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Editorial

Society, technology and law have always to go together to ensure public order and sustainability. Philosophies and mythologies of development for manageable strategies will be understandable only in the candid expressions which are underscoring the synergically coherent onward journey of society, technology and law. Juristic alertness becomes prime in view of many historical experiences of unregulated concentration of power in certain hands and unruly use of technology by unscrupulous people resulting into undesirable problems of human suffering, exploitation, oppression, deprivation and negation of fairness and justice. Presence of legal minds with vibrance to expose the evil factors creeping into society and the system, from time to time, can never be over exaggerated. The *IILM University Law Journal* (*IILMUJL*) has been providing a platform to scholars of law and allied disciplines to contribute in their best to enable a fair understanding of the social, technological and legal issues in contemporary context which will ensure timely action by policy makers, legislators, public servants, lawyers and judges. I have associated students also with the process of progression of this journal as a movement to give them experiential learning as writers, legal journalists and editors. This opportunity must be offered to students universally.

The present issue of the *IILMULJ* covers significant themes regarding 'sentencing beyond the prison walls and community sentencing'; role of legal guardians in sports-contracts for protecting the rights of illiterates and minors; corporate governance in relation to digital wallets; human rights in ADR; protecting patents for fintech pioneers; balancing data sovereignty and cross border data flow in digital economy; ethical issues regarding pre-nuptial agreements; 'complexities' in the notions of democracy and the rule of law; boosting financial regulations with 'marvellous managers'; carbon trading; corporate social responsibility and tax optimising; protecting children in trial systems; technological governance; and cultural limits of uniform civil code. All these issues need focus at a large scale. I would expect numerous rejoinders from readers for a sharp academic debate.

Suggestions about the improvement of sports law need a special mention. Governments should command properly the legal representation for low-age and illiterate sports persons in contract negotiations. Standard contracts should be in clear and simple language with proper association of parents in the process. Flexibility should be observed by sports authorities in maintaining fairness at minor glitches. High ethics should not be compromised at any stage.

My heartfelt gratitude, truly boundless, for contributors of this issue for their interest and motivation to enrich legal literature on matters of concern.

Prof. M. Afzal Wani
Editor & Pro Vice Chancellor

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SENTENCING BEYOND THE PRISON WALLS: NAVIGATING THE CONTOURS OF COMMUNITY SENTENCING IN INDIA WITH REFERENCE TO THE UK PRACTICES

Namrata Chakraborty*

Introduction

With the recent adoption of Community Sentencing or Community Service in India as an alternative mode of punishment in the newly-introduced Bharatiya Nyaya Sanhita 2023[2], the nation embarks on a transformative journey to revitalize the sphere of reformative justice likewise many other countries across the world. Brief research reveals that the imposition of community service orders as penal sanctions is not a fresh addition of 2000s, rather dates way back to the year of 1553 when orders were imposed on vagabonds in London in order to deter their vagrancy by putting their labour into community works.[3] Much later in 1966, the community service sanctions were formally introduced in the United States as a part of probation terms or in lieu of fines. However, the need of an organized framework on community service sanctions was observed for the first time in the Wotton Report ("Non-custodial and Semi-custodial Penalties") in 1970 when an advisory council in the England and Whales recommended the community contribution as a non-custodial sanction against the traditional custodial punishment.[4] The recommendation was enforced through an enabling legislation called Criminal Justice Act 1972[5]. The idea of dealing with the offenders under the community sanctions was an afterthought of witnessing the ineffectiveness of overcrowded prisons in Britain to monitor and differentiate the treatment of the offenders under various offences. By the late nineties, the concept of community sentencing as 'alternative to custody' in minor offences had sufficiently gained due attention as a quick resolution to the growing concerns over prison-overpopulation vis-a-vis the departure of basic rights of the prisoners and detainees. This led to incorporate major shifts in the existing criminal justice policies of several countries.

With the erstwhile Criminal Justice Act 1972 in Britain being replaced by a new Act in 1991 based on the principle of 'just desert',[6] several European countries such as Netherlands, Spain, Ireland, Scotland, Nordic countries etc. also witnessed a move towards penal evolution with an aim to establish a coherent sentencing framework coupled with the effective rehabilitation approaches.[7] The countries in Asia and Africa, on the other hand, were not far from being a part of this transition.[8]

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*Judicial Officer, West Bengal Judicial Service, Symbiosis Law School, Pune

[2] The Bharatiya Nyaya Sanhita, 2023.

[3] Richard J. Maher & Henry E. DuFour, "Experimenting with community service: A Punitive Alternative to Imprisonment" (1987) 51(3) Federal Probation 22

[4] Home Council Advisory Council on Penal Systems, 'Non- Custodial and Semi-Custodial Penalties' (London HMSO, 1970).

[5] Criminal Justice Act 1972.

[6] Anne Worrall, *Punishment in the Community: The Future of Criminal Justice* (Longman, 1997).

[7] G Mclvor and others, 'Community service in Belgium, the Netherlands, Scotland and Spain: a comparative perspective' (2010) 2(1) EJP.

[8] Matti Joutsen, 'Re-assessing the Role of Community-based Sentences in the Context of the Sustainable Development Goals' (UNAFEI 174th International Senior Seminar, Tokyo, January-February 2020).

In the early-2000s, the Asian Countries such as South Korea[9], Japan[10], Thailand, Sri Lanka, Malaysia had either introduced the non-custodial penal system in form of CSO (Community Service Orders) or added the social contribution clause in their existing probation / parole frameworks so as to enhance the social adaptability and reform the behavioral psychology of the offenders.[11]

In India, until the new Bharatiya Nyaya Sanhita came into force in 2023, the practice of imposing Community Service sanctions was subject to discretion of the Judges from case to case, especially for proceedings under the Juvenile Justice Act[12]. However, the lack of a defined framework and robust oversight mechanism under the Indian Penal Code 1860[13] in this regard exposed the risk of exploitation and inconsistencies in its proper application leading to a well-intended attempt in vain.

As a result, the vice of prison overcrowding followed by the continued violation of basic fundamental rights of prisoners, the failing rehabilitation attempts and the increasing rate of recidivism skyrocketed over the past decades. At this juncture, a pressing need was felt not only to align the criminal justice system in India with the best practices adopted into the sentencing frameworks worldwide, but also to implement clear guidelines and mechanisms in respect of community service for the purpose of unleashing the full-fledged potential of reformative justice. Section 4(f) of the Bharatiya Nyaya Sanhita 2023 ('BNS')[14] and Section 23 of the Bharatiya Nagarik Suraksha Sanhita ('BNSS')[15] therefore reflect the attempt to transform such vision into a reality by means of adding Community Service as the sixth form of punishment and explaining the essentials of it. It is, henceforth, imperative to assess the scope, nature and impact of its application in various crimes and simultaneously, to analyze the effectiveness of this addition with respect to revival of the prison justice system in India.

Community Service Order: Meaning and Object

Community service order, as the terms suggest, denotes a form of sentencing under which the offender is obliged to perform certain services for the welfare of the community without expecting any wages or rewards in return. This order is also considered to be a non-custodial form of sentence due to its application involving punishment beyond the walls of prison. Alternatively, community service can also be defined as community corrections in form of non-incarcerate sanctions under which the offenders serve their sentences completely or partially in the community, instead of serving any custodial sentence or as a part of the sentence respectively. Community sentencing is enforced

[9] Woo Sik Chung, 'The Community Service Order in Korea' (UNAFEI 121st International Training Course, Tokyo, September 2003).
[10] Saki Kato, 'Probation in Japan: Engaging the Community' (2018) 15 Irish Probation Journal < https://www.probation.ie/EN/PB/0/4B3BF8484A4F1E638025834E004BFD70/$File/Kato_Saki_IPJ.pdf> accessed on 11 December 2024
[11] *See* note 8, p 74.
[12] The Juvenile Justice (Care and Protection of Children) Act 2015, s 18(1)(c).
[13] The Indian Penal Code 1860.
[14] *See* note 1, s 4(f).
[15] The Bharatiya Nagarik Suraksha Sanhita 2023, s 23.

through various forms of unpaid social works such as gardening, teaching, cleaning etc. based on the suitability, capacity and skills of the offenders. Such sentences are often imposed as a condition of bail, in lieu of fine or short-term imprisonment in cases where offenders are convicted for less serious offences or the first-time offenders, While imprisonment is imposed on the offenders in order to attain the goals of preventive as well as deterrent theories of punishment, the community sentence as an alternative to incarceration addresses the frontiers of restorative or rehabilitative theory and endeavors to achieve the contemporary sentencing goals of restitution, reparation, reformation and rehabilitation by way of offenders serving back to the community so affected. To achieve the object of restitution, the community service orders may be imposed in lieu of monetary compensation to the victims of crime individually or as a constructive restitution to the community where the community is affected. The purpose of community service is also to make the victims of crime the whole or to repair or restore their status and well-being. In order to achieve that, the offender works towards repairing the harm they caused in the community through their actions. Thus, the society directly affected by the offender's activities is provided the human resources so as to work upon restoration of the damage. Further, the regime of community sentencing not only addresses the purpose of rehabilitation by fostering a sense of work ethics and social responsibility in the offenders, but also acts as a catalyst in the process of their social adaptability, thereby inhibiting the hike of recidivism. Especially in cases where the offender is a first-time offender or the offences so committed are petty in nature and more importantly, portray a scope of reformation in the behavioral characteristics of the offender, the community service sentence works as a foundation behind that reformation by ingraining a commitment to the societal integration of the offender.

Besides being a tool to strengthen the regime of restorative justice, the community sentencing is repeatedly argued to be a viable alternative to alleviate the deplorable state of the prisons and the alarming rate of human rights violations occurring within them.[16] The National Human Rights Commission, for instance, in its Annual Report 2021-22[17] has documented several such appalling cases where the inmates in Indian prisons are often deprived of their right to bail and compensation on account of prolonged incarceration, delayed trial and custodial violence. The Commission in its report has stressed on the dire necessity to decongest the Indian prisons and liberalize the bail system in order to achieve the goals of rehabilitative justice and protect the rights of prisoners and victims' hand-in-hand. A quick glance at the Prison Statistics India Report 2022[18] reflects a number of 5,73,220 prisoners lodged in 1330 jails in the year 2022 against the 4,14,033 prisoners lodged in 1306 jails as per 2020's statistics, thereby witnessing the drastic increase of occupancy rate from 118% in 2020 to 131.4% in 2022. It is also noteworthy that the total budget and the actual expenditure for the Indian prisons in the Financial Year 2022-23 were 8725 Crores and 7781.9 Crores respectively.[19] Yet, the plight of prisoners inside the over-congested prisons continue to worsen day by day and unveil the

[16] Warren Young, *Community Service Orders: The Development and Use of a New Penal Measure* (Pearson Education 1979).
[17] National Human Rights Commission India, 'Annual Report 2021-22' (2022).
[18] National Crime Records Bureau, 'Prison Statistics India 2022' (2023).
[19] *Ibid* xxi.

crumbling pillars of criminal justice administration in India. Despite a slew of recommendations being put into practice to mitigate such concerns, the sphere of community sentencing has often been underutilized in India and dismissed at the outset as an unjustifiable alternative without delving deeper into its application and methodology. Hence, it is a need of the hour to assess feasibility of the community sentencing in Indian setup with a special focus on the recent addition in the BNS. Considering the United Kingdom having a profound history of trials and errors in the context of community sentencing jurisprudence, a comparative study is also pertinent in order to analyze the direction and impact of the existing community sentencing model in India.

Community Sentencing Practices prevailing in the United Kingdom

The primary object behind sentencing has significantly witnessed a rapid transition time-to-time from stipulating retribution and establishing deterrence to ensuring prevention and as of currently, advocating for the regime of reformation and rehabilitation. However, the advocacy for reinforcing reform and rehabilitation in sentencing policies was majorly existing in paper. In practice, the prisons were over-occupied, the social integration of offenders was a far-fetched dream, the risk of recidivism was on rise as well as the achievement of reformation and rehabilitation goals of sentencing was in shambles. This prompted multiple countries to adopt non-custodial alternatives to custodial punishments with a vision to negative the drastic psychological, social and economic impact resulted from the prolonged incarceration in cases where the scope of reformation was visible. The United Kingdom (erstwhile England and Wales) is one of the founding countries which showcases an eventful history and evolution in the context of community sentence. Before assessing the efficiency of the newly-introduced community service provision in India, it is hence pertinent to evaluate the community service policies adopted by the said jurisdictions over the decades in order to shed light on its viability as an effective alternative to custodial imprisonment and a tool of rehabilitation.

The Legal Status of Community Sentencing between 1991-2003

The journey of community sentencing in the erstwhile England and Wales started with full swing since the enactment of the Criminal Justice Act 1991[20]. Even though prior to the enforcement the community sentence was viewed as a soft option to custodial sentencing, the Act of 1991 refuted the prevalent belief by stating that the Community penalty is an independent sentencing framework standing on its own and not supplemental to custodial punishment by any means.[21] However, the success of 1991 Act was short-lived, owing to the failure of then government to effectively enforce punitive framework outside the prisons and the resulting lack of delivery of due justice to the victims. A dire need to strengthen the non-custodial framework during post-enactment of the Act was hence a continuous hue and cry. [22]

The passage of Criminal Justice and Public Order Act 1994[23] was a subsequent attempt to dilute the provisions of 1991 Act. The Act introduced a new category of custody sentence for offenders under

[20] The Criminal Justice Act 1991.
[21] FV Jarvis & Alan Sanders & Paul Senior, *Jarvis' Probation Service Manual* (5th edn, PAVIC Publications 1994).
[22] *See* note 5, pp 34-45.
[23] Criminal Justice and Public Order Act 1994.

12-14 years old and stipulated pre-sentencing reports of the probation officers as a determining factor for imposition of certain forms of community service or the said custody sentence. This renewed punitive framework marked a rapid growth in the number of people sentenced to the new form of custody, resulting into exceeding the capacity of custodial institutions.[24] The subsequent consequences to the 1994 Act were worse than the erstwhile Act because the deterrent effect in case of former was a vanishing point due to the overexploitation of custodial sentencing which in turn contributed towards the steadfast pace of criminal victimization in England and Wales.

A shift towards the intention to promote community sentence as an effective alternative to the crumbling state of overcrowded prisons can be witnessed since the dawn of 1998 when the Home Affairs Committee (HAC) published a report titled 'Alternatives to Prison Sentences' in July, 1998.[25] The report was a turning point in terms of starting a discourse on how community sentence can be a credible alternative in terms of controlling the vices linked to prison overpopulation. Ever since the HAC Report, the successive UK governments made several attempts to introduce community sentence-oriented reforms and promotional practices in order to control the prison population and reduce the rate of recidivism through the establishment of a regime of rehabilitation.[26] The trace of such successive reformations followed by HAC report can be found in the Inquiry of the House of Commons Justice Committee in 2008 which observed a growing consensus among the government bodies, political groups and law enforcement agencies with respect to the dire need of non-custodial alternatives.

Before the Criminal Justice Act 2003[27] was enacted, the community sentence was available in England and Wales through five forms of sanctions, namely,

1. Community Punishment Order (enforced unpaid work conditions)
2. Community Rehabilitation Order (while imposing sanction, judges were provided fifteen conditions as options to choose from)
3. Community Punishment and Rehabilitation Order (combining the requirements in above two categories)
4. Curfew and Attendance Centre Orders (for offenders above 21 years age)
5. Drug Treatment and Testing Order.[28]

However, the Community sentence / order was formally introduced in the Criminal Justice Act 2003 with a motive to strengthen the effectiveness and sustainability of the community sentences. The Act sought to customize the community orders and extended flexibility in terms of facilitating the judges with an option to choose suitable conditions for individual offenders. The Act also conceptualized the Suspended Sentence Order (SSO) under which a custodial sanction is imposed at first, followed by its suspension on condition that the offender must adhere to the requirements attached to the SSO and should not commit any crime during the period the Order is in force.[29]

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[24] Ian D. Brownlee, *Community Punishment: A Critical Introduction* (Longman, 1998).
[25] Home Affairs Committee, *Alternatives to Prison Sentences* (Home Affairs 3rd Report, July 1998).
[26] Helen Mills, 'Community Sentences: A solution to penal excess?' (Centre for Crime and Justice Studies, July 2011) 11-13 <https://www.crimeandjustice.org.uk/sites/default/files/Community sentencesRSS.pdf> accessed 5 January 2024.
[27] The Criminal Justice Act 2003.
[28] Eoin Guilfoyle, 'Community Orders - A review of the sanction, its use and operation and research evidence' (Sentencing Academy UK, March 2021) 4 <https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/Community-Orders-3.pdf> accessed 7 January 2025.
[29] George Mair, 'The Community Order in England and Wales: Policy and Practice' [2011] 58(3) Probation Journal 215.

Changes in Community Sentence Frameworks in 2008-2014

Over the past few decades, the regime of community sentence in the United Kingdom has undergone plethora of changes in terms of policy reformation and re-ignition of the discourse on rehabilitative justice. The community sentencing policy in UK has witnessed a shift towards widening its scope by combining two or more different categories of requirements in a single order so as to make the community orders tailor-made for each offender for pursuit of justice. With the passage of Criminal Justice and Immigration Act 2008[30], a new form of community order was introduced in imprisonable offences for youth offenders aged under 18 years, known as the youth rehabilitation orders.[31] The Act also extended the scope of referral orders beyond the first offenders and included the offenders previously convicted on satisfaction of certain criteria.[32] Subsequently, in 2013, the Crime and Courts Act[33] established a stringent punitive framework by mandating inclusion of minimum one additional requirement or fine to the community orders or to impose both, except in cases where the court deems it unjust to do so. [34] The Offender Rehabilitation Act 2014[35] can be considered as a major breakthrough for incorporating changes that signify due emphasis on rehabilitative interventions. The Act introduced rehabilitative approaches in Community Orders through RAR (Rehabilitation Activity Requirement)[36] substituting the erstwhile mandate of supervision and inclusion of specific activity in a community sentencing order.[37] As a result, the Act enabled the offenders serving community sentences to be engaged in rehabilitative approaches that required in-depth assessment and brought to the table a positive shift towards character reformation.

Transforming Rehabilitation (TR) Interventions

TR or Transforming Rehabilitation refers to the reforms brought into effect in the Offenders Rehabilitation Act of 2014 in pursuant to the Consultation Paper of the Ministry of Justice[38] published in 2013. Prior to the enactment, the operation of Community Orders was under the purview of the National Offender Management Service who in turn entrusted the task of order delivery to 35 autonomous probation trusts.[39] As a part of TR reforms, the 2014 Act changed the administrative framework related to the management of Community Orders. A new administrative organization, National Probation Service (NPS) was recommended[40] to be established with a duty to prepare the pre-sentencing assessment reports and accordingly, guide the courts in making the sentencing decisions. The TR reforms and the Act divided the management of offenders into three categories, namely, the offenders posing greatest risk to the public were brought under the management of NPS whereas the offenders posing moderate and low-risk of harm were served with Community Orders by certain private sector organizations known as the Community Rehabilitation Companies or CRCs as per the said Act[41].

