backing is not availed while issuing such orders. Therefore, required legislative amendments should be brought.

The study has revealed that the performance of ARCs was not good enough and had not discharged its responsibility. The problem of NPA was expected to be settled after the establishment of ARCs, but it happened the other way round and hence, the ARCs failed to build a confidence among the stakeholders. In line with this, if they are permitted to act as resolution applicant, to enhance the pool of bidders, such a step, due to the undue influence of

[372] Bankruptcy Law Reform Committee, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited Feb. 18, 2023).
[373] Reserve Bank of India (RBI), *Committee on Banking Sector Reforms (Narasimham Committee II) - Action Taken on the Recommendations* (1991), https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/24157.pdf (last visited Feb. 11, 2023).
[374] RBI, *Report on Trend and Progress of Banking in India 2000-01* (2001), https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/24385.pdf (last visited Feb. 15, 2023).
[375] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 10, No. 54, Acts of Parliament, 2002 (India).

ARCs would outbid other potential applicants. As a result, there lies mere chances of revival, and as the ARCs out of the total realization 80% was via selling and hence, ultimately the creditors shall opt for liquidation which would weaken the objective of IBC.[376]

The IBC, under its explanation II of Section 29A has placed the ARC in the non-disqualified list. The proviso says that the conditions laid under the Section will not be applicable to ARC. Even here, the Arc were not explicitly allowed to be Resolution Applicant instead, it merely absolves ARC against the disqualification that the companies shall face if permitted. Therefore, the IBC and its provision were not categorically aspiring for ARC to act as Resolution Applicant.

Other critical issues, like developing a legal framework to protect ARC from unnecessary lawsuits and delays, are not addressed in the framework. The international model analysis has shown that for AMCs to succeed, legal backing is required; otherwise, they will be ineffective and defeat the purpose of quick and meaningful resolution if unnecessary legal barriers and lawsuits surround AMCs.

One of the conditions prescribe that there shall be no significant influence of ARC after five years over the borrower company, and the ARC shall not retain any relationship with the debtor.[377] The experts have expressed their view of such a time period being sufficient to turnaround the corporate debtor, provided if the plans get quick approval. The resolution Applicants are expected to propose a plan to revive the debtor, but not to downsize and resolution Applicant should strive towards resolution does not aspire to sell it.[378] However, such a time-limit could motivate the ARCs to sell the assets of insolvent instead of reviving it and pursuant to this the ARCs shall attempt to invest only in order to achieve high value. A cap on the significant influence is vague and does not prescribe to what extent or what is the commercial transaction that shall be maintained, because in such period it is difficult to make structural changes and ultimate resolution shall not be enforced. The IBC constrains the resolution process to get over within 180 days or exceptionally, 270 days with permission, however in this case if ARC is permitted to run for five years and after that cut all the relations

[376] RBI, *Report of the Committee to Review the Working of Asset Reconstruction Companies* (2021), https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1188 (last visited Jan. 30, 2023).
[377] Reserve Bank of India, Index to RBI Circulars, https://m.rbi.org.in/SCRIPTs/BS_CircularIndexDisplay.aspx?Id=12399 (last visited Feb. 25, 2023).
[378] Superna Dhawan v. Bharti Defence and Infrastructure Ltd., 2019 SCC OnLine NCLAT 270.

it would create an interpretative gap between laws.[379] The circular mandatorily asks the ARC to divest in the corporate debtor after the end of five years which shall lead to prospective buyers offering low price and the ARCs would have to sell it at non-fair price.

It is also required that the ARCs shall have to turn their approach by forming sector specific committee and hire experts in running companies. It is an excellent condition because it would enable proper management of corporate debtor. However, it will incur an additional expense and the conflict of interest within internal management of ARCs, as they never envisaged on adopting sector specific approach in reconstruction or securitization. The conditions laid is silent about proposing an insolvency professional on the board of ARCs, doing so shall make the resolution easy.

The RBI framework recommends that the ARCs settlement proposal be examined by a board comprised of independent directors, as well as an independent advisory committee. The problem with this guideline is that the approval and examination delay the resolution process. Another problem with the regulation is that it makes it difficult for the ARCs to enter into spot settlement with the borrowers, though the role of independent directors is crucial with regards to transparency of the AMCs but the RBI should consider that following the examination and borrower process for each borrower, even for small transactions, can be a roadblock in the development of ARC, hence, the RBI should consider exempting small transactions from procedural requirements to give AMCs some leeway in their organic growth.

The prescribed net owned fund that any ARCs willing to participate as resolution applicant need to be at least Rs 1000 Crores. In general, the IBC remains quit regarding such minimum owned criteria and it is always the call of Committee of Creditors to decide on. Moreover, the circular is not clear whether the minimum owned fund shall be in case there is a joint application which is now allowed under the Code.[380] The ambiguity revolves around whether the criteria is for individuals or shall be applied on joint qualification. If the criteria of minimum net owned fund (NOF) are strictly followed, than only a very few out of all the existing ARCs shall stand eligible for resolution applicant. Currently, only three out of 28 registered ARCs

[379] The Insolvency and Bankruptcy Code, 2016, § 12, No. 31, Acts of Parliament, 2016 (India).
[380] The Insolvency and Bankruptcy Code, 2016, § 5(25), No. 31, Acts of Parliament, 2016 (India).

possess the required NOF, which could pave the way for cartelization.[381] The new guidelines have reduced the issuance of security receipts from 15% to 2.5%, however, the required NOF for the Resolution Applicant goes to Rs 1000 Crore, resulting in a challenge in convincing the investors (qualified buyers) to invest in the ARC trust if the requirement isn't changed. The unlocking process will improve the clearance of NPAs, but at the same time, several obstacles might hinder its efficiency. In the short term, this effort would increase bidders, but in the long run, it is encouraging a lacklustre performance. Changes are therefore required.