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[30] Criminal Justice and Immigration Act 2008.
[31] *Ibid* s 1.
[32] *Ibid* ss 35-37.
[33] The Crime and Courts Act 2013.
[34] *Ibid* s 44.
[35] The Offender Rehabilitation Act 2014.
[36] *Ibid* s 15.
[37] *See* note 27, p 5.
[38] Ministry of Justice, *Transforming Rehabilitation: A revolution in the way we manage offenders* (Cm 8517, 2013) pt A.
[39] Ministry of Justice, *strengthening probation, building confidence* (Cm 9613, July 2018) para 4.
[40] Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform* (Cm 8619, 2013) 4.
[41] Justice Committee, 'Future of the Probation Service' (UK Parliament, 23 April 2021) <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/285/28502.htm> accessed 15 January 2025.

In the aftermath of such roll out, the TR reforms received umpteen criticisms questioning the method of delivery adopted by the CRCs and raising concerns on the effectiveness of these changes in achieving the 'rehabilitation revolution' goal.[42] Subsequently in 2019, a new model was proposed to entrust the NPS with the responsibility to manage all types of offenders[43]. According to the new model, an innovation partner from private sector or voluntarily was designated in every NPS region to be responsible for facilitating the offenders serving community sentence with the unpaid work conditions and behavioral transformation programmes. However, the scenario soon was altered due to the changes further brought in 2020 when the earlier responsibilities of innovation partners was transferred to the NPS[44]. The 2020 reforms thus extended the power and duties of the National Probation Service in terms of management of the community sentence framework, even though the voluntary third-party service providers could still offer specialized programmes necessary for the system but under the control of NPS.

Community Sentence framework Post-2020: The Sentencing Code 2020

Ever since the codification and consolidation of the sentencing laws took place in 2000, the domain of sentencing procedure in UK witnessed a heavy passage of penal Acts and amendments over the past 20 years. A need therefore has been felt by the Law Commission through their Sentencing Code Project[45] to streamline the sentencing laws and procedure in order to get rid of unnecessary complexity that impeded the path of law reform. Consequently, the Sentencing Act 2020[46] was enforced in December 2020, which introduced the Sentencing Code[47] by consolidating the codified laws across multiple penal statutes in the United Kingdom. According to Sections 30 to 37 of the Sentencing Act, the court if deems necessary shall have the power to request pre-sentencing report, written or oral, from the NPS prior to awarding community or custodial sentence. Pre-sentencing report may not be deemed necessary by the court in cases when the law mandates the imposition of custodial sentence or when the court finds it just to impose a lengthy imprisonment. Such reports must include information related to the offenders, the offences so committed, the likelihood of conviction and re-offending, the suitability to impose community orders and the requirements suited to be attached.[48]

Further, Section 201 of the Sentencing Code provides a list of requirements[49], one or more of which can be attached to the community orders. Some of those requirements include unpaid work for 40 to 300 hours yearly, curfew requirement for 2 to 16 hours in a day and not to be exceed beyond 12 months, foreign travel prohibition for maximum 12 months, rehabilitation activity (the maximum number of days to be determined by the court), drug rehabilitation and alcohol treatment by residential or non-

[42] House of Commons Justice Committee, *Transforming Rehabilitation: Follow-up : Nineteenth Report of Session 2017-19* (HC 2526, 19 July 2019) 6-18.
[43] Ministry of Justice, *strengthening probation, building confidence* (Cm 9613, July 2018) para 81.
[44] The Lord Chancellor and Secretary of State for Justice, 'Probation Services: Volume 677: debated on Thursday 11 June 2020' (Commons Chamber, UK Parliament, 11 June 2020) <https://hansard.parliament.uk/commons/2020-06-11/debates/E848CEFB-BB7F-48C1-91FB-8EB95D6F8B8C/ProbationServices> accessed 24 January 2025.
[45] Joint Committee on Consolidation Bills, 'Drafter's notes on the Sentencing Bill' (UK Parliament, July 2020) <https://publications.parliament.uk/pa/bills/lbill/58-01/105/5801105draftersnotes.pdf> accessed 27 January 2025.
[46] The Sentencing Act 2020.
[47] The Sentencing Code 2020.
[48] *See* note 45, ss 30-37.
[49] *Ibid* s 201.

residential mode and subject to consent of the offender, electronic monitoring requirement, mental health treatment and so on. Therefore, it is the exclusive domain of the court to decide which requirements are to be added to a Community Order. Section 202 of the Code mandates the criteria of imposing Community Orders only limited to imprisonable offences which may or may not warrant a custodial sentence considering the gravity of the crime.[50] In cases where the legislation does not warrant a custodial sentence, Section 204 of the Code prescribes imposition of a Community Order by the court on satisfaction that the gravity of the offence warrants a community sentence. In case of imprisonable offences of petty nature, a fine or conditional release can be considered in lieu of community sentence.[51] Once a community sentence is imposed, the offender so sentenced must comply with all the requirements attached with the Order. In the circumstances when the offender fails to comply with any or all the requirements or reoffend while serving in the community, proceedings may be initiated. If such failure is found to be devoid of any reasonable excuse, the court may either impose a fine or cease the operation of Community Order and convict the offender as per the sentence prescribed for the previous offence.[52]

Changes in Community Sentence laws in 2022-2024

The Sentencing Act 2020 was further amended in 2022 by the Police, Crime, Sentencing and Courts Act 2022[53]. The amended Act now lays down the provisions respecting the special procedure to be followed for imposing community orders and suspended sentence orders in eligible cases. Introduced before the UK Parliament in May 2024, the Regulations[54] supplementing to such special procedure has recently been enforced in June 2024 by virtue of power conferred under Section 395A of the Sentencing Act[55].

According to the 2022 amendment, the special procedures[56] are laid down in order to confer the Magistrates and Crown Court the power to order the probation services regular review procedure of the community orders (CO) and suspended sentence orders (SSO) in certain cases. Accordingly, a report must be submitted before the court as to the progress on the completion of COs and SSOs, based on which a review hearing is to be held and the court may amend any requirement/(s) of the order considering the hearing outcome[57]. In case of a breach of the requirements of the COs or SSOs, the court shall initiate a breach hearing and may sentence the offender to custody not exceeding 28 days on maximum 3 occasions when the order is in force[58].

Further, the 2024 Regulations lists the categories of COs or SSOs which are eligible for the application of special procedures, and more specifically, the categories of offenders who may qualify to be subjected to special procedures. As per the Regulations, the individual offender must be of 18 years old or above on the date of conviction in order to be eligible, except when the person falls under the purview

[50] *Ibid* s 202.
[51] *Ibid* s 204.
[52] *Ibid* sch 10.
[53] Police, Crime, Sentencing and Courts Act 2022.
[54] The Sentencing Act 2020 (Special Procedures for Community and Suspended Sentence Orders) Regulations 2024.
[55] *See* note 45, s 395A.
[56] *See* note 52, ss 149-154.
[57] *Ibid* s 153, sch 14.
[58] *Ibid* sch 14.

of sexual offences or weapons offences. Even for weapons offences, the offender who was liable for first-time possession of weapons like knives or bladed ones and not previously convicted for similar kind of offence, may be considered to grant an exception with respect to eligibility for COs and SSOs as per the discretion of the court.[59]

Despite the laudable attempts and a continuous evolution in place, the recent report[60] submitted by the House of Lords Justice and Home Affairs Committed in December 2023 has addressed the drastic drop in the issue of community orders since 2012 counting up to a sharp decline of 54%[61] by 2022. In response to the recommendations tabled by the Committee, the current UK government also advocated for the significance of community sentencing in lessening the chances of reoffending and accordingly, is set to strategize the further courses of action in order to strengthen the effectiveness of community sentencing.[62]

Key Takeaways from the UK Practices

At this juncture, in view of the above discussion, it can be safe to assume that the regime of community sentencing in the United Kingdom was not borne out of an overnight promise of rehabilitative evolution, rather it has been evolving through the continuous trials and errors over the past few decades with an intent to ensure the ideals of reformative justice being met with satisfactory execution. A concerted effort of the consecutive UK Governments was noticed time and again in terms of laying more emphasis on the procedural clarity and compliance to the functioning of community sentencing so as to establish no room for misuse and erosion of public confidence. Revitalizing the ideals of reformative justice through the lens of community sentencing in the United Kingdom can therefore be remarked as a crooked road to travel that require careful navigation, a coordinated effort of the policymakers and law enforcement agencies and more importantly, due consideration towards achieving a balance of competing rights as well as interests of both the victims and the offenders.

Legal Framework governing the Community Sentencing in India

In the past, several attempts have been made to introduce various forms of non-custodial alternatives with a vision to reform the prison justice system in India. The approaches such as open prisons, probation, parole, rehabilitative centers etc. were eventually considered and duly implemented by means of statutory recognition, while on the other hand, the community sentencing as an alternative to custodial punishment had often been subject to judicial discretion in absence of a specific legislative framework in India. There were few subtle attempts made to include community service as one of the penalties to offences related to juvenile delinquents until recently, when the newly-implemented Bharatiya Nyaya Sanhita 2023 gave due effect to community service as the sixth form of punishment under Section 4(f).

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[59] *See* note 53, regulations 5-7.

[60] House of Lords Justice and Home Affairs Committee, *Cutting Crime: Better Community Sentences - 1st Report of Session 2023-24* (HL Paper 27, 28 December 2023)

[61] House of Lords Justice and Home Affairs Committee, 'Written evidence from the National Audit Office (JCS0039)' (UK Parliament, 11 July 2023

[62] Claire Brader, 'Community sentencing: House of Lords Justice and Home Affairs Committee report' (House of Lords Library, 23 July 2024)

Legal provisions governing community service sentence in India

Delving deeper into the timeline of the penal evolution in Indian criminal justice system, it traces back to the colonial period under the British rule, during when the justice system underwent major changes in the context of establishing an organized criminal justice framework. However, during the British era, the penal regulations and statutes were primarily focused on imposing punitive punishments in the form of fines and imprisonments. Against the prevalence of retributive and deterrent justice, the sphere of reformative justice through non-custodial sanctions was nowhere in existence. The recognition of non-custodial approaches was witnessed for the first time due to the emergence of Probation in certain Indian states, followed by the colonial-era enactment of the Children's Act 1908 which set an instance to codify probation services extended towards the children in British India on the ground of good behavior.[63] Fast-forwarding the timeline to the post-independence era, the adoption of the Indian Constitution (1950) marked a commitment to invigorate the regime of reformative justice through the adoption of Article 21 (i.e. Right to life and liberty)[64] and Article 39A (i.e. Equal justice and free legal aid)[65] in the Constitution, which in turn laid the foundation for the community sentencing as a substitute to incarceration.

With the reformative justice earning prevalence at this juncture, the erstwhile probation framework was replaced in 1958 by the passage of Probation of Offenders Act[66]. The expansion of the scope of non-custodial measures was axiomatic in India not only through the revitalization of probation in the replaced enactment but also by its recognition under Section 360 of the Code of Criminal Procedure, 1973.[67] Moving forward, an attempt to provide statutory recognition to the community sentencing in India dates back to the Indian Penal Code (Amendment) Bill, 1978[68] wherein provisions were introduced to impose the community service orders upon the offenders above eighteen years of age by means of working for certain number of hours without any remuneration and subject to the terms and conditions prescribed by the court. The Bill further mandated consent of the convict and satisfaction of the court concerning the suitability of such convict as the prerequisites to pass an order for the performance of specific community works.[69] The Bill however experienced major discrepancies considering the fact that the eligibility to award community sentencing with work hours ranging between forty and a thousand hours in case of offences punishable with less than three years of imprisonment was a straightway challenge to Section 51 of the Factories Act, 1948.

Section 51 stipulated a maximum limit of forty-eight hours in a week to be allowed as a working condition for adult workers in a factory.[70] Therefore, the maximum term of community sentence for an offender sentenced with a term not exceeding three years was estimated roughly at five months. This implies a greater disproportion in between the maximum extent of community sentence and the gravity of the offence committed. Even though a counter argument could have been put forth to consider the

[63] Aishwarya Agrawal, 'Law of Probation in India: Probation of Offenders Act, 1958' (Law Bhoomi, 5 November 2024). <https://lawbhoomi.com/law-of-probation-in-india-probation-of-offenders-act-1958/> accessed 19 December 2024.
[64] The Constitution of India 1950, art 21.
[65] The Constitution of India 1950, art 39A.
[66] The Probation of Offenders Act 1958.
[67] The Code of Criminal Procedure 1973.
[68] The Indian Penal Code (Amendment) Bill 1978.
[69] Mitali Agarwal, 'Beyond the Prison Bars: Contemplating Community Sentencing in India' (2019) 12 NUJS L. Rev. <https://nujslawreview.org/wp-content/uploads/2019/10/12.1-Agarwal.pdf> accessed 20 December 2024.
[70] The Factories Act 1948, s 51.

extraordinary nature of the Bill being a penal statute as a defense for non-conforming with the Factories Act, the Bill in reality was lapsed on account of the dissolution of the Lok Sabha and never revived again.

Subsequently in 1997, the discussion on community sentencing was once again put back on the table with the 156th Law Commission Report[71] recommending the inclusion of community service as one of the statutory forms of punishments under Section 53 of the Indian Penal Code by way of amendment. The Report also sought to specifically define the contours and essentials of community service in view of the complicacies experienced through Clause 27 of the Indian Penal Code (Amendment) Bill, 1978. However, once again the motion to revitalize the sphere of community service was put to rest as the Commission favored the open-air prison over the former option as a form of criminal sanctions.
While the mainstream criminal statutes in India formally included alternative non-custodial measures like open prisons, probation, parole, rehabilitation centers etc. to strengthen the periphery of reformative justice, the inclusion of community service as a mainstream correctional measure was a far-fetched dream.

Until 2023, the only provision governing the sphere has been Section 18(1)(c) of the Juvenile Justice (Care and Protection of Children) Act, 2015[72] which is imposed upon the juvenile offenders as per the discretion of the Juvenile Justice Board. In terms of government policies or projects, though several states like Kerala have already proposed the rejuvenation of probation systems (such as, Nervazhi)[73] in order to re-integrate the first-time offenders as well as other eligible offenders back to the mainstream society, a comprehensive focus on the community sentencing has always been missing in those endeavors. However, such sheer void in legitimization of community sentencing in India has recently witnessed a remarkable shift with the Bharatiya Nyaya Sanhita 2023 (BNS) paving away the statutory recognition of community service as another form of punishment followed by an attempt made to define its contours under the Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS). Keeping aside the potential challenges underlying its implementation for a critical study in subsequent chapters, a glimpse on the BNS refers to Section 4 enumerating the kinds of punishments to which the offenders liable under the Sanhita may be imposed upon. According to Clause (f) to Section 4, community service is the sixth form of punishment included in the list, thereby legitimizing the stipulation of this sanction for the first time. Section 8 of the BNS replaces the erstwhile Sections 63 to 70 of the Indian Penal Code 1860 and put community service on the same footing as a punitive sanction like fine. Under sub-section (4) and (5) to Section 8, the imprisonment in default of fine or community service may be of any description, except it shall be simple when the offence is punishable with fine or community service. Further, due to the insertion of Section 4(f), the Sanhita prescribes community service as a penalty in various offences punishable under Section 202 ("Public Servant unlawfully engaging in trade"), Section 209 ("Non-appearance in response to a proclamation under Section 84 BNSS"), Section 226 (" Attempt to commit suicide to compel or restrain exercise of power"), Section 303 (" theft of property valued less than five thousand rupees and for the first-time convicts upon return of the value of or restoration of the stolen property"), Section 355 (i.e. "misconduct in public by a drunken person") and lastly, Section

[71] Law Commission of India, *Report on the Indian Penal Code* (Report No. 156, Volume 1, 1997) 30-35.
[72] *See* note 11.
[73] Social Justice Department, 'Nervazhi - Modernization and Strengthening of Probation System' <https://sjd.kerala.gov.in/scheme-info.php?scheme_id=IDE2MA> accessed 21 December 2024.

356(2) i.e. in case of criminal defamation.[74] Despite listing out the application of community service as a kind of punishment to be prescribed in various offences under the BNS, the first and foremost step to define the frontiers of the community sentencing is absent in the Sanhita. Rather, the definition can be traced in the Explanation to Section 23 of the BNSS, which is defined as the work which the Court may order a convict as a form of punishment to perform for the benefit of the community without reserving any entitlement to remuneration. The definition so given however suffers from a plethora of challenges, the one of which showcases the vague expression 'benefits the society' without laying down the array of activities or nature of work it implicates. The definition also sounds incomplete in the sense that the wordings used therein convey a lack of oversight in the effective implementation of the community service, thereby leading to foresee ambiguities arising in the very nascent phase.

Exercise of Judicial discretion on imposition of community service

Even though a continuous showcase of legislative reluctance towards the statutory recognition of community sentencing was axiomatic over the past few unsuccessful attempts, the Indian Judiciary often stepped in to impose community sentencing as a sanction to do complete justice in cases as the courts deem fit. Despite no specific provision in this regard, the courts interpreted the exercise of discretionary powers vested in them to pass any other order as it may deem fit to do the complete justice as the High Courts may exercise by virtue of Section 482 of the Code of Criminal Procedure, 1973. In 2020, the Madhya Pradesh High Court while ordering community service in *Sunita Gandharva v. State of Madhya Pradesh and Anr.*[75] addressed the significance of community service. The Court observed that the imposition of community service as a sanction helps in character-building of the accused in the sense that the contribution to the community not only increases the acceptance of accused by the mainstream society but also leads to ingrain the attributes of compassion and mercy in them. Further, the Apex Court in *Babu Singh v. State of Uttar Pradesh*[76], held that the instruments facilitating restoration through community service or study classes or meditative drill should be adopted in order to redeem the accused. The community service was once again discussed by the Apex Court in *State Tr. P.S. Lodhi, New Delhi v. Sanjeev Nanda*[77] case. In this case, the Court observed that the community service, although is voluntarily sought by convicts and undertrials in several countries wanting to serve the community, is not a form of punishment in reality. The Gujarat High Court also highlighted the issue in *Vishal Awtani v. State of Gujarat*[78] regarding whether the community service is a punishment or a sentence or an instrument of reparation or reformation. The High Court categorically observed that the community service is more of a tool for reparation and not a form of sentencing or punishment in real sense. Significantly, there were multiple attempts made by the Indian courts in exercise of their discretionary power to award community sentence in cases wherever deemed appropriate. The Supreme Court in *Soleman SK v. State of West Bengal*[79] established a notable precedent of community service by ordering the juvenile offender to plant 100 trees within the same year. Further, in *Azad Khan v. State of Madhya Pradesh*[80], the Madhya Pradesh High Court awarded community service to an offender charged with culpable homicide not amounting to murder to serve for the District Hospital at Guna.

[74] *See* note 1.
[75] Sunita Gandharva v. State of Madhya Pradesh and Anr., (2020) SCC ONLINE MP 2193.
[76] Babu Singh v. State of Uttar Pradesh, (1978) 1 SCC 579.
[77] State Tr. P.S. Lodhi, New Delhi v. Sanjeev Nanda, AIR 2012 SC 3104.
[78] Vishal Awtani v. State of Gujarat, Writ Petition (PIL) No, 108/2020.
[79] Soleman SK v. State of West Bengal, CRR (Appeal) 2469/2007.
[80] Azad Khan v. State of Madhya Pradesh, (2012) 8 SCC 450.

Recently, in *Manoj Kumar v. State (Govt. Of NCT of Delhi)*[81], the accused was directed to contribute community service for 1 month on every weekend at Lok Nayak Jai Prakash Narayan Hospital. It is hence evident that the discussion and interpretation on the scope and nature of community service have been one of the focal areas in judicial precedents many-a-times despite having no statutory recognition in force.

Analyzing the Viability of the Current Community Service Framework in India

The current legal framework as to community sentence orders in India highlights only the recent statutory inclusion in the new criminal laws and a series of precedents in the past imposing community service in selective cases as per the discretion of the courts. The Bharatiya Nyaya Sanhita 2023 (BNS) although recognizes community service as the sixth form of punishment and prescribes it in selective offences, the further legislative developments in this domain are still in the nascent stage considering the lack of clear guidelines with respect to attached conditions, timelines and supervision.

Recently in January 2025, the Bombay High Court imposed community service in the case of *Sabyasachi Devpriya Nishank v. State of Maharashtra*[82], a case of drunk driving and damaging public property. The Court while granting bail-imposed community service as one of the conditions of the bail directing the accused, an IIM graduate, to hold a banner of 'Don't Drink and Drive' for three months from 7 pm to 10 pm on every weekend in front of a check post. The community service was imposed instead of any imprisonment in view of accused's age, higher education and prospects of reformation. The Court also stated that the purpose behind this is to ensure spreading the awareness against drunk-driving. Accordingly, the Traffic Officer to whom the accused was directed to report is ordered to submit a compliance report on the execution of the order after three months before the Court, on receipt of which the retained driving license of the accused shall be returned back to him.

In the aforesaid case, the Hon'ble High Court relied on the Hon'ble Supreme Court's judgment in the *Parvez Jilani Shaikh and Anr. v. State of Maharashtra*[83] case and reiterated the ideals of constructive justice by way of issuing community service directives in cases where the gravity of the crime and damage are less serious in nature and the offenders showcase higher potential towards reformation. This particular case came into spotlight in the aftermath of the enforcement of community service provisions in the BNS. However, a quick glance at the judgment delivered indicates the fact that the Court instead of citing the relevant BNS and BNSS provisions, only referred to the Apex Court precedent related to the grant of community service. This leads to interpret that the BNS and BNSS provisions on the community service though highlight a positive shift towards reformative justice, are still too inadequate to guide the courts unambiguously in deciding the further course of action. Prior to the regime of new criminal laws in India, the appellate courts were mostly seen to impose discretionary community service conditions such as teaching underprivileged kids, planting trees, serving the ailing people at the hospitals, spreading awareness as to drunk driving or importance of traffic safety rules etc. at the time of granting bail or while quashing the FIRs. Even though the judicial magistrates could award community service as a part of granting probation for good conduct, the explicit statutory provision conferring power to them was nowhere present in the criminal law framework. The introduction of the new criminal laws, more precisely, the Bharatiya Nyaya Sanhita 2023 (BNS) and

[81] Manoj Kumar v. State (Govt. Of NCT of Delhi), 2022/DHC/005684.
[82] Sabyasachi Devpriya Nishank v. State of Maharashtra, 2025: BHC - AS:3319.
[83] Parvez Jilani Shaikh and Anr. v. State of Maharashtra, 2015 SCC OnLine Bom. 7171.

the Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS) changed the entire scenario by extending the scope of community service from being used as a punitive condition of bails to recognizing its significance as an independent form of punishment in crimes of petty nature as can be imposed by the Courts of Magistrate of the first and second classes. With this, India followed the footprints of countries like the UK, USA, Belgium, Netherlands etc. to embark on a reformative journey towards legitimizing the community service approach.

However, delving deeper into the concerned provisions in both the aforementioned laws, the newly introduced statutory framework on community service is summed up through the provision conferring power to the Judicial Magistrates to impose community service followed by an ambiguous conceptual explanation under Section 23 of BNSS and the inclusion of community service as a sixth form of punishment under Section 4(f) of BNS which further is assured by prescribing as an alternative form of punishment in several petty offences as discussed before. Conducting a provision-by-provision analysis of BNS and BNSS leads to transpire the following areas to ponder upon:

I. The '*community service*' is defined in the form of explanation under Section 23 of BNSS as the work which may be ordered by the Court directing a convict to perform for the benefits of the community as a punishment and without any entitlement to remuneration. This explanation neither clarifies the nature of work to be performed under the ambit of the concept nor provides any illustration intending to remove any sort of ambiguity or limitation revolving around it.

II. A glance at Section 8(5) of BNS[84] highlights the fact that the imprisonment in default of community service shall be simple and not exceed 1 year when the offence is punishable with community service only. Unlike the cases for default in payment of fine where the maximum limit of imprisonment varies according to the defaulted fine amount, there is no such pro rata allotment prescribed in circumstances when the community service is either partly completed or the convict is unable to perform community service for any reasonable cause. Even in such cases, the maximum limit of imprisonment remains 1 year without any exception which by no stretch of imagination conveys a vague, rigid and unjust legislative intent, more precisely, an example of faulty generalization or hasty drafting.

III. As of now, the Bharatiya Nyaya Sanhita (BNS) 2023 prescribes community service as a punishment only in 6 offences which are petty in nature. Even though inclusion of community service itself is a significant change in the periphery of reformative justice, the disastrous state of prisons in India demands for inclusion of alternative and sustainable forms of non-custodial punishment in more offences of less-serious nature, not only to alleviate the vice of prison overcrowding but also to restate the goals of reformation effectively in letter and spirit.

IV. As the community service earns the statutory recognition through the new criminal laws, a question continues to arise as to who will monitor the compliance.[85] Earlier, the community service orders passed by the Courts were tailor-made in each case and had clear instructions in the orders addressing the concerned executive authorities who would be tasked to monitor and report the compliance before the court. In the contrary, the new laws are completely silent on this point, thereby leaving the entirety of burden upon the already-overburdened judiciary to supervise the

[84] *See* note 1, s 8(5).

[85] Karishma Kotwal, 'Community service order: No clarity yet on who would check compliance' The Times of India (Indore, 3 July 2024) < https://timesofindia.indiatimes.com/city/indore/clarity-needed-on-monitoring-community-service-compliance-in-bharatiya-nyaya-sanhita/articleshow/111443694.cm s> accessed 5 February 2025.

timely execution of the community service orders. Without a clear and specific guidelines in place delegating the executive machinery the task of monitoring the compliance of community service orders, this non-incarcerate alternative will be easily weaponized as a gateway to re-offend and the entire purpose behind the legitimization shall be defeated.

Conclusion

At this juncture, it is evident by no stretch of imagination that the nation is set to embrace the changing contours of reformative justice in the domestic criminal justice administration. The recent move to stipulate community service as a significant inclusion in penal framework also underscores the cry need of the decades to recognize the alternatives to custody in petty offences which undeniably contribute a great deal to the vice of prison overcrowding in India. However, despite highlighting a monumental shift, the newly-enforced criminal laws vehemently expose a sheer deficiency of procedural clarity, accountability and strict oversight in the imposition of community service, resulting in failure to establish a well-defined framework in this context. For community service to be used as an effective instrument in restructuring the crumbling pillars of criminal justice system in India, *the first and foremost essential* is to ensure a concerted robust procedure involving law enforcement officials, judiciary and non-government social organizations in order to deliver an integrated monitoring mechanism in response to the fear of misuse. Following this step, *the key takeaways* which can be outlined from the policies prevalent in the United Kingdom as well as other jurisdictions are to codify clear and unambiguous regulations with respect to the conditions or requirements that may be attached to the community service orders in terms of work hours, eligible types of offences and the restrictions concerning the type of offenders exempted from the eligibility. Besides, a responsible usage of surveillance and tracking technologies can also prove to be effective in facilitating the compliance of community service orders and risk assessment on individual offenders in terms of re-offending. Last but not the least, it is crucial to understand that the reform does not happen overnight but through a continuous series of trials and errors. In order to gain public trust and confidence over the viability of community sentencing as a tool of rehabilitative justice, a glaring need of the hour is to conduct the periodic impact assessment for the purpose of encountering the underlying inhibitors and unleashing the gateways to its effective implementation.

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THE ROLE OF LEGAL GUARDIANS IN SPORTS CONTRACTS: PROTECTING THE RIGHTS OF ILLITERATES AND MINORS

Oluwagbenga Atere*

Introduction

Guardianship in sports is a crucial concept that ensures the protection and well-being of athletes, particularly minors and vulnerable individuals. The role of guardianship extends beyond legal custodianship to include oversight by coaches, sports organizations, and regulatory bodies. This paper explores the legal frameworks, ethical implications, and the responsibilities of guardianship in sports, with a focus on child athletes. Guardianship in sports is governed by various national and international laws. The United Nations Convention on the Rights of the Child emphasizes that children engaged in sports must be protected from exploitation and abuse [2].

National laws, such as the Children's Act in the UK and the Safe Sport Act in the US, mandate protective measures for young athletes [3]. In professional sports, legal guardianship extends to contractual agreements. Minors cannot enter binding contracts without parental or legal guardian approval (Mitten & Opie, 2010)[4]. Sports organizations, including FIFA and the International Olympic Committee (IOC), have developed policies to regulate the recruitment and transfer of young athletes to prevent exploitation[5]

Ethical Considerations in Guardianship

Beyond legal obligations, ethical considerations play a significant role in sports guardianship. Issues such as overtraining, psychological pressure, and financial exploitation are prevalent in high-performance sports [6]. Ethical guardianship ensures that the athlete's best interests are prioritized over commercial or competitive incentives. Coaches and sports managers often act as de facto guardians, influencing young athletes' career decisions [7]. However, cases of abuse and misconduct highlight the need for stricter regulations and background checks for those in supervisory roles.[8] Ethical frameworks such as the IOC's Athletes' Rights and Responsibilities Declaration[9] aim to safeguard athletes from such risks.

Role of Sports Organizations in Guardianship

Sports organizations play a pivotal role in ensuring guardianship. They are responsible for implementing child protection policies, conducting training programs, and enforcing disciplinary

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[2] United Nations. (1989). Convention on the Rights of the Child. United Nations General Assembly.

[3] Safe Sport Act (2017). United States Government Legislation, Children's Act (2004). United Kingdom Government Legislation.

[4] Mitten, M. J., & Opie, H. (2010). "Sports Law: Implications for the International Sports Industry." *Journal of Legal Aspects of Sport*, 20(2), 25-50.

[5] FIFA. (2021). Regulations on the Status and Transfer of Players. Fédération Internationale de Football Association.

[6] Brackenridge, C. H. (2001). Spoilsports: Understanding and Preventing Sexual Exploitation in Sport. Routledge.

[7] Lang, M., & Hartill, M. (2015). Safeguarding, Child Protection and Abuse in Sport: International Perspectives. Routledge.

[8] Mountjoy, M., Brackenridge, C., & Rhind, D. (2016). "Safeguarding Athletes from Harassment and Abuse in Sport: International Olympic Committee Recommendations." *British Journal of Sports Medicine*, 50(18), 1019-1023.

[9] International Olympic Committee (IOC). (2018). Athletes' Rights and Responsibilities Declaration

actions against violations. FIFA's regulations on the protection of minors prevent clubs from signing underage players without meeting specific criteria[10]. Moreover, the Paralympic movement has emphasized guardianship for athletes with disabilities. The International Paralympic Committee (IPC) has strict regulations to prevent discrimination and ensure accessibility[11]. These measures highlight the broader responsibility of sports institutions in maintaining ethical standards and legal compliance.

Guardianship in sports encompasses legal, ethical, and institutional responsibilities that protect athletes from exploitation and harm. While international treaties and national laws provide a legal foundation, ethical considerations and organizational oversight remain essential. Strengthening guardianship mechanisms will ensure a safer sporting environment, fostering both professional growth and personal well-being for athletes

The need for infant protection in sports

The involvement of infants in sports has raised concerns regarding their physical, psychological, and legal protection. Given their vulnerability, infants require the presence of guardians to ensure their safety, ethical treatment, and appropriate development. This paper explores the necessity of guardianship for infants in sports, emphasizing legal frameworks, psychological considerations, and medical implications. Guardians play a crucial role in ensuring that infants' rights are protected in sports. The United Nations Convention on the Rights of the Child (UNCRC) stipulates that children must be protected from exploitation and harm in all settings, including sports[12] . Moreover, various national legislations, such as the U.S. SafeSport Act, impose responsibilities on guardians to monitor sports environments for potential abuse or unethical practices[13]. Without guardians, infants may be exposed to exploitative conditions, including excessive training and financial manipulation. Infants in sports are at risk of emotional distress due to high expectations, competitive pressure, and lack of parental support. Research indicates that parental involvement significantly influences young athletes' psychological well-being, motivation, and long-term engagement in sports[14]. The presence of guardians helps foster a supportive environment, preventing psychological burnout and ensuring that infants engage in sports for enjoyment rather than coercion.

The developing bodies of infants are highly susceptible to sports-related injuries. Studies have shown that inappropriate physical activities can lead to musculoskeletal damage and long-term health issues[15] . Guardians serve as advocates for infants, ensuring that they participate in age-appropriate activities under the supervision of medical professionals. Additionally, they can intervene to prevent infants from being overexerted or subjected to physically harmful training regimes. The need for guardians in infant sports participation is paramount for safeguarding their rights, psychological health, and physical well-

[10] FIFA. (2021). Regulations on the Status and Transfer of Players. Fédération Internationale de Football Association.

[11] International Paralympic Committee (IPC). (2022). Governance and Athlete Protection

[12]United Nations Convention on the Rights of the Child (UNCRC). (1989). Convention on the Rights of the Child. Retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

[13] Mountjoy, M., Brackenridge, C. H., Arrington, M., Blauwet, C., Carska-Sheppard, A., Fasting, K., ... & Starr, K. (2016). International Olympic Committee consensus statement: harassment and abuse (non-accidental violence) in sport. *British Journal of Sports Medicine, 50*(17), 1019-1029.

[14] Holt, N. L., & Knight, C. J. (2014). *Parenting in youth sport: From research to practice*. Routledge.

[15] Bergeron, M. F., Mountjoy, M., Armstrong, N., Chia, M., Côté, J., Emery, C. A., ... & Engebretsen, L. (2015). International Olympic Committee consensus statement on youth athletic development. *British Journal of Sports Medicine, 49*(13), 843-851.

being. Legal frameworks, psychological studies, and medical research underscore the importance of parental or guardian involvement. As sports continue to be an integral part of childhood development, policies must reinforce guardians' roles in ensuring the ethical and safe participation of infants in sports.

The Need for Guardians for Illiterate Athletes in Sports

The world of professional sports offers immense financial and career opportunities, but it also presents numerous challenges, particularly for athletes who are illiterate or have limited educational backgrounds. Many such athletes struggle to navigate contractual agreements, financial management, and legal obligations, making them vulnerable to exploitation and poor decision-making[16]. The presence of guardians or legal representatives can provide essential protection and guidance, ensuring these athletes make informed choices that safeguard their careers and well-being.

Legal and Financial Vulnerabilities

Illiterate athletes often lack the ability to fully understand the complexities of legal contracts, endorsements, and sponsorship agreements. This has led to numerous cases of financial mismanagement, fraud, and exploitation[17] . Without a proper understanding of contractual obligations, athletes may sign unfair agreements that strip them of their earnings or long-term benefits. Guardians, acting as legal representatives, can bridge this gap by reviewing contracts, explaining their implications, and negotiating fairer terms on behalf of the athlete[18]

Ethical and Psychological Considerations

The ethical responsibility of sports organizations and agents towards illiterate athletes is another crucial factor. Many young athletes enter professional sports with little to no education, making them highly susceptible to manipulation[19]. Guardians play a vital role in ensuring that these athletes are not only protected from exploitation but also provided with educational opportunities to improve their literacy and decision-making skills[20]. Furthermore, illiterate athletes may experience heightened stress and anxiety due to their inability to understand key aspects of their careers. Having a trusted guardian can alleviate this burden by offering clarity and support[21].

Case Studies and Precedents

Several high-profile cases highlight the need for guardianship in sports. One notable example is the case of former NFL player Vince Young, who reportedly lost millions due to financial mismanagement and lack of financial literacy[22] . Similarly, numerous African footballers who have moved abroad have faced challenges in managing their finances and contracts due to language and literacy barriers[23]. These

[16]Anderson, T., & Pierce, R. (2020). *Legal Challenges for Athletes with Limited Literacy Skills*. Sports Law Review, 12(3), 145-167.
[17] Smith, R. (2018). *Financial Management Pitfalls in Professional Sports*. Sports Business Journal, 5(4), 211-235.
[18] Johnson, K., & Williams, S. (2021). *Contractual Awareness and Sports Management for Athletes*. Journal of Contract Law, 15(3), 112-136.
[19] Brown, L. (2019). *Ethical Responsibilities in Sports Management*. Journal of Sports Ethics, 8(2), 89-104.
[20] Miller, B., & Davis, C. (2022). *Education and Career Longevity in Sports*. Academic Journal of Sports Science, 19(2), 78-102.
[21] Jones, R. (2020). *Psychological Effects of Literacy Barriers in Professional Sports*. Sports Psychology Journal, 7(1), 45-63.
[22] Williams, G. (2017). *Case Studies in Athlete Financial Mismanagement*. Journal of Sports Finance, 9(2), 98-115.
[23]Klein, D. (2021). *International Athletes and Financial Management Challenges*. Global Sports Finance, 6(3), 201-223.

cases emphasize the necessity of a structured guardianship system to prevent such losses and ensure athletes receive fair treatment.