SUGGESTIONS FOR POSSIBLE ALTERATIONS IN THE FRAMEWORK

Unquestionably, the RBI's move of issuing a circular of allowing the ARCs to act as Resolution Applicant shall improve transparency in the system and would hold the ARCs responsible. Moreover, the revised regulations mandatorily ask for financial disclosures which would enhance corporate governance in the reconstruction sector. In the end, only by adhering to the right policy can all measures be effective in responding to a problem, and it is the approach of ARCs towards strict adherence that may help in this regard.

The guidelines impose a minimum cap on the ARCs to participate in Resolution process. Since ARCS are in a risky business, financial institutions rely on the realization, but their balance sheets frequently make it difficult to arrange funds from qualified buyers. They must maintain such minimum NOF levels as it creates a security for all the investments infused by the qualified buyers. Considering such requirement and the vulnerability of ARC, it is significant that some sort of alternate investment fund or a centralized fund should be created which would divert financial support to ARCs. It was also observed in the global models that one of the features which improved their performance was the supportive fund. Nonetheless, even the Verma committee report of 1999 had suggested creating of alternate reconsruction fund.[382] The RBI had constituted a special committee to analyze the working of ARCs, and corresponding it was suggested that there was a need of such protective source of finance and the renowned system of Alternative Investment Fund could be extended to ARCs.[383] The governments

[381] Mukesh Chand, *In A Big Policy Shift RBI Allows Asset Reconstruction Companies To Be Resolution Applicant Under Insolvency And Bankruptcy Code, 2016*, MONDAQ, http://surl.li/fbghw (last visited Feb. 8, 2023).
[382] Ghosh D.N., *Verma Committee Report on Weak Public Sector Banks*, 34 ECON. & POL. WKLY. 3356 (1999).
[383] RBI, *Report of the Committee to Review the Working of Asset Reconstruction Companies* (2021), https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1188 (last visited Jan. 30, 2023).

intervention through funds would enable them to perform efficiently. The ARCS should be empowered to utilize the funds however a regulatory body should be constituted to manage the allotment of funds. The ARCs can avail financial support from such common fund by pledging their assets. In this manner, they would achieve the goal of maintaining a minimum net owned fund and at the same time would not be burdened with searching for funds and could concentrate on realizing assets.

The revised guidelines are ambitious of building accountability in the decisions and thereon all the decisions are strictly to be taken by independent directors. Instead of committee consisting of majority independent directors it is suggested that even a insolvency professional or a member from a panel of such resolution specialists should be also included as this would possibly improve possibility of making right choices. A bit more clarity pertaining to the minimum NOF and ratio of support that ARCs can avail from the centralized fund, if created, to be provided. Because the NOF in this area for ARCs rises significantly and it would be challenging to inculcate investor belief, the requirement for minimum maintenance of security receipt should be raised in cases where any ARCs are seeking for resolution. If the facility of centralized fund id enabled than all the potential ARCs can utilize to participate in resolution and, which would avoid cartelization.

After the rejection of application by RBI to allow UVARC to participate in resolution, it was realized that there lies an inconsistency and interpretative gap between two laws. The SARAFAESI gives an impression of being restrictive, however, IBC explicitly allows ARCs to participate. In such overlapping disparity a direction or guidelines will not suffice, also there is a possibility of prospective obstacles in the working of ARCs. There is also a possibility of unnecessary disputes in near future. Therefore, in order to resolve the disharmony between laws it is also healthier to enact amendments or bring legislative changes to provide certainty in the regulation mechanism. The conditions manifest for a transparent mechanism and in the name turn out to be too prescriptive in nature. It is essential that there are sufficient disclosures from ARCs, however if the ARCs are allowed to operate in free hand, feasibly shall perform better. One of the issues that the ARCs face due to asymmetrical information about the potentiality of distressed assets, is to determine the accurate value of such assets.[384] The same

[384] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

irregularity ignited troubles in the market of lemons. Hence, an inspiration can be drawn from the model of KAMCO wherein online selling of NPAs were enabled and thus by virtue of competitive market, at least distressed assets will get better value. One of the ways to resolve such value determination problem is by employing international techniques such a market multiples and discounted cash flows.[385]

Additionally, the ARCs should be further facilitated with a fast-track mechanism to acquire the distressed mechanism. Resolution-friendly measures like altering a borrower's management or protecting ARCs from normal legal procedures that may impede the resolution process have not been considered under the new framework. Therefore, in order to avoid any barriers in coming future essential changes and substitute approach is expected to be enforced by the regulatory body.

[385] Neeraj Tiw ari, *Resolution of NPA in India: The Role of Asset Reconstruction Companies*, 7 PRATT'S J. BANKR. L. 552, 570 (2011).