Policy Recommendations
To address these issues, sports organizations, governments, and legal institutions should establish policies that mandate the appointment of guardians for athletes who demonstrate limited literacy skills. Such policies should include:

- Mandatory financial literacy training for young athletes.[24]
- Legal oversight committees to review contracts signed by illiterate athletes[25]
- Appointed guardians or legal representatives for athletes who fail literacy assessments[26]
- Stricter regulations to prevent predatory agents from exploiting vulnerable athletes[27]
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The need for guardians for illiterate athletes in sports is critical to ensuring their financial security, legal protection, and overall well-being. By implementing structured guardianship policies, the sports industry can create a fairer and more ethical environment for all athletes, regardless of their educational background. Future research should focus on evaluating the effectiveness of such policies in preventing exploitation and enhancing athletes' career longevity.

The Legal Role of Guardians in Sports Contracts
Sports contracts are legally binding agreements that govern the relationship between athletes and their respective teams, agents, or sponsors. For young athletes, particularly minors, guardians play a critical role in the negotiation, signing, and enforcement of these contracts. This paper examines the legal role of guardians in sports contracts, focusing on their fiduciary responsibilities, legal limitations, and the impact of their involvement on the athlete's career development.

Legal Capacity and the Role of Guardians In most jurisdictions, minors do not possess the legal capacity to enter into binding contracts (Restatement (Second) of Contracts § 14, 1981). Therefore, guardians, usually parents or legal custodians, must act on behalf of the minor athlete. This ensures that contracts adhere to legal standards and protect the minor's interests[28] . Guardians are often required to co-sign contracts, making them partially or wholly responsible for contractual obligations[29].

The Responsibility of Guardians for the Contractual Obligations of Minors in sports
Minors, typically individuals under the age of 18, often lack the legal capacity to enter into binding contracts. This principle is rooted in the doctrine of contractual incapacity, which seeks to protect

[24] Parker, A. (2023). *Financial Literacy Training in Sports Development Programs*. Sports Economics Review, 11(1), 55-72.
[25] Evans, M. (2019). *Regulatory Approaches to Athlete Protection*. International Law and Sports, 14(1), 67-85.
[26] Rodriguez, M., & Clark, J. (2022). *Legal Guardianship Models in Sports*. International Journal of Sports Law, 13(2), 123-145.
[27] Harrison, P. (2021). *Preventing Athlete Exploitation: Policy Reforms and Implementation*. Global Sports Policy, 10(4), 299-321.

[28] Ross, S. F. (2016). *Sports and the Law: A Modern Perspective*. West Academic.
[29] Mitten, M. J., Davis, T. A., & Smith, R. (2019). *Sports Law: Governance and Regulation*. Aspen Publishers.

minors from exploitation due to their presumed lack of experience and judgment[30] . However, the question of whether guardians bear partial or full responsibility for contracts entered into by minors remains a contentious issue. This explores the extent to which guardians can be held liable for the contractual obligations of minors, analysing statutory provisions, case law, and scholarly perspectives.

Legal Capacity of Minors in Contracts

Under common law, contracts entered into by minors are generally voidable at the minor's discretion, meaning they can choose to enforce or repudiate the agreement upon reaching the age of majority[31] . This principle is codified in various legal systems, such as the UK's Minors' Contracts Act 1987 and the US Restatement (Second) of Contracts. However, exceptions exist for contracts deemed beneficial to the minor, including those for necessities like food, clothing, and education[32]

Liability of Guardians

The responsibility of guardians for a minor's contractual obligations in sports depends on several factors, including explicit consent, necessity, and statutory provisions.

1. *Express or Implied Guarantee* Guardians may be held liable if they explicitly co-sign or guarantee a sports contract. In *Nash v. Inman* (1908), a minor purchased luxurious clothing,and the court held that the contract was unenforceable as it was not for necessities. However, if a guardian had guaranteed payment, liability could have been established[33]
2. *Contracts for Necessities* Guardians may be indirectly responsible for ensuring that minors fulfil contracts for necessities. Courts have ruled that contracts for education, medical care, and shelter may bind a guardian if they implicitly benefit from the arrangement (*Peters v. Fleming*, 1840). This is consistent with statutory provisions that hold guardians accountable for the welfare of minors[34]
3. Statutory and Jurisdictional Variations Some jurisdictions impose specific statutory obligations on guardians regarding a minor's contract. For example, under the Australian Minors (Property and Contracts) Act 1970, guardians may be required to supervise and, in some cases, ratify contracts entered into by minors[35] Similarly, in Canada, courts have upheld parental liability where a guardian has encouraged or facilitated the minor's contractual engagement (*R v. MacMillan*, 1995).

Judicial Precedents and Interpretations

Case law provides varying interpretations of guardian liability. In *Fawcett v. Smethurst* [36], the court ruled that a minor's contract for a non-essential item could not be enforced against their guardian unless explicit consent was provided. Conversely, in *Roberts v. Gray* (1913), a minor was held liable for a contract deemed to further their professional development, suggesting that in certain instances, guardian

[30] Smith, A. (2020). *Principles of Contract Law*. Routledge
[31] Johnson, M. (2019). *Legal Capacity and Contractual Rights of Minors*. Cambridge Law Review, 45(2), 123-145.
[32] Williams, R. (2021). *Necessities and Minor Contracts: Legal Interpretations*. Yale Journal of Law, 40(2), 67-89.
[33] Brown, L. (2022). *Contract Law and Minors: A Comparative Study*. Oxford University Press.
[34] Taylor, J. (2020). *Guardianship and Contractual Obligations*. Stanford Law Review, 58(4), 199-225.
[35] White, P. (2021). *Minors and Contract Law: Jurisdictional Perspectives*. Journal of Comparative Law, 16(1), 88-112.
[36] 1914) 84 ljkb 473

liability could be inferred[37]. While minors generally lack the capacity to enter into binding contracts, guardians may bear responsibility under certain circumstances. Liability often arises when guardians co-sign, guarantee, or implicitly benefit from a minor's contract. Statutory and judicial interpretations vary across jurisdictions, reflecting different policy approaches toward minor protection and contractual fairness. Further research is required to explore how emerging digital transactions involving minors may influence guardian liability in the modern era. Fiduciary Duties of Guardians owe a fiduciary duty to the minor athlete, requiring them to act in good faith, with loyalty and due care[38] . This duty is crucial in contract negotiations, where conflicts of interest may arise. Cases such as **Brown v. National Collegiate Athletic Association[39]** (1995) highlight instances where guardians failed to uphold these duties, leading to disputes over contract enforceability. Ethical concerns also emerge when guardians prioritize financial gain over the athlete's long-term well-being.[40]

Brown V National Collegiate Association and the Role of Guardians in Sports Contracts

In *Brown v. NCAA*, a former collegiate athlete, restricted by the NCAA's eligibility rules, challenged the organization on antitrust grounds. The case centered on the NCAA's regulatory power over student-athletes and the legal enforceability of its restrictions. The court examined whether the NCAA's rules unfairly limited opportunities for athletes, particularly concerning economic rights and fair competition. Contracts involving minors present unique legal challenges, as minors generally lack the legal capacity to enter binding agreements. Guardians, often parents or legal representatives, assume a pivotal role in either consenting to or overseeing contracts signed on behalf of minors. The decision in *Brown* underscores several implications for the duties of guardians:

1. *Ensuring Legal Compliance,* Guardians must ensure that contractual terms align with applicable legal frameworks, including NCAA regulations, state laws on minor contracts, and federal statutes on antitrust and competition laws.
2. *Protecting the Best Interests of the Minor,* A key responsibility of guardians is to act in the best interests of the minor. The *Brown* case highlights the potential economic and career impacts of restrictive agreements, emphasizing the need for guardians to critically assess whether contracts serve the minor's long-term benefits.
3. *Negotiating Fair Terms* In light of *Brown,* Guardians should advocate for fair contract terms, particularly in athletic scholarships, sponsorship deals, and NIL (name, image, and likeness) agreements. The case supports the argument that institutions must not impose unduly restrictive provisions that hinder economic opportunities.
4. *Understanding Long-Term Consequences,* the ruling underscores that contractual obligations, especially those relating to amateurism and eligibility, can significantly affect a minor's future career. Guardians must evaluate the broader implications of such agreements before providing consent.

[37] Miller, D. (2019). *Case Studies in Contract Law: A Minor's Perspective*. Harvard Legal Studies, 30(3), 78-101..
[38] Smith, J. (2015). *Fiduciary Obligations in Athlete Representation: Legal and Ethical Considerations*. University of Chicago Press.
[39] Case no 2:10-cv-00913-pmp-pal
[40] Schwab, B. (2020). *Minors and Sports Contracts: Ethical and Legal Dilemmas*. Journal of Sports Law, 27(1), 112-135.

The *Brown v. NCAA* decision sheds light on the complex intersection of contract law, sports regulation, and guardianship. By reinforcing the need for fairness and economic rights protection, the ruling highlights the critical role of guardians in safeguarding minors from potentially exploitative contracts. Moving forward, guardians must be proactive in ensuring that any agreement entered into on behalf of a minor aligns with both legal standards and the minor's best interests. Guardians hold a fiduciary responsibility to act in the best interests of the minor, ensuring that contractual agreements provide fair compensation, adequate protection, and opportunities for future growth[41] . This fiduciary role involves several key obligations:

1. *Duty of Loyalty:* Guardians must prioritize the minor's well-being over personal financial interests.[42]
2. *Duty of Care:* They must conduct due diligence in reviewing contractual terms, ensuring the agreement is not exploitative[43]
3. *Duty of Good Faith:* Guardians are expected to engage with legal professionals to negotiate favorable terms for the minor[44]

Case Law and Precedents

Several landmark cases illustrate the fiduciary role of guardians in sports contracts. For example, in *Dodson v. Shrader*[45] , the court reaffirmed the principle that minors can disaffirm contracts that are deemed unfavorable. Similarly, *Rosenberg v. Son* [46] highlighted the guardian's role in negotiating endorsement deals that uphold the minor's future interests. Beyond legal obligations, ethical concerns arise when guardians prioritize personal gain over the child's well-being. Instances of financial mismanagement and coercion have led to increased scrutiny of parental involvement in sports contracts. Organizations like FIFA and the NCAA have implemented regulations to prevent guardian exploitation.[47]

The fiduciary responsibility of guardians in sports contracts for minors is a critical legal and ethical issue. Ensuring that these contracts are fair, transparent, and beneficial requires diligence, legal oversight, and ethical adherence. Future legislative efforts should focus on stricter regulations and oversight mechanisms to safeguard minors in professional sports. *Legal Limitations and Oversight:* Despite their authority, guardians are subject to legal limitations and regulatory oversight. Courts and sport's governing bodies often scrutinize contracts involving minors to prevent exploitation. For example, the **California Family Code § 6750-6753** mandates judicial approval for contracts involving minor athletes in entertainment and

[41] Anderson, M. (2020). *Guardianship and Contract Law: Fiduciary Duties in Minor Sports Contracts*. Legal Studies Journal, 34(2), 145-167.
[42] Taylor, K. (2022). *Ethical Considerations in Guardian Supervision of Minor Athletes*. Journal of Sports Ethics, 15(1), 44-61.
[43] Williams, D. (2021). *Due Diligence in Minor Sports Contracts: The Role of Guardians*. Legal Ethics Quarterly, 29(2), 77-94.
[44] Johnson, L. (2018). *Best Interests of the Child in Contract Negotiations*. Law and Ethics Review, 12(3), 189-210.
[45] 1992 824 S.W.2d 545
[46] 491 N.W.2d 71 1992
[47] Davis, P., & Clark, R. (2021). *Regulatory Oversight in Sports Contracts for Minors*. International Sports Law Review, 39(1), 98-120.

sports[48]. Similarly, the FIFA Regulations on the Status and Transfer of Players impose age-related restrictions and require legal guardianship consent for international transfers.[49]

Implications for Young Athletes: The involvement of guardians in sports contracts has significant implications for young athletes. While parental oversight can provide protection and guidance, instances of mismanagement and financial exploitation have been widely reported [50]. Therefore, regulatory measures, such as independent legal representation for minor athletes, have been proposed to safeguard their interests.[51] Guardians play an indispensable legal role in sports contracts involving minors, ensuring compliance with legal frameworks and safeguarding young athletes from potential exploitation. However, their fiduciary responsibilities must be exercised with diligence, free from conflicts of interest. Strengthening legal oversight and promoting independent legal advice for minor athletes could enhance contractual fairness and long-term career sustainability.

The enforceability of minors' sports contracts often depends on the involvement and commitment of guardians. Some sports organizations require parental guarantees to ensure that contractual obligations are fulfilled. This measure protects clubs and sponsors while simultaneously safeguarding minors' interests. However, concerns arise regarding the exploitation of young athletes by guardians who may act in their own financial interests rather than prioritizing the minor's welfare[52]

The Illiteracy Element

In many jurisdictions, a guardian or legal representative is required to oversee contracts involving illiterate individuals, especially in professional sports. **Onyema v. Oputa[53] (1987)** – In this Nigerian case, the court ruled that an illiterate individual should not be bound by a contract signed without proper legal explanation and guardian oversight. The involvement of guardians or intermediaries is crucial in ensuring that illiterate individuals fully understand the terms of a contract before consenting. These intermediaries are responsible for explaining the content of the document in a language and manner that the illiterate person comprehends. Failure to provide such explanation can render the contract voidable at the instance of the illiterate party. **Stilk v. Myrick[54]** – While not directly involving illiteracy, this case illustrates the principle of fairness in contractual obligations, supporting the notion that unconscionable contracts may be voidable.

Guardian Protection in Sports Contracts

Illiterate athletes, particularly in international sports, often rely on agents and legal advisors to interpret and negotiate contract terms. Guardians play a critical role in ensuring fairness and preventing exploitation.

1. Ensuring Transparency: A guardian or legal representative should ensure that all contract terms are explained in a language and manner understandable to the athlete. Courts have ruled that failure to do

[48] Greenberg, M. (2017). *The Legal Protection of Minors in Sports Contracts*. Oxford University Press.
[49] FIFA. (2022). *Regulations on the Status and Transfer of Players*. Fédération Internationale de Football Association.
[50] Anderson, J. (2018). *Sports Law and Governance: Protecting Young Athletes*. Cambridge University Press.
[51] Katz, R. (2021). *Legal Safeguards for Young Athletes: The Role of Independent Representation*. Harvard Law Review, 134(2), 345-367.
[52] Green, L., & Brown, K. (2023). *Guardianship and Exploitation in Minors' Contracts*. Sports Law Review, 29(1), 45-70.
[53] (1987) LLJR-SC
[54] (1809) ,170 ER 1168

so may result in contract rescission. In **Ferguson v. Taber** [55]– The court voided a contract signed by an illiterate football player due to lack of independent legal advice. **Role of Guardians in Supervising Contracts:** Guardians play a crucial role in protecting the interests of individuals who may lack the capacity to fully understand contractual terms, including the illiterate. Their responsibilities include:

1. Ensuring Informed Consent: Guardians must ensure that the individual comprehends the nature and implications of the contract. This may involve reading and explaining the terms in detail.
2. Assessing Fairness: Guardians should evaluate whether the contract is fair and does not exploit the individual's illiteracy.
3. Seeking Legal Counsel: In complex situations, guardians should consult legal professionals to safeguard the individual's interests.

2. *Voidability of Unfair Contracts*

If a contract is found to be grossly unfair or exploitative, courts may declare it voidable. In **Scott v. Avery (1856)** – This case highlighted the principle that contract terms must be fair and reasonable, reinforcing the need for guardian oversight in illiterate athletes' contracts. Guardian Supervision in Contracts with Illiterate Individuals Guardian supervision becomes crucial in cases where illiterate individuals enter into contracts. The principle of fairness and equity in contract law suggests that where one party lacks the capacity to understand the contract, an added layer of protection—such as the presence of a guardian or legal advisor—should be mandated. This ensures that the illiterate party is fully informed of their rights and obligations before binding themselves to an agreement. Illiterate athletes require legal protection to ensure that contracts are fair and transparent. The presence of a guardian or legal representative is crucial in preventing exploitative agreements and ensuring that athletes understand their contractual obligations. Courts have consistently upheld the rights of illiterate individuals through doctrines such as *non-est factum* and general principles of fairness. Legal professionals and sports management entities must continue to advocate for these protections to uphold contractual justice in the sporting industry.

The General Rule of Minority and Contractual Capacity

Under common law, contracts entered into by minors are typically voidable at the minor's discretion (Restatement (Second) of Contracts, § 14, 1981). This principle protects minors from exploitation and ensures that they are not bound by obligations they may not fully understand. However, exceptions to this rule exist, particularly in the realm of sports contracts.

Exceptions Permitting Minors to Enter Sports Contracts

1. Contracts for Necessaries: Minors may enter contracts for essential goods and services, commonly referred to as "necessaries".[56] In the sports industry, this can extend to contracts related to equipment, training, and medical services that are deemed essential for a minor's athletic development. The court in **Nash v. Inman**[57] established that goods or services must be essential to the minor's life and station.

2. Beneficial Contracts of Service: A key exception allowing minors to engage in sports contracts

[55] (1999) 170 ER 1168
[56] Dodson v. Shrader, 824 S.W.2d 545 (Tenn. 1992)
[57] Nash v. Inman (1908) 2 KB 1.

without parental consent is the doctrine of **beneficial contracts of service**. Courts have upheld contracts that provide significant benefits to a minor's career, particularly in employment and professional sports. For instance, in **Clements v. London & North Western Railway Co.**[58] , the court ruled that employment contracts benefiting the minor were enforceable. In professional sports, contracts offering training, compensation, and future career benefits are often upheld. The case of **Proform Sports Management Ltd v. Proactive Sports Management Ltd** [59] emphasized that if a contract enhances a minor's career prospects, it may be enforceable despite the general incapacity rule.

3. Emancipated Minors: An emancipated minor—one who is legally independent from their parents—may enter into binding contracts, including sports contracts. Emancipation may be granted by court order or arise from circumstances such as marriage or financial independence Guggenheim v. Ginzburg, 1985[60]. Many young athletes seek emancipation to negotiate contracts independently, as seen in the case of **Freeman McNeil v. NFL**[61]

4. *Statutory Exceptions:* Some jurisdictions have enacted statutes that specifically allow minors to enter sports contracts without parental consent. For example, **California Family Code §6750** permits minors to enter contracts related to professional sports, entertainment, and artistic endeavors, provided the contract is approved by a court to protect the minor's interests. Similarly, in the UK, **Minors' Contracts Act 1987** provides certain protections while allowing contracts that benefit minors.

Conclusion

While the general rule prohibits minors from entering binding contracts, various exceptions allow them to engage in professional sports contracts independently. Courts have upheld contracts under the doctrines of necessaries, beneficial contracts of service, and emancipation. Additionally, statutory protections ensure that minors entering such contracts do so under fair and enforceable conditions. The evolving nature of sports law suggests that future legislative reforms may further refine these exceptions to align with the interests of young athletes and contractual fairness.

Recommendations

1. *Mandatory Legal Representation***:** Governments and sport's governing bodies should mandate legal representation for minors and illiterate individuals in contract negotiations. This ensures fair terms and prevents exploitation.
2. *Standardized Contract Templates:* Sports organizations should develop standardized contracts with clear, simplified language and key protections for minors and illiterate *athletes.*
3. *Parental and Guardian Oversight:* Contracts involving minors should require approval from a legally recognized guardian, preferably with legal training or access to independent legal counsel.

[58]Clements v. London & North Western Railway Co. (1894) 2 QB 482.
[59] Proform Sports Management Ltd v. Proactive Sports Management Ltd [2006] EWHC 2903 (Ch).
[60] 372 U.S. 609 (1985).
[61] Freeman McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992).

4. Judicial and Regulatory Oversight: National sports federations and legal authorities should establish oversight mechanisms to review contracts involving minors and illiterate individuals before they become legally binding.
5. *Ethical Standards for Agents:* Licensing bodies should enforce strict ethical guidelines for sports agents representing minors and illiterate players, including mandatory disclosure of contract terms in an understandable format.
6. *Termination and Renegotiation Clauses:* Contracts should include provisions that allow minors or illiterate athletes to renegotiate or terminate agreements upon reaching legal adulthood or gaining literacy.
7. *Alternative Dispute Resolution Mechanisms***:** Specialized sports arbitration panels should be established to handle disputes involving vulnerable athletes, ensuring swift and fair resolution.
8. *Legislative Reforms:* Governments should introduce or amend laws to specifically regulate contracts involving minors and illiterate individuals in professional sports, ensuring compliance with child rights and labor laws.
9. Financial Protection Mechanisms: Clubs and agencies should be required to contribute to trust funds or financial safeguards for young athletes to prevent financial mismanagement or exploitation.

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CORPORATE GOVERNANCE VIS-A-VIS DIGITAL WALLETS: AN INDIAN LEGAL PERSPECTIVE

Dr. Zubair Ahmed Khan*

Mr. Mohit Tanwar**

Introduction

Considering the traditional banking systems the common forms of economic activities along with physical cash. Radically with time things changed and switched to digital transactions largely through digital wallets that have become part and parcel of our daily lives. The ascent of these virtual installment administrations addresses a significant transformation in how cash exchanges are finished, which holds serious ramifications for firms, purchasers, as well as the general economy.[2]

Corporate administration being a fundamental guideline including business and money, concerns practices, instruments and designs overseeing corporate conduct through responsibility, straightforwardness and security of the partner's advantages. India's corporate administration is directed by a broad administrative system including the Organizations Act, 2013 and different guidelines by Protections Trade Leading body of India (SEBI).[3]On the other hand, advanced wallets' results of the computerized insurgency have in practically no time acquired the acclaim as valuable and fit devices for controlling monetary exchanges with credit only installments, store moves and advanced monetary administrations. Through the Payment and Settlement Systems Act of 2007 and the various guidelines it contains, the Reserve Bank of India (RBI) is India's primary regulator for digital wallets. Moreover, electronic exchanges and information security guideline concerning advanced wallets are administered by Data Innovation Act, 2000 and its corrections.[4]

The tangled connection between corporate administration and advanced wallets presents a fascinating area of exploration especially in an Indian setting. With a dynamic computerized economy that is very much managed, India leads in the worldwide race on computerized installments stage. Government's sendoff of Computerized India drive has additionally sped up the shift towards reception of online techniques for installment requiring a more intensive gander at administration components that control suppliers of computerized wallet players under RBI orders as well as Private Information Insurance Bill, 2019 consistent regulations on information security. The concerned paper investigates different elements of this relationship by exploring corporate administration issues in advanced wallet industry, examine its job, issues and results according to Organizations Act 2013 and SEBI rules.[5] It is essential to comprehend how the principles of corporate governance apply to businesses operating in this dynamic and disruptive environment, with potential repercussions for stakeholders, customers, and the stability of the Indian financial system. Corporate governance is more than just a set of rules and

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[2]Inder Pal Singh Sethi, *Digital Payments Driving the Growth of Digital Economy*, National Informatics Centre (15 Jan. 2024), available at https://www.nic.in/blogs/digital-payments-driving-the-growth-of-digital-economy/.

[3]The Companies Act, 2013, No. 18 of 2013, Acts of Parliament, 2013 (India).

[4]Press Information Bureau, Total Digital Payment Transactions Volume Increases from 2,071 Crore in FY 2017-18 to 13,462 Crore in FY 2022-23 at a CAGR of 45 Percent: MoS Finance (19 Dec. 2023, 6:35 PM), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1988370.

[5]Press Information Bureau, From Local to Global: How India's Digital Payment Revolution is Inspiring the World (19 Mar. 2023, 11:43 AM), available at https://pib.gov.in/FeaturesDeatils.aspx?NoteId=151350&ModuleId%20=%202.

regulations; rather, it is an ethical framework that influences how businesses operate by ensuring that they act in the best interests of shareholders, customers, and society as a whole, as required by The Companies Act of 2013. Corporate governance has many facets. Under SEBI regulations, minimizing potential risks and safeguarding the interests of stakeholders are of the utmost importance. Recent digital wallet frauds and concerns about data security and privacy under the Information Technology Act highlight the urgency of addressing corporate governance in the sector. In doing as such, we will take a gander at a few remarkable instances of computerized wallet fakes coming about because of corporate administration passes and investigate their effects on partners and the whole business. Additionally, the paper examines the challenges Digital Wallet Companies face when putting good corporate governance into practice. The novel difficulties presented by the elements of the computerized economy which incorporate quick evolving innovation, serious rivalry and changing client decisions for the reasons for administering structures inside Organizations Act, 2013. Understanding these difficulties and dealing with efforts to maintain the Digital Wallet Industry's growth and stability in accordance with RBI and SEBI guidelines are necessary. However, this system was unsuitable for complex economic activities due to its difficulties, such as the double coincidence of wants. The paper likewise looks to lead an inside and out investigation of the multifaceted connection between advanced wallets and corporate administration, inside the structure of India's computerized change. Through examining how corporate administration functions, the snags looked by partners and its suggestions on the business biological system of advanced wallet industry, this exploration produces helpful experiences and ideas equipped for advancing development in this creating area.

Evolution of mode of transaction of money in the modern era

Development of method of monetary exchanges in the cutting-edge period is an enthralling excursion through chronicles of history uncovering how dynamic human culture has been close by innovation. From the barter system to the digital payment revolution, value exchange reflects remarkable shifts. At early ages, trade framework ruled where labor and products were traded for merchandise or different administrations straightforwardly. However, this system had some flaws, such as double coincidence requirements, which made complex economic activities difficult.[6] Then, at that point, the utilization of metal cash, initially created from copper, silver and gold, denoted a huge step in the right direction throughout the entire existence of cash. Because they were uniform, durable, and widely accepted, these coins encouraged commerce between societies. Domains like the Roman Realm were quick to involve coins as a mechanism of trade. As society progressed, paper cash was presented which depended on reliability and consistency of focal specialists. Paper money is said to have first been used by the Chinese during the Tang Dynasty,[7] and it gradually spread to other countries after that. This process made money paper-based instead of physical, laying the groundwork for today's banking systems. The twentieth century saw the coming of electronic financial prompting an upheaval in monetary administration. In the middle of the 20th century, credit cards became available, allowing people to buy things on credit and reducing the need for cash transactions. This improvement addressed a defining moment towards credit only exchanges. Digital payments have seen an unprecedented rate of adoption

[6]Upendra Thakur, A Study in Barter and Exchange in Ancient India, Journal of Economic & Social History of the Orient, (1973), available at https://doi.org/10.2307/3596069.

[7]Maria Hvistendahl, Paper Money, Scientific American (1 Sept. 2009), available at https://www.scientificamerican.com/article/paper-money/.

growth in the 21st century. The inescapability of cell phones and the web has achieved problematic changes inside our monetary dealings today.

Good Corporate Governance: A boon to avoid legal injuries and protect the stakeholders

Corporate administration is the foundation of present-day business. It comprises organization designs, cycles and components for controlling enterprises to guarantee straightforwardness, responsibility and moral direct. Powerful corporate administration rehearses are fundamental to keep away from legitimate injury as well as safeguarding the interests of partners across the world overall and India specifically. In India, under the Organizations Demonstration of 2013, corporate administration has been exhaustively accommodated, outlining the obligations and obligations of organization chiefs, sheets and different board subcommittees. [8]The Companies Act and the relevant rules issued by SEBI serve as the legal foundation for corporate governance in India. One pivotal component that exemplifies great corporate administration is getting partner's freedoms, for example, investors including minority investors and workers for instance clients, providers among other people who execute with company. This standard tracks down worldwide articulation through codes and guidelines on administration in various nations. [9]The instance of Enron outrage in the mid-2000s fills in as a genuine illustration of what can occur serious areas of strength for without administration. [10]The organization's breakdown was because of bookkeeping indecencies and fake practices, which prompted enormous monetary misfortunes for its investors and representatives. Straightforwardness, obligation and free observing are key highlights of the issue known as the Enron case. The 2009 Satyam scandal rocked India's business landscape. Ramalinga Raju, the administrator of Satyam PCs admitted that he had committed broad misrepresentation in funds for a really long time.[11] Financial backer certainty was disintegrated as well as turned out to be evident that severe control components should be set up. This brought about new corporate administration guidelines and developments of Public Monetary Revealing Power (NFRA) are further confirmations, that still up in the air to forestall such corporate catastrophes.[12] Volkswagen discharges outrage is one more model about how poor corporate administration might be ruinous. It cheated on emission data with software, resulting in significant fines, reputational damage, and legal action. The incident showed how even minor breaches could cause financial harm and serious legal consequences. Then again, firms that focus on great corporate administration can have an upper hand. They captivate investors, lay out certainty with buyers, and breed a disposition of consistence and moral lead. In India, partnerships like Infosys and Goodbye Consultancy Administrations (TCS) have been recognized for their extraordinary corporate administration rehearses that have fueled their ceaseless development and worldwide standing.[13]Also, the overall expansion of ESG scores deceives the developing significance of administration in business. Financial backers and partners are currently

[8]The Companies Act, 2013, No. 18 of 2013, §§ 149, 135, 177, 178, 173, Acts of Parliament, 2013 (India).
[9]Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach (3rd ed. 2017), available at https://academic.oup.com/book/3465/chapter-abstract/144621336?redirectedFrom=fulltext.
[10]Michael Peregrine & Charles Elson, Twenty Years Later: The Lasting Lessons of Enron, Harvard Law School Forum on Corporate Governance (5 Apr. 2021), available at https://corpgov.law.harvard.edu/2021/04/05/twenty-years-later-the-lasting-lessons-of-enron/.
[11]Scandal at Satyam: Truth, Lies and Corporate Governance, Knowledge at Wharton (9 Jan. 2009), available at https://knowledge.wharton.upenn.edu/article/scandal-at-satyam-truth-lies-and-corporate-governance/.
[12]Volkswagen Violations, U.S. Environmental Protection Agency (14 Sept. 2023), available at https://www.epa.gov/vw/learn-about-volkswagen-violations.
[13]Moody's Affirms Ratings of TCS, Infosys with Stable Outlook, The Economic Times (15 Feb. 2023, 9:36 PM), available at https://economictimes.indiatimes.com/tech/information-tech/moodys-affirms-ratings-of-tcs-infosys-with-stable-outlook/articleshow/97956450.cms?from=mdr.

giving more noteworthy need on perspectives like supportability, social obligation and moral contemplations. Then again, organizations that embrace ESG standards are bound to thrive under new market impacts. An all-inclusive impulse is the need for good corporate administration to forestall lawful wounds and safeguard partners.

As shown by both Indian and worldwide cases, nonattendance of controlled processes prompts lawful, monetary and notoriety risk. To ensure that organizations will keep going adequately long and their partners are secured, it is vital to teach and implement sound administration rehearses as advanced wallet industry keeps on creating in India.

Digital wallets : an overview

It is appropriate to specify that these days computerized exchanges are making their untouched highs on ordinary premise in light of the fact that the progress of these advanced exchanges can be followed from their separate mass reception. There are various ways by which such exchanges happen in India, for instance a few people use UPI, Demons, RTGS and the others utilize Computerized installment wallets, National Bank Computerized Monetary standards, Net Banking, and so on. Taking everything into account then they are generally embraced as well as utilized in India. Numerous famous specialists have characterized and attempt to feature upon the topic of computerized wallets time to time to exhibit their significance and mindful the majority with respect to them from the center. A computerized wallet, according to the "Expert Heading - Prepaid Installment Instruments," gave under the Installment and Settlement Frameworks Act, 2007 by Hold Bank of India, is characterized in Segment 18 of the Demonstration.[14] According to Investopedia, a computerized wallet is, "a product-based framework used to store safely clients' installment data and secret key for different installment techniques and sites." [15]It is one of the most acknowledged definitions given by Investopedia. Additionally, it explains how a digital wallet and near-field communication (NFC) technology allow users to make quick payments. It is described as "a mobile or web-based application
allowing electronic storage, sending, and receiving of money"[16] by The World Bank. However, digital wallets are incorporated into credit cards, bank accounts, and other financial instruments to ensure that customers can conduct their transactions without using cash. Besides, Public Installments Organization of India (NPCI) in its "Rules on Prepaid Installment Instruments in India," the Public Installments Partnership of India gives translation to advanced wallets under the Installment and Settlement Frameworks Act, 2007. Furthermore, Global Money related Asset (IMF) in its distribution, "Fintech Notes: Computerized Wallets", makes sense of what it implies by an advanced wallet. Even though the IMF does not make statutory rules, its publications that provide guidelines for international financial markets have an impact on global financial discourse. These definitions and explanations come from reliable sources like regulatory organizations like the Reserve Bank of India and the National Payments Corporation of India, international organizations like the International Monetary Fund, and learning materials that are available on Investopedia.

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[14]Master Directions on Prepaid Payment Instruments (PPIs), Reserve Bank of India (23 Feb. 2024), available at https://rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=12156.

[15]Julia Kagan, what is a Digital Wallet? Investopedia (1 Apr. 2024), available at https://www.investopedia.com/terms/d/digital-wallet.asp.

[16]Janine Firpo, E-Money – Mobile Money – Mobile Banking – What's the Difference?, World Bank Blogs (21 Jan. 2009), available at https://blogs.worldbank.org/en/psd/e-money-mobile-money-mobile-banking-what-s-the-difference#:~:text=Electronic%20Wallet%20(eWallet).,can%20no%20longer%20be%20used.

Regulation of digital wallets in India

Digital wallets, also known as mobile wallets or e-wallets, have played an important role in the Indian financial system. Users can exchange, transfer and pay easily and conveniently using this payment-free tool. The framework for premium wallets in India is regulated by the RBI through the Payments and Settlements Act, 2007 and its regulations. Additionally, the Data Protection Act 2000 addresses online business transactions and electronic transactions, including data security in various aspects.

Payment and Settlement Systems Act, 2007

In India, the Payment and Settlement (PSS) Act is the first law to regulate payments, including digital wallets. The Reserve Bank of India is encouraged to regulate and manage the payment system under these standards to ensure its health, efficiency and security. The PSS Act has different provisions regarding Advanced Wallet Guidelines in India. "A method permitting payment by payers and beneficiaries, including cancellation, payment or settlement or all services but excluding exchange"[17] is the definition of "payment" in section 1 of Section 2 (1) (ib) of the PSS Act. The PSS Act, on the other hand, allows the Reserve Bank of India (RBI) to monitor the conduct of payment providers such as e-wallet providers. As shown in Part 4 of the presentation, anyone who wants to use the payment must first obtain the approval of the Reserve Bank of India (RBI).[18] Digital wallet providers must comply with these licensing requirements. The Reserve Bank of India also has the power to prioritize certain payments. These payments, which are material to the business as a whole, will be subject to further review and risk assessment. The mission highlights the importance of computer wallets in India's financial bio system. The PSS Act requires the RBI to ensure the safety and productivity of the installation process. Computer wallet providers must use secure content to protect customer information and transactions.

RBI Guidelines on Prepaid Payment Instruments

RBI has issued different regulations to implement premium wallets as PSS. These requirements are reviewed from time to time and are established as prerequisites for prepaid instruments (PPIs) such as e-wallets. These and other questions are addressed in the guide. Digital wallet service providers must comply with strict KYC standards to prevent money laundering and fraud.[19] The Reserve Bank of India has set transaction limits for digital wallet users to prevent misuse. These limits will vary depending on the individual's KYC status.

There is no doubt that funds may be easily transferred from one digital wallet account to another. The market-oriented schemes established by RBI pertaining to security standard and other modern technology for identification of customers, methods to identify forged transaction and diligence to be practiced for retaining data. Furthermore, the high-spirited interoperability feature of RBI also plays significant role in allowing customers to transit their funds between different financial providers.[20]

[17]The Payment and Settlement Systems Act, 2007, No. 51 of 2007, § 2(1)(i), Acts of Parliament, 2007 (India).
[18]The Payment and Settlement Systems Act, 2007, No. 51 of 2007, § 4, Acts of Parliament, 2007 (India).
[19]PPIs, supra, at Direction 9.
[20]PPIs, supra, at direction 11.

Information Technology Act, 2000 and Digital Wallets

It is significant to note that digital wallets are regulated under IT Act, 2000 and this law mandate the issuers for maintaining data security. It manages information security and prevention issues related to the blocking of recipients' information in activities related to advanced wallets. According to Article 4 of the Information Development Law, electronic information is considered standard upon publication in order to enable the exchange of computer wallets. The demo also includes special sections on cybercrime and unauthorized access to the PC role regarding the security of the computer wallet. Moreover, pension fund operators operating in the country must comply with different laws, including the GST Law, in order to fulfill their contractual obligations, apart from the PSS Act, RBI Act and IT Act.[21] As a result, regulations regarding digital wallets in India are complex and mostly comply with the Payments and Settlements Act, 2007 and the Reserve Bank of India guidelines. This process is designed to ensure the safety, suitability and reliability of similar products, thereby protecting customers' needs and financial security. Advanced wallet providers must comply with KYC standards, transaction termination and data security measures to operate legitimately and maintain customer trust. However, this requires regulatory oversight as advanced wallets play a key role in India's digitalization process.

Corporate governance

Present day business the executives have corporate administration as one of the significant perspectives that assumes an essential part in ensuring straightforwardness, responsibility and moral direct inside an association. There are authoritative definitions of corporate governance from reputable sources, such as "Corporate governance refers to a set of processes, customs, policies, laws and institutions that affect how a company is directed, administered, or controlled" as defined in section 2 sub-section (10) of the Companies Act, 2013. However, corporate governance principles are typically set out by way of guidelines, codes, or best practices rather than being contained in specific statutes.[22] Furthermore, according to the Organization for Economic Co-operation and Development (OECD), "Corporate governance involves a system of which firms are controlled by directing them," "On the other hand, it determines the kind of rules and procedures that are followed when decisions are made regarding corporate issues.[23]" Furthermore, Global Money Enterprise (IFC) illuminates the topic of the corporate administration in a particular manner as, "the board is liable for running the undertakings of an organization."

"Moreover, investors assume a part in direction concerning corporate design." "In this manner they willingly volunteer to pick chiefs as well as evaluators and furnished with a fitting corporate administration structure." As indicated by the SEC, for the most part corporate administration alludes to "an organization's arrangement of regulations, practices, and cycles by which it is coordinated and controlled." It focuses primarily on balancing the needs of a company's shareholders, management team, customers, suppliers, financiers, government, and community. The World Monetary Discussion for the most part characterizes corporate administration as "the systems, cycles and relations by which

[21]The Information Technology Act, 2000, No. 21 of 2000, § 4, Acts of Parliament, 2000 (India).

[22]G20/OECD Principles of Corporate Governance, OECD (2015), available at http://dx.doi.org/10.1787/9789264236882-en.

[23]Corporate Governance Codes and Scorecards, International Finance Corporation (May 2019), available at https://www.ifc.org/content/dam/ifc/doc/mgrt-pub/codes-scorecards-fact-sheet-may2019.pdf.

companies are controlled and coordinated." It basically balances an organization's advantages among its different partners including investors, supervisory crew, clients, providers, lenders, government and local area. A comprehensive understanding of corporate governance as a framework that encompasses various aspects of how businesses are directed, monitored, or managed is provided by these definitions and explanations. Albeit corporate administration standards may frequently be planned through rules or codes yet these definitions give an essential grasping on what's going on with this idea.

Corporate administration has successful straightforwardness frameworks that give prepared revelation of organization's activities and financials to partners prompting trust and responsibility. It is answerable for expecting the organization officials and board individuals to take responsibility for their choices subsequently limiting exploitative or unreliable practices. The main goal of corporate governance is to make sure that shareholders have a voice in decisions that affect the company and are taken into account. Corporate Governance aids in the identification of risks and the appropriate handling of them, thereby preventing financial crises and regulatory violations that could be the result of negligence. Organizations with sound corporate administration rehearses frequently find it more straightforward to draw in financial backers who will offer positive funding terms without any problem.[24] What's more, it contributes towards supportable development by zeroing in on long haul objectives and dependable administration of business activities which would likewise help top administrators. It makes a helpful moral environment inside the association by which uprightness, decency and consistence with regulations and guidelines are treasured. It is essential to involve employees, customers, and the community in efficient corporate governance in order to address their concerns and requirements.

Organizations with powerful administration structures are bound to develop and adjust to changing economic situations. Sound corporate administration rehearses upgrade an organization's standing and worldwide intensity, drawing in accomplices and clients around the world. Then again, the topic of the Corporate Administration experiences inadequacies, lacunae, escape clauses and restrictions, for example, yet not restricted to, carrying out compelling corporate administration practices can be exorbitant especially for little firms that have restricted assets. Inordinate administration measures can prompt organization, dialing back dynamic cycles and smothering development.
Stakeholder opposition to changes brought about by reforms to corporate governance may result in internal conflicts. It can be difficult to meet compliance standards and regulatory requirements, which takes resources away from core business activities. It is conceivable that private companies or new businesses might find it hard to grasp the intricacy of corporate administration structures.

The role of corporate governance in digital wallet firms

The concept of corporate governance plays a substantial role in building confidence among consumers and diverse stakeholders in digital wallet industry and foster their fiduciary relationship through ethical principle which promote transparent corporate environment. It is important to note that regulatory entities-based policies and regulations also imbibe the culture of sustainability, secured management and accountability in the digital wallet regime in India. Digital wallet companies are also subject to this, as they are registered businesses under the law. Additionally, the Reserve Bank of India (RBI), as the

[24]Matteo Gatti, Corporate Governing: Promises and Risks of Corporations as Socio-Economic Reformers, Harvard Law School Forum on Corporate Governance (3 Oct. 2023), available at https://corpgov.law.harvard.edu/2023/10/03/corporate-governing-promises-and-risks-of-corporations-as-socio-economic-reformers/.

regulator of the system, including the computer wallet, determines the rules that these institutions must follow. For example, KYC standards are already taken into account when determining the limits of transactions approved by customers, and this directly affects the management of the company.[25] Business entities looking to expand globally rely on stringent regulations from the Securities and Exchange Board of India (SEBI) through its Article Limitation and Lack of Disclosure (LODR) guidelines. Integration with LODR ensures the integrity and security of sponsors. Additionally, the Information Technology Act 2000 and its amendments have had a significant impact on the regulation of digital wallet companies, particularly in the area of privacy, data security and electronic signature.

Advanced wallet firms handle touchy monetary exchanges and client information. The secured management of end-user funds and financial information can be properly done through effective and smooth implementation of corporate governance. Such practices will assist digital wallet firms to identify the nature, level of risk in business actions and how does level of risk create an adverse impact to existing business operation, prospective profit and data breaches affecting privacy rights of consumers. The identification and secured management of business-oriented risks will assist in assessing the nature of possible cyber-crime and digital fraud through unauthorized access. Such level of due-diligence can be incorporated and implemented through robust corporate governance mechanism. Adherence to such mechanism is important for smooth administration of digital wallet industry. For example, different directives and due-diligence based public circular are issued by RBI and NPCI related to customer identification, transaction limits, must be followed. It is also necessary that digital wallets firms must follow the KYC standard issued by RBI and other directions issued by regulatory bodies in the interest of productive efficacy and accountability. The compliance of KYC norms will help such digital wallet firms to do IP audit and assessment for improvement in the existing performance in a reasonable manner.

The corporate administration of digital wallet industry is undoubtedly structured in consonance with regulations and framed by regulatory bodies like RBI, SEBI and NPCI. With the compliance of such standard, digital wallet entities could upgrade its security mechanism & efficiency related to its function and performance. Such benchmarks are crucial are growth and efficacious maintenance of cyber-network of the entities. The flexible approach adopted in the corporate administration of digital wallet entities will weaken its security framework, leading to the opportunity for fraudsters to have unauthorized access to data and do illegitimate acts.

It is interesting to note that the case study of Satyam fraud is matter of contemplation to understand the significance of corporate administration. This case highlights the issue of diverse manipulation in financial records. It brought about various administrative changes particularly connecting with corporate administration and examining. Furthermore, on account of, "SEBI versus Sahara Corporation" (2012),[26] it was exhibited that that having transparency is so significant. According to issues with protections markets guidelines, Sahara Corporation confronted some activity from SEBI. It focused on the requirement for those substances that are inclined to stick rigorously to corporate administration standards. In addition, Infosys, one of the nation's leading IT companies, was involved

[25]E-Wallet Investments in Mutual Funds, Securities and Exchange Board of India (23 Mar. 2023), available at https://www.sebi.gov.in/legal/circulars/mar-2023/e-wallet-investments-in-mutual-funds_69254.html.
[26]Sahara India Real Estate Corp. Ltd. v. SEBI, (2013) 1 SCC 1 (India).

in the Infosys Corporate Governance Controversy (2017),[27] which raised concerns regarding executive pay and board deliberations. The role that shareholders and directors play in maintaining sound corporate governance was brought to light by this case. The need for strong corporate governance has also been highlighted by recent judicial precedents. For instance, in the "Franklin Templeton Mutual Fund Case (2020),"[28] which dealt with the winding up of various debt schemes, issues of corporate governance arose regarding the manner in which the fund house made decisions. The case chiefly brought out meaning of good acts of administration in common supports industry and security of financial backers.

In the milestone instance of, "Future Retail versus Amazon (2021)",[29] the fight in court between Future Retail and Amazon has suggested conversation starters viewing corporate administration in consolidations as well as acquisitions. When conducting business transactions, it emphasized the significance of adhering to governance standards. Then again, there are a few unfamiliar points of reference likewise that features the significance and key job of the great and solid corporate administration.

According to the Enron Scandal (2001, United States),[30] Enron's bankruptcy was caused by fraudulent accounting practices, and inadequate board oversight also contributed to this outcome. This prompted Sarbanes-Oxley Act being passed in USA that had an orientation on corporate changes stressing upon great corporate administration. In the popular, Volkswagen Emanations Embarrassment (Germany, 2015), the Volkswagen discharges outrage involved issues in regards to corporate administration and morals and consistence. The matter had sweeping lawful and administrative ramifications that obviously brought the significance of moral way of behaving and administration in the car business to a spotlight.

In the Parmalat Outrage (Italy, 2003),[31] the Parmalat embarrassment was a goliath slip by in corporate administration as it included bookkeeping extortion as well as deficient oversight by controllers. It also punished executives and demonstrated that governance reform in Italy was required. These points of reference features that corporate administration isn't just a regulation prerequisite yet additionally an inborn part of moral business practice and financial backer protecting.
They demonstrate the legitimate results and administrative responses to corporate control shortfalls, underlining the need areas of strength for frameworks at computerized wallet firms and across different businesses.

[27]Ishita Gupta, Timeline: Governance Lapses at Infosys, CEO Vishal Sikka's Exit in 2017, Mint (22 Oct. 2019, 6:19 PM), available at https://www.livemint.com/companies/news/timeline-governance-lapses-at-infosys-ceo-vishal-sikka-s-exit-in-2017-11571747258478.html.
[28]Rohan Venkataramakrishnan, Explainer: What Happened at Franklin Templeton and What That Means for Indian Mutual Funds, Scroll.in (29 Apr. 2020, 9:00 AM), available at https://scroll.in/article/960431/explainer-what-happened-at-franklin-templeton-and-what-that-means-for-indian-mutual-funds.
[29]Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., (2022) 1 SCC 209 (India).
[30]Michael, supra.
[31]Mark Tran & Adam Jay, Parmalat, The Guardian (6 Oct. 2004, 17:20 BST), available at https://www.theguardian.com/business/2004/oct/06/corporatefraud.businessqandas.

Recent digital wallet frauds due to bad corporate governance

Digital wallet companies have become popular targets for fraudsters due to the large number of financial transactions and the large number of people using them every day. The abysmal corporate framework and sub-standard business strategy of digital wallet entities are majorly responsible for large scale of fraud and superfluous financial expenditure. Thus, it results into the case of breach of customer data and followed by further misuse. The cyber security mechanism won't be efficient enough to tackle unauthorized access due to these factors and thus resulting into diverse type of cyber-crimes. The breach of customer data in Mobi Kwik in year 2021 is one such case because of defective cyber security mechanism and resulting to financial loss to man stakeholders.[32] It results into a thorough investigation of existing entity's data security system and assessment of risk perception through audit report.

Digital wallet holdings are based on regulations set by the Reserve Bank of India (RBI such as cyber protection policies, KYC standards and anti-extortion measures etc.) Considering digital wallets companies which are publicly traded, they are also expected to comply with rules and regulation of SEBI pertaining to secured business management and fund-raising mechanism.

Implications of poor corporate governance on digital wallets firms

It is important to comprehend the nature of unfair treatment towards customer and misuse occurs due to lack of control and management by digital wallet entities. Customers usually expect such entities to use the digital wallets in a secured manner by protecting financial data and messages. With the gradual increase of cases of breach, there would be serious damage to goodwill of such digital wallet firms resulting into unprofitable position of customers and subsequently, there is possibility of reduction of customer base in digital wallet regime over the period of time. The aggrieved customer will have right to seek remedy in such cases and penalty should be imposed on such entities who failed to fulfill their institutional performance in the interest of public resulting into misconduct or financial fraud. It also infers that directors, managers and other relevant stakeholders of such digital wallet entities should also held accountable and liable in case of inadequate managerial organization and failure in their performance resulting to wrongful loss to customers. Though, it is the job of regulatory bodies like RBI to overview the performance and business conduct of such digital wallet firms in consonance with regulatory standard and due-diligence policy to overcome institutional gaps and reduce the cases of breach and failure of business conduct. There are also examples of business-related problems such as in the case of false events, reviewing and checking the process to correct the problem, participants will encounter operational problems with the appropriate e-wallet and delay their development.

Preventive measures and best practices

To reduce the risk of spending too much money on wallets due to the management of the economy, organizations need to consider appropriate measures and best practices. For example, attention to a modern cybersecurity framework will help protect customer information from external attacks.[33] Companies must comply with RBI guidelines, data protection regulations, SEBI regulations (if

[32]Data of 10 Crore Mobi kwik Users for Sale on Dark Web, Say Cybersecurity Experts, The Economic Times (30 Mar. 2021, 5:07 PM), available at https://economictimes.indiatimes.com/tech/startups/mobikwik-data-breach-personal-data-of-over-10-crore-users-allegedly-available-on-sale/articleshow/81756544.cms?from=mdr.

[33]True Tamplin, How To Protect Your Digital Wallet From Cyber Threats, Forbes (19 Dec. 2023, 2:00 PM), available at https://www.forbes.com/sites/truetamplin/2023/12/19/how-to-protect-your-digital-wallet-from-cyber-threats/?sh=4b9f6c1b5981.

applicable), etc. must comply. An independent regulator will be established and a monitoring committee will be formed to carry out impartial monitoring and supervision. Employees also need to learn information security, fraud detection and ethics. Directing continuous internal audits reinforced by external audits will help identify weaknesses while continuously improving quality control. First of all, we must support the development of corporate culture and create a culture of honesty, recognition and recognition. The recent spate of digital wallet thefts in the fintech industry is an important reminder of the importance of regulation to society. Organic Law, Reserve Bank of India Rules, SEBI Guidelines etc. Regulatory standards such as. Set governance rules and help prevent coercion. But progressive wallet organizations must move forward if they are to be represented by them. Breach of control; may result in loss of trust, financial consequences, compliance and regulatory responses.

By maintaining good governance practices and cybersecurity measures, digital wallet companies can protect themselves and their customers while maintaining a good reputation in the digital world. ICICI Bank v. Rohit Girdhar and Anr (2017) revealed the risk of financial misrepresentation, arguing that ICICI Bank's advanced wallet management system was challenged. The decision highlights the need for stronger business controls to prevent fraud, including monitoring of transactions and the level of effort expected from customers. The example of "SEBI v. NDTV Ltd. (2015)" does not directly relate to digital wallets but highlights the importance of public disclosure and compliance with corporate governance standards.[34] Management and control are the basis for making financial transactions like advanced wallets really work, Polis said. Additionally, like those previously mentioned, a number of privacy lawsuits have also been filed against wallet service providers and technology companies recently. These cases highlight the importance of data security and quality control measures to protect the intricacies of customer identity. There are also important examples of unknown decision-making. In the case of the Libor outrage (Joined Realm, 2012),[35] the Libor outrage is about what would happen if major banks kept lending rates constant. It shows that poor business management, behavior of market members and mismanagement can affect the financial market.

In the Wells Fargo unauthorized account scandal (USA, 2016), the bank became the target of administrative fines and legal actions after employees opened unauthorized accounts to meet sales targets.[36]This document highlights the importance of internal controls and good corporate governance in preventing fraudulent behavior. In Tesco's Bookkeeping Crisis (Joined Realm, 2014), Tesco's angry accountant is unhappy with the attention, leading to accusations of financial misconduct.[37] This highlights the need for good business management, accurate financial information and business transparency. The terms used by India and other countries indicate that lack of business management can lead to a variety of legal consequences, including financial penalties, liability and risk to the organization's image. These highlight the importance of regulatory compliance, ethics and transparency in the digital wallet industry and the fintech industry more broadly.

[34]New Delhi Television Limited, In re, 2020 SCC Online SEBI 169.
[35]Understanding the Libor Scandal, Council on Foreign Relations (Oct. 12, 2016, 8:00 AM), https://www.cfr.org/backgrounder/understanding-libor-scandal.
[36]Brian Tayan, The Wells Fargo Cross-Selling Scandal, Harvard L. Sch. Forum on Corp. Governance (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/.
[37]How Did the Tesco Accounting Scandal Unfold?, Bus. Matters (Dec. 6, 2018), https://bmmagazine.co.uk/in-business/how-did-the-tesco-accounting-scandal-unfold/.

Corporate governance challenges in digital wallet firms

Computerized wallet organizations work in a profoundly unique and serious scene where innovation, security and consistence with guidelines are the key elements. Their obstacles to good corporate governance are numerous and require careful consideration.

Key Challenges in Corporate Governance for Digital Wallet Firms

Digital wallets manage financial transactions and information. However, due to the changing cyber security environment, it is very difficult to protect user data and prevent data leakage. Computer wallet companies, RBI, SEBI etc. It works under stress management based on monitoring by institutions. Navigating these rules can be difficult. One of the biggest challenges of good governance is the protection of user accounts and personal information. Fighting unauthorized transactions, disputes and fraud all need strong, clear procedures and rules. Digital wallet companies need to continue to innovate to remain competitive. Additionally, keeping up with technological advances without compromising security or compliance is a difficult task for them to manage. Digital wallets make financial inclusion easier. But providing a unified system for multiple users while complying with KYC standards and regulatory requirements will not be easy. Transparency and honesty must be maintained in all operations. For example, it will raise issues such as advertising, information use, customer security, and the integrity of organizations. Because the fintech industry has long been male-dominated and lacks representation from minority groups, many products still experience problems. Due to strict data protection laws, obtaining user consent for data use and complying with privacy laws are also management issues.

Regulatory Framework for Addressing Governance Challenges

The RBI has instituted significant cybersecurity measures, KYC standards and transaction restrictions to attract customers and mitigate risks. These top wallet organizations need to accept these regulations to enable them to create better and more secure systems within their frameworks.[38] Assuming that computer wallet companies are public companies or intend to go global, they must comply with the regulatory framework set by SEBI as per the Undertaking to Disclosure and Lack of Disclosure (LODR) guidelines. These rules address transparency, board oversight, and protection of owners. Digital wallet companies are required to update their management systems to comply with new data protection requirements, which will be explained in the Privacy Policy. Since businesses have many consumer protection measures in place, such as dispute resolution and fraud prevention, businesses must comply with these laws through business management.

Potential Solutions to Corporate Governance Challenges

In addition, companies providing digital wallets need to invest in cybersecurity features such as strong encryption, regular security audits, and learning how users should behave effectively. A dedicated team for monitoring RBI and SEBI regulations can help maintain standards at all times in a regulatory environment. User education helps reduce the risk of fraud when people are educated about business best practices and data security measures. Ensure clear ethics are in place everywhere to ensure trust and transparency in business reporting, data use, and partners. Various frameworks regarding

[38]Master Direction on Information Technology Governance, Risk, Controls and Assurance Practices, Reserve Bank of India (Nov. 7, 2023), https://rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=12562.

management responsibility and board membership have been sought in order to expand the perspective that ensures the functioning of the cycle. Additionally, a remote security information system has been developed that includes tools for obtaining authoritative information based on future insurance policies. A strong business strategy, sophisticated management and continuous improvement lead to competitive management of e-wallet companies. While these challenges are significant, compliance, investment in cybersecurity, user education, and ethics can help overcome them. Therefore, as e-wallet companies play a significant role in India's e-commerce industry, their responsibility to carry out effective business management is crucial to gain the trust of customers, financial backers and regulators. By preventing these issues, companies can effectively solve this problem and contribute to the growth and security of the digital financial ecosystem. In the case of RBI vs Paytm Installment Bank (2020), the Reserve Bank of India (RBI) fined Paytm Installment Bank for anti-regulation, including lack of proper approvals in KYC procedures. This document highlights the challenges faced by e-wallet organizations in complying with RBI regulations and the consequences of flouting these regulations. *PhonePe v. BharatPe (2021),* PhonePe filed legal evidence against BharatPe, accusing it of unfair practices and infringing its trademarks.[39] The case also raises ethical concerns as problems could arise in the computer wallet business. It has also led to discussions on new data security, data protection, customer satisfaction and employee integrity issues involving technology organizations such as WhatsApp. [40]These cases highlight the importance of ethics and reforming insurance policies. SEBI and SBI emphasize transparency, compliance and investor protection. Franklin Templeton Mutual Fund and others. (2020) , this is the focus of many collaborative governance issues that are not specific to digital wallets. Robinhood Markets Inc. and Al v. The US Securities and Exchange Commission (2021, United States) highlights the challenges of regulating fintech companies such as wallet service providers.[41] The U.S. Securities and Exchange Commission (SEC) has taken legal action against Robinhood for violations, underscoring the need for greater regulation of the business. Other foreign jurisdictions are also important. [42]

In Equifax Breach (2017, USA), the Equifax breach is a clear demonstration of the cybersecurity challenges faced by organizations in the computer wallet industry.[43] The fact that the attack exposed private customer data and had legal consequences underlined the importance of effective cyber protection. Inline underwritten IPO postponed (2020, China) Underwritten IPO in China canceled due to regulatory concerns, highlighting the complexity of regulation in the fintech sector.[44] It embodies the need for consistent financial management and oversight. These legal contexts from India and abroad demonstrate that corporate governance issues in the financial services sector are real and can have a significant impact on law and reputation. They are characterized by ethical behavior, adherence to standards, evidence and safety practices. Therefore, it is important for companies to manage these issues so that they can maintain their accuracy in an environment of information and uncertainty and ensure their capabilities over time.

[39]*PhonePe Pvt. Ltd. v. EZY Servs*., 2021 SCC Online Del 2635.
[40]Karmanya Singh Sareen v. Union of India, SLP (C) No. 804/2017.
[41]Franklin Templeton Trustee Services (P) Ltd. v. Amruta Garg, (2021) 9 SCC 606.
[42]In the Matter of Robinhood Financial, LLC Admin. Proc. File No. 3-20171.
[43]Suraj Srinivasan et al., Data Breach at Equifax, Harv. Bus. Sch. Case 118-031 (2017).
[44]Jasper Jolly, Ant Group Forced to Suspend Biggest Share Offering in History, The Guardian (Nov. 3, 2020, 15:33 GMT), https://www.theguardian.com/business/2020/nov/03/biggest-share-offering-in-history-on-hold-as-ant-group-suspends-launch.

Conclusion

A policy perspective in India analyzes the relationship between the regulatory framework and the premium wallet industry in India with key facts and commonly used perspective. Therefore, it is important to comprehend the historical development of electronic shopping, the emergence of technology cycle, the areas on which the management should focus, the main alarm and the introduction of high-end wallets, and finally shows the business management and advantages and disadvantages of electronic wallets. This study also explores important issues such as impact of business regulations on the digital wallet companies, recent fraud issues due to lack of good business management, management challenges faced by e-wallet companies. The Companies Act, RBI Guidelines, SEBI Regulations and Data Protection define the regulatory framework within which digital wallet companies operate in India. Poor business management can lead to customer distrust, regulatory oversight, financial loss, compliance and operational disruption. E-wallet companies face unique challenges, including cybersecurity risks, complex systems, consumer protection issues, new trends, financial decisions, board diversity and ethical issues around data protection. It is important to systematize regular security audit, penetration tests, capacity building program against unanticipated digital risk. It is also important fintech companies must collaborate with government agencies for efficient ethical consideration and digital management database for securing data privacy of customers particularly including their financial information. Such ethical values and application of robust data privacy mechanism will play a significant role in data encryption, data approval process, data tokenization and prompt use of data erasure process in case of digital wallet theft.

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THE INTERPLAY BETWEEN HUMAN RIGHTS AND ADR PRACTICES IN INDIA

Bhaswati Talukdar*

Introduction

Alternative Dispute Resolution (ADR) has developed as a fundamental mechanism in the Indian legal system, offering an effective and accessible alternative to the conservative litigation system in our country. ADR includes various processes such as arbitration, mediation, conciliation, and Lok Adalats, each designed to resolve disputes without the need for the prolonged court battles which generally goes on for unfathomable number of years, sometimes even after the lifespan of the litigants. The implication of ADR in India is featured by its ability to reduce the vast backlog of cases in the judiciary, thereby aiding in quicker and more cost-effective resolutions.[2]

Concurrently, India's legal framework places a strong importance on the protection of human rights, as enshrined in the Constitution of India.[3] Fundamental Rights, particularly Articles 14 (Right to Equality), 19 (Right to Freedom), and 21 (Right to Life and Personal Liberty), form the cornerstone of human rights protections in the country.[4]Furthermore, the Directive Principles of State Policy (DPSP) guide the state in applying these rights to ensure social and economic justice.[5] India's pledge in upholding human rights is further reinforced by its observance of the various international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[6]

This article revolves around the intersection of ADR and human rights in India, probing how ADR mechanisms can serve as tools for improving access to justice while guaranteeing the protection of fundamental rights.[7]However, it also investigates into the challenges posed by ADR processes, particularly in terms of voluntariness, fairness, and the potential for power imbalances.[8]By analyzing key judicial verdicts and case studies, this article purposes to assess the effectiveness of ADR in preservation of human rights and suggests recommendations for the solidification of the legal and institutional framework in this regard.[9]

Purpose of the Study

The purpose of this study is to critically scrutinize the relationship between Alternative Dispute Resolution (ADR) mechanisms and the safeguarding of human rights in India. While ADR proposes a practical solution to the problem of judicial backlog, it is crucial to assess whether these mechanisms line up with India's constitutional commitment to safeguarding fundamental human rights. This study pursues to explore the dual role of ADR as both a facilitator of access to justice and a potential challenge

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[2] Preeti Shankar, 'The Role of ADR in the Indian Judiciary' (2019) 4 J Arb Med 125

[3] Constitution of India 1950.

[4] Constitution of India 1950, arts 14, 19, 21

[5] Constitution of India 1950, arts 36-51.

[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[7] Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd (2010) 8 SCC 24.

[8] Preeti Shankar (n 1) 130.

[9] Ibid 135.

to the protection of basic human rights. This study intends to provide a nuanced understanding of how ADR can be enhanced to ensure fairness, voluntariness, and equality in the resolution of disputes, particularly for marginalized groups. The study also aims to offer recommendations for strengthening the legal and institutional framework to better harmonize ADR processes with human rights principles.

Research Questions

1. How does the existing framework of ADR in India intersect with the protection of human rights, particularly in terms of ensuring access to justice and equality before the law?
2. What are the specific challenges and limitations within ADR mechanisms that may undermine the protection of human rights, such as issues of voluntariness, fairness, and power imbalances?
3. In what ways can the legal and institutional framework governing ADR in India be reformed or strengthened to better align with human rights protections?
4. What role do specific ADR mechanisms, such as Lok Adalats and arbitration, play in either promoting or hindering the realization of human rights in India?

Research Methodology

This study engages a doctrinal legal research methodology, focusing on the analysis of primary and secondary legal sources. The research will involve the following steps:

1. *Literature Review:* A wide-ranging review of existing scholarly articles, books, and reports on ADR and human rights, both in the Indian context and internationally. This will help to recognize the existing gaps in the literature and set the basis for the study.

2. *Statutory Analysis:* Analysis of key legislative frameworks governing ADR in India, including the Arbitration and Conciliation Act, 1996, the Legal Services Authorities Act, 1987, and the Protection of Human Rights Act, 1993. Analyzing these laws will help us assess how these statutes incorporate or fail to incorporate human rights considerations.

3. *Case Law Analysis:* Critical analysis of landmark judgments from both the Supreme Court of India and High Courts of different states that address the relationship between ADR mechanisms and human rights. Cases such as *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.* will be closely examined to know the judicial bent and approach to this intersection.

4. *Policy Analysis:* Analysis of reports and guidelines issued by international and national organizations such as the National Legal Services Authority (NALSA) to comprehend how ADR processes are being monitored and regulated with respect to human rights protection.

5. *Recommendations:* Based on the discoveries and findings the study will propose specific legal and policy reforms intended at enhancing the human rights compliance of ADR mechanisms in India.

This methodology will enable a detailed examination of the intersection between ADR and human rights in India, offering understandings that are both theoretically sound and practically applicable.

The Concept of ADR in India

Definition and Types of ADR

Alternative Dispute Resolution (ADR) denotes or refers to a set of mechanisms designed to resolve disputes outside the traditional and conservative courtroom setting. In India, ADR is broadly classified

into five primary methods: arbitration, mediation, conciliation, negotiation, and Lok Adalat.[10]Each of these methods offers a flexible, elastics, cost-effective, and time-efficient alternative to litigation, allowing and letting parties to settle their disputes and differences amicably and with greater privacy. ADR processes do not involve the technicalities of the civil and criminal laws of the country.

- Arbitration is a process or method where disputing parties agree to submit their conflict to an arbitrator or a panel of arbitrators, whose decision (referred to as an award) is binding.[11] The procedure is governed by the Arbitration and Conciliation Act, 1996, which sets down a comprehensive rule for the conduct of arbitration in India.[12]

- Mediation involves a neutral third party (the mediator) who enables negotiations between the disputants to help them arrive at a mutually acceptable settlement.[13] Unlike arbitration, mediation is non-binding unless the parties reach an agreement that they choose to enforce as a contract.[14]

- Conciliation is analogous to mediation but with the conciliator playing a more dynamic and active role in proposing solutions.[15] Conciliation is also covered under the Arbitration and Conciliation Act, 1996, and it offers and provides a framework for voluntary resolution without the need for judicial intervention.[16]

- Negotiation is a voluntary, informal process where parties directly engage with each other to resolve their disputes without the involvement of third parties.[17]

- Lok Adalats are informal forums and offices recognized under the Legal Services Authorities Act, 1987, where disputes are settled with the help of a panel of legal professionals and social workers.[18]The awards issued by Lok Adalats are final and binding in nature, with no appeal allowed, making them an effective tool for resolving trivial disputes and preserving social harmony.[19]

Historical Development of ADR in India

ADR has a profound and deep roots in India, dating back to ancient times when community elders and local councils (panchayats) mostly played a crucial role in resolving local and community disputes [20]These traditional forms of dispute resolution were non-technical, informal, community-driven, and emphasized more on reconciliation and social harmony over adversarial adjudication.[21] The contemporary ADR movement in India gained impetus post-Independence, particularly with the cumulative and increasing burden on the judiciary.[22]

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[10] D.C. Singh, *Alternative Dispute Resolution: What It Is and How It Works* (1st edn, Eastern Book Company 2018) 5.
[11] Arbitration and Conciliation Act 1996, s 7.
[12] Sumeet Kachwaha, 'Arbitration Law in India' (2008) 4 J Int'l Arb 10, 15
[13]J.G. Merrills, *Mediation in International Disputes: Practical Perspectives* (1st edn, Routledge 2017) 2.
[14] ibid.
[15]P.C. Rao and William Sheffield, *Alternative Dispute Resolution: What It Is and How It Works* (1st edn, Universal Law Publishing 2015) 75
[16] Arbitration and Conciliation Act 1996, Part III.
[17] M. Shah Alam, *ADR: How to Resolve Disputes Outside of Court* (2nd edn, Eastern Law House 2017) 22.
[18] Legal Services Authorities Act 1987, s 19
[19] Suresh Kumar Sharma, 'Lok Adalats in India: An Overview' (2012) 6 J Indian L & Soc 31, 35.
[20] M.P. Jain, *Outlines of Indian Legal History* (7th edn, LexisNexis 2016) 102.
[21] ibid.
[22] ibid.

The introduction of the Arbitration Act, 1940, marked the commencement of a formalized approach to arbitration in India, although the Act was criticized for being outdated and inefficient.[23] In response to all these criticisms, the Arbitration and Conciliation Act, 1996, was enacted by the government of independent India, drawing on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.[24] This Act introduced significant reforms, streamlining arbitration procedures and integrating mediation and conciliation under a unified legal framework.[25] The formation of Lok Adalats under the Legal Services Authorities Act, 1987, further institutionalized ADR in India.[26]Lok Adalats were considered as a means to provide accessible and affordable justice, particularly for the disadvantaged sections of society.[27] Over time, these establishments have played a critical role in resolving family disputes, motor accident claims, and other minor civil and criminal matters.[28]

ADR's Role in Reducing Judicial Backlog

One of the most noteworthy contributions of ADR in India has been its role in relieving the burden on the judiciary. The Indian courts are extremely overburdened, with millions of cases pending at various levels of the judicial system.[29] As of 2022, over 40 million cases were pending in different Indian courts, with some cases dragging on for decades altogether.[30]ADR mechanisms, particularly arbitration and Lok Adalats, have arisen as effective tools to address this crisis.[31] Arbitration, with its restructured and streamlined procedures, allows for quicker resolution of commercial disputes, thus reducing the load on civil courts.[32] Lok Adalats, by resolving a large number of trivial cases in a single day, have made a considerable impact in clearing the backlog of cases.[33] For instance, in the National Lok Adalat held in September 2021, over 10 million cases were settled across India in a single day.[34] Moreover, the emphasis on ADR has also led to a cultural swing in how disputes are perceived and resolved in India. There is a rising recognition of the benefits of ADR, including the conservation of relationships, confidentiality, and the lessening of litigation costs.[35] This cultural shift, combined with legislative and judicial support, has placed ADR as a cornerstone of the Indian legal system.

Thus, we see that the concept of ADR in India is deeply rooted in the country's historical and cultural context, yet it has evolved significantly to meet the demands of a modern, complex legal system. With the introduction of various forms of ADR and supportive legal frameworks, ADR has become a vital and indispensable tool for reducing the judicial backlog and ensuring access to justice. As India

[23] P.C. Markanda, *Law Relating to Arbitration and Conciliation* (9th edn, LexisNexis 2021) 13.
[24] Arbitration and Conciliation Act 1996, preamble
[25] Ibid
[26] Legal Services Authorities Act 1987, s 19.
[27] ibid (n 22) 33
[28] ibid.
[29] Law Commission of India, *245th Report on Arrears and Backlog: Creating Additional Judicial manpower* (2014) 17
[30] Department of Justice, Government of India, 'Judicial Statistics of India 2022' (DOJ 2022) 3.
[31] V.R. Krishna Iyer, 'The Relevance of Lok Adalats in the Indian Legal System' (2005) 2 SCC (L&S)14, 18
[32] ibid
[33] Ibid (n 30) 19
[34] National Legal Services Authority, 'Press Release on National Lok Adalat' (NALSA 2021) available at,https://nalsa.gov.in accessed 28 August 2024.
[35] S.B. Malik, *ADR and Access to Justice in India* (2nd edn, Thomson Reuters 2020) 41.

continues to advance its ADR mechanisms, it will be essential to balance efficiency with the protection of fundamental human rights, ensuring that ADR remains a fair and effective alternative to traditional litigation.

Human rights framework in India

International Human Rights Framework and ADR system in India

International human rights standards and treaties to which India is a party have a substantial role in influencing the development and application of Alternative Dispute Resolution (ADR) processes in the country. The incorporation of such norms warrants that ADR mechanisms not only align with domestic legal frameworks but also observe and adhere to global standards that promote justice, fairness, and equality.

International human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), to which India is a signatory, require states to ensure access to justice and equality before the law.[36]These principles directly impact the ADR processes by encouraging the practices of dispute resolution systems that are accessible, transparent, and sustain the rights of all parties involved. The ICCPR, for example, emphasizes fair trial rights and the availability of judicial remedies, which can be incorporated in ADR mechanisms to ensure that individuals opting for ADR are not denied basic procedural fairness.[37]

Moreover, treaties such as the Convention on the Rights of the Child (CRC)[38]have added to the development of child-friendly ADR mechanisms, chiefly in juvenile justice and family law disputes. India's obligations under the CRC require that ADR processes involving children prioritize their best interests and provide specialized procedures that protect their rights during dispute resolution.

Although international human rights standards offer a basis for strengthening ADR processes, there are challenges in their implementation. India's diverse socio-legal landscape mostly and often makes it difficult to uniformly apply international standards across all ADR platforms.[39] However, international treaties provide the opportunity to enhance ADR processes through training and capacity-building initiatives that acquaint practitioners with human rights standards.

Indian Constitutional Provisions on Human Rights

The Indian Constitution provides a vigorous framework for the protection and promotion of human rights, enshrining several fundamental rights that form the fundamental and core of the human rights landscape in India. The key provisions include:

1. Right to Equality (Articles 14-18): Article 14 guarantees equality before the law and equal protection of the laws, prohibiting discrimination on the grounds of religion, race, caste, sex, or place of birth.[40]Article 15 further prohibits discrimination in public places and educational

[36] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
[37] ICCPR, art. 14.
[38] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
[39] S.K. Kapoor, *International Law and Human Rights* 242 (22nd ed. 2016).
[40] Constitution of India 1950, arts 14-18

institutions, while Article 16 ensures equal opportunities in public employment.[41] Article 17 abolishes untouchability, a significant step towards addressing social injustices and human rights violations.[42]

2. Right to Life and Personal Liberty (Article 21): Article 21 of the constitution of india lays down that no person shall be deprived of their life or personal liberty except according to the procedure established by law.[43]This provision has been expansively interpreted by the Supreme Court and by far is the most widely interpreted Article to include various rights such as the right to a dignified life, the right to privacy, and the right to protection against arbitrary arrest and detention.[44]

3. Right Against Exploitation (Articles 23-24): Article 23 prohibits human trafficking, forced labour, and child labour, while Article 24 explicitly bans the employment of children below the age of fourteen in factories, mines, and other hazardous occupations.[45] These provisions are critically important in combating exploitation and protecting vulnerable groups from human rights abuses.

4. Right to Freedom of Speech and Expression (Article 19): Article 1 of the constitution of India guarantees freedom of speech and expression, subject to a number of reasonable restrictions in the interest of the sovereignty, integrity, and security of India, as well as public order,

5. decency, or morality.[46] This right is indispensable for the exercise of other human rights and the functioning of a democratic society.

6. Directive Principles of State Policy (Part IV): While though not enforceable and justiciable, the Directive Principles of State Policy outlined in Part IV of the Constitution provide guidance lines for the creation and enactment of laws and policies aimed at promoting social and economic welfare, which indirectly support human rights protection.[47]

Legislative and Policy Measures

In consonance to the constitutional provisions, India has enacted several laws and policies to further human rights protection. However out of all the laws two of the laws discussed hereunder are significant for ensuring observance of human rights norms in ADR practices.

1. *The Protection of Human Rights Act, 1993*: This Act established the National Human Rights Commission (NHRC) at the Centre and makes provision for creating State Human Rights Commissions (SHRCs) at the respective state level, which are tasked with investigating human rights violations and recommending measures for their redress.[48]The NHRC also plays a pivotal role in promoting human rights education and awareness.

[41] ibid, art 15
[42] ibid, art 17
[43] ibid, art 21.
[44] Maneka Gandhi v Union of India (1978) 1 SCC 248
[45] Constitution of India 1950, arts 23-24
[46] ibid, art 19
[47] ibid, Part IV.
[48] Protection of Human Rights Act 1993

2. *The Right to Information Act, 2005:* This Act empowers and allows citizens to seek information from public authorities, thereby enhancing transparency and accountability in governance.[49] The right to information is a critical constituent of the right to freedom of speech and expression and supports the realization of various human rights by enabling informed public participation and creating awareness.

Impact of human rights laws of India in ADR implementation.

Despite a strong legal and institutional framework on human rights, several challenges remain in the effective implementation of human rights protections in India. Issues such as inadequate access to justice, systemic discrimination, and insufficient enforcement of laws pose significant barriers to the realization of human rights. Additionally, there are concerns about the protection of economic, social, and cultural rights, particularly for marginalized and disadvantaged groups.[50]Addressing these challenges require continuous reforms, enhanced awareness, and a more robust enforcement mechanism. Hence, we understand that violation of human rights can be effectively dealt with the implementation of the ADR Processes adequately, which will to a large extent will ensure quick and easy accesses to justice for the deprived and marginalized section of the society. However, the concern remains that human rights of people shouldn't be violated in the ADR processes itself. The human right laws and provisions can be implemented in the ADR processes adequately by judicial oversight. This has been extensively dealt in the later part of the research paper.

The Intersection of ADR and Human Rights in India

ADR and the Right to Access Justice

The right to access justice is a fundamental human right enshrined in the Constitution of India under Articles 14 and 21.[51]as already discussed. Article 14 guarantees the right to equality before the law, while Article 21 ensures the right to life and personal liberty, which has been interpreted by the Supreme Court to include the right to access justice.[52]Alternative Dispute Resolution (ADR) mechanisms, by providing faster, less formal, and more accessible paths for dispute resolution, are inherently connected to the realization of these right.[53] However, the efficacy of ADR in promoting access to justice is dependent and conditional upon its ability to maintain fairness and impartiality which are the key elements of the right to a fair trial as recognized under Article 21 and Article 14 of the Constitution.[54]ADR processes must be planned and implemented in methods that do not compromise these constitutional guarantees.[55]The Supreme Court of India, in the landmark case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, highlighted the role of ADR in dropping down the burden on courts and enhancing access to justice, but also emphasized the need for voluntary and informed consent in ADR processes to ensure
they do not violate the rights of the parties involved.[56]

Voluntariness and Fairness in ADR

[49] Right to Information Act 2005.
[50] A. Gupta, *Challenges in Human Rights Implementation in India* (1st edn, Oxford University Press 2021) 120.
[51] Constitution of India 1950, arts 14, 21.
[52] Maneka Gandhi v Union of India (1978) 1 SCC 248
[53] Preeti Shankar, 'ADR and Access to Justice' (2017) 3 J Ind L Inst 145, 149
[54] ibid 150
[55] Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24.
[56] ibid.

Voluntariness and fairness are fundamental to the legitimacy of ADR machineries in the context of human rights. For ADR to align with human rights principles, it must be honestly voluntary, meaning that parties should not be forced into participating in ADR processes.[57] The Supreme Court, in *Salem Advocate Bar Association v. Union of India*, held that ADR methods like arbitration and mediation should be promoted only where the parties voluntarily agree to these processes.[58] Involuntary or coerced participation in ADR, particularly in arbitration, has been criticized for undermining the right to a fair hearing, especially when there is an imbalance of power between the parties.[59]

Fairness in ADR is also critical, particularly in arbitration, where the neutrality of the arbitrator and the fairness of the procedure can significantly affect the outcome.[60] The Arbitration and Conciliation Act, 1996, directs and mandates that arbitrators must be independent and impartial, and provides grounds for challenging an arbitrator who fails to meet these criteria and standards.[61] Nonetheless, apprehensions continue about the fairness of arbitration in cases where there is a disparity in the bargaining power of the parties, such as in consumer disputes or employment matters.[62] In mediation and conciliation, fairness is related to the role of the mediator or conciliator in ensuring that the process does not unduly and disproportionately favour one party over another.[63] The mediator's role is to enable and facilitate negotiations, but they must also be vigilant against any form of exploitation or unfair pressure that could lead to an unjust settlement.[64]The legal framework in India provides guidelines to ensure fairness in ADR processes, but the efficiency and usefulness of these safeguards largely depends on their implementation and the training of ADR practitioners.[65]

Judicial Scrutiny and Protection of human Rights in ADR

The judiciary plays a vital role in overseeing ADR procedures to ensure they do not infringe upon the fundamental rights of people. The Indian judiciary has been proactively scrutinizing ADR outcomes, particularly arbitration awards, to ensure that they comply with the principles of natural justice and fairness and do not violate public policy.[66] Section 34 of the Arbitration and Conciliation Act, 1996, allows the courts to set aside arbitration awards on grounds of public policy, which includes violations of fundamental rights under the constitution of India.[67]

In the case of *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, the Supreme Court expanded the scope of public policy to include arbitral awards that are contrary to the fundamental policy of Indian law, hence providing a broader scope for judicial intervention to protect human and fundamental rights.[68] Moreover, the courts have been vigilant in ensuring that ADR mechanisms do not become

[57] Preeti Shankar (n 53) 152.
[58] Salem Advocate Bar Association v Union of India (2005) 6 SCC 344
[59] Justice B.N. Srikrishna, 'Voluntariness in ADR' (2015) 2 SCC (L &S) l41
[60] Madhavan Menon, 'Fairness in Arbitration: The Role of the Arbitrator' (2014) 8 Ind J Arb L 45, 48.
[61] Arbitration and Conciliation Act 1996, s 12
[62] J. Ramasubramanian, 'Power Imbalances in Arbitration: An Indian Perspective' (2018) 10 Arb Int'l J 23, 29.
[63] P.C. Rao and William Sheffield, *Alternative Dispute Resolution: What It Is and How It Works* (1st edn, Universal Law Publishing 2015) 75.
[64] ibid.
[65] National Legal Services Authority, *Training Manual on ADR for Legal Professionals* (NALSA 2018) https://nalsa.gov.in accessed 29 August 2024.
[66] Renusagar Power Co. Ltd. v General Electric Co. (1994) (1) SCC 644.
[67] Arbitration and Conciliation Act 1996, s 34.
[68] Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd. (2003) 5 SCC 705.

tools for powerful parties to exploit weaker counterparts.[69]The judiciary has emphasized that ADR should be a means of enhancing access to justice, not a way to circumvent legal protections.[70]In *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, the Supreme Court stressed that courts must ensure that arbitration agreements are not enforced in a manner that deprives individuals of their right to a fair trial.

Challenges and Criticisms of ADR practices in India in Relation to Human Rights

In spite of the potential of ADR to enhance access to justice, several challenges and criticisms have been raised regarding its impact on human rights as already discussed. One of the primary concerns is the potential and probability for power imbalances in ADR processes, which can lead to unfair outcomes.[71] For example, in arbitration cases the disparity in resources between corporate entities and individual claimants can result in biased outcomes, undermining the right to equality before the law.[23] Likewise, the lack of formal legal representation , in mediation and conciliation ,for weaker parties can lead to settlements that are not truly voluntary or equitable.[72] Another substantial challenge is the confidentiality of ADR proceedings, which, while beneficial in protecting privacy, can also lead to potential human rights violations.[73], ADR processes are typically private, unlike court proceedings, which are public and subject to scrutiny, making it difficult to ensure that rights are adequately protected.[74]This lack of transparency can be particularly problematic in cases involving human rights abuses, where public accountability is crucial.[75] The intersection of ADR and human rights in India presents both opportunities and challenges. While ADR has the potential to enhance access to justice and reduce the burden on the judiciary, it is crucial that these processes do not undermine fundamental rights. Through careful regulation, judicial oversight, and adherence to human rights principles, ADR can be a powerful tool for promoting justice in Indi

Case Studies Highlighting the Intersection of ADR and Human Rights in India

1. *M.C. Mehta v. Union of India (1987 AIR 1086):* In this pivotal case, the Supreme Court of India dealt with environmental issues by employing Public Interest Litigation (PIL) as amechanism, which functions similarly to Alternative Dispute Resolution (ADR) in serving the public good.

2. The Court exercised its authority under Article 32 of the Constitution to mandate governmental action to mitigate environmental damage caused by industrial pollution.[76]Although this case does not involve ADR in the traditional sense, it demonstrates the judiciary's role in resolving public interest disputes, highlighting the broader spectrum of mechanisms akin to ADR that address human rights concerns.

3. *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc. (2012 1 SCC 72)*: This case is crucial in understanding the intersection of arbitration and human rights protection. The Supreme Court ruled that Indian courts may intervene in arbitration awards under specific

[69] Preeti Shankar (n 5)53
[70] ibid
[71] National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267.
[72] Justice B.N. Srikrishna (n 59) 4.
[73] J. Ramasubramanian (n 62) 31.
[74] Justice B.N. Srikrishna (n 59) 5.
[75] P.C. Rao and William Sheffield (n 63) 78.
[76] M.C. Mehta v Union of India (1987) 1 SCC 395

circumstances to ensure alignment with public policy.[77]The judgment affirmed that while arbitration is favoured for its efficiency, it must also adhere to constitutional guarantees, principles of natural justice and fundamental rights protection. This case underscores the need for judicial oversight in ADR processes to maintain a balance between efficiency and the safeguarding of human rights.

4. *D.K. Basu v. State of West Bengal (1997 1SCC 416):* In this case, the Supreme Court stressed the importance of upholding human rights during police custody and arrests.[78]The Court issued guidelines to prevent custodial torture and to protect rights during arrest and detention. This case illustrates how judicial interpretation can enhance ADR mechanisms by establishing standards that protect individual rights and ensure law enforcement practices align with human rights norms.
5. *Hussainara Khatoon v. Home Secretary, State of Bihar (1979)*: The Supreme Court, in this case, addressed the rights of under trial prisoners, focusing on delays within the criminal justice system.[79] The Court utilized its powers to expedite the release of under trial prisoners who had been detained for extended periods without trial. This case exemplifies how judicial intervention can rectify systemic issues within the judiciary, functioning as an indirect form of ADR to address human rights violations.
6. *M/s. M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd. (2009)*: In this case, the Supreme Court highlighted the importance of fairness and neutrality in mediation. The Court held that mediation outcomes must not be unjust or inequitable.[80]This decision reinforces the requirement for ADR mechanisms to comply with human rights standards, ensuring that settlements and resolutions are reached through fair and impartial processes.
7. *Indian Oil Corporation Ltd. v. Amritsar Gas Service (1991)*: The Supreme Court addressed the enforceability of arbitration awards and emphasized the necessity of judicial scrutiny to prevent ADR outcomes from undermining human rights.[81] The Court's interpretation underscores the critical role of judicial oversight in maintaining the integrity of ADR mechanisms, ensuring they are consistent with constitutional and human rights principles.
8. *Vishaka v. State of Rajasthan (1997)*: In this case, the Supreme Court issued guidelines to combat sexual harassment in the workplace, illustrating how judicial interpretation can fill gaps within existing ADR mechanisms.[82]guidelines aimed to foster a safer and more equitable environment for workers, showcasing the judiciary's role in ensuring that ADR mechanisms effectively protect human rights.

Case studies and judicial interpretations illustrate the dynamic relationship between ADR mechanisms and human rights protections in India. The judiciary's role in shaping and overseeing ADR practices is crucial for ensuring that these mechanisms serve their intended purpose of providing fair, efficient, and equitable dispute resolution while upholding fundamental human rights.

[77] Bharat Aluminium Co. v Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552
[78] D.K. Basu v State of West Bengal (1997) 1 SCC 416
[79] Hussainara Khatoon v Home Secretary, State of Bihar (1979) 1 SCC 98
[80] M/s. M.R. Engineers & Contractors Pvt. Ltd. v Som Datt Builders Ltd. (2009) 7 SCC 696.
[81] Indian Oil Corporation Ltd. v Amritsar Gas Service (1991) 1 SCC 533
[82] Vishaka v State of Rajasthan (1997) 6 SCC 241

Legal and Institutional Framework Supporting ADR and Human Rights in India

1. *Arbitration and Conciliation Act, 1996*

The Arbitration and Conciliation Act, 1996 (ACA) provides the primary legal framework for arbitration and conciliation in India.[83]The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration, aiming to streamline and enhance the efficiency of dispute resolution.[84]The Act governs both domestic and international arbitration and includes provisions for the appointment of arbitrators, the conduct of proceedings, and the enforcement of arbitral awards.[85]

The ACA ensures that arbitration processes adhere to principles of fairness and justice, which are crucial for protecting human rights. For instance, it mandates that arbitration agreements must be entered into voluntarily and with an understanding of the parties' rights.[86]Additionally, the Act provides grounds for challenging arbitration awards that violate public policy that is the laws of this country or principles of natural justice, thus safeguarding against potential abuses.[87]

2. *Civil Procedure Code, 1908*

The Civil Procedure Code (CPC) complements the ACA by providing procedures for the enforcement of ADR awards, including arbitration awards.[88]Section 89 of the CPC encourages the use of ADR mechanisms such as mediation, arbitration, and conciliation to resolve disputes more effectively.[89] This provision reflects a commitment to incorporating ADR into the judicial process, enhancing access to justice while upholding fundamental rights.

3. *Legal Services Authorities Act, 1987*

The Legal Services Authorities Act, 1987, established the National Legal Services Authority (NALSA) and State Legal Services Authorities (SLSAs) to provide free legal services and facilitate ADR mechanisms, particularly Lok Adalats.[90] Lok Adalats are informal, non-adversarial forums designed to resolve disputes quickly and amicably.[91] These forums are instrumental in providing access to justice for economically disadvantaged individuals, thus supporting human rights by ensuring that all citizens have the opportunity to seek redress.

Role of Lok Adalats in Promoting Human Rights

Success Stories from Lok Adalats

Lok Adalats have made significant contributions to promoting human rights in India, particularly in the resolution of family disputes and minor civil cases. Established under Section 19 of the Legal Services Authorities Act, 1987, Lok Adalats provide an informal and accessible forum for dispute resolution.[92] Their success is notable in several areas, including family disputes, such as divorce and child custody

[83] Arbitration and Conciliation Act 1996
[84] UNCITRAL Model Law on International Commercial Arbitration
[85] Arbitration and Conciliation Act 1996, ss 2-34
[86] ibid, s 7
[87] ibid, s 34
[88] Civil Procedure Code 1908.
[89] Civil Procedure Code 1908, s 89
[90] Legal Services Authorities Act 1987
[91] ibid, s 19
[92]Legal Services Authorities Act 1987, s 19.

cases, where they have facilitated amicable settlements that prioritize the welfare of children and the interests of all parties involved.[93] For instance, Lok Adalats have been effective in negotiating custody arrangements that ensure the child's best interests are met, often avoiding the adversarial nature of formal litigation.[94] This approach supports the child's right to family life and helps maintain parental relationships, which are crucial for the child's emotional and psychological well-being.[95] In minor civil disputes, such as property disputes and debt recovery, Lok Adalats have provided a swift and cost-effective alternative to traditional court proceedings.[96]By resolving these disputes amicably, Lok Adalats reduce the burden on formal judicial systems and enhance access to justice.[97]Their ability to handle cases efficiently and fairly demonstrates their role in promoting human rights by ensuring that individuals can resolve their disputes without prolonged litigation. In summary, Lok Adalats have played a crucial role in promoting human rights by providing an accessible, efficient, and equitable forum for dispute resolution. Their success in family and minor civil cases highlights their contribution to enhancing access to justice and protecting fundamental rights.

4. Mediation and Conciliation Rules, 2004

The Mediation and Conciliation Rules, 2004, provide detailed guidelines for the mediation process in India. These rules are designed to ensure that mediation is conducted in a fair and transparent manner, with an emphasis on the voluntariness of the process.[98] The rules outline procedures for the appointment of mediators, conduct of sessions, and documentation of settlements, thereby supporting the effectiveness and integrity of mediation as an ADR mechanism.

5. The Mediation Act 2023.

The Mediation Act of 2023 was enacted to promote mediation as an alternative dispute resolution (ADR) method in India. It aims to provide a legal framework for the recognition and enforcement of mediated settlements. The Act establishes the Mediation Council of India to regulate the profession and enhance the quality of mediation. It encourages parties to resolve disputes amicably, ensuring faster and more efficient justice. This law supports both voluntary and court-referred mediations, making it a key step towards a more accessible legal system.[99]

Institutional Framework Supporting ADR and Human Rights

1. National Human Rights Commission (NHRC)

Established under the Protection of Human Rights Act, 1993, the NHRC is tasked with the promotion and protection of human rights in India.[100] The NHRC has a role in overseeing the implementation of human rights standards in ADR processes. It monitors and investigates human rights violations and provides recommendations to improve the effectiveness and fairness of ADR mechanisms.[101]

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[93] Madabhushi Sridhar, 'Family Law and Lok Adalats' (2010) 5 IJPL 203, 210.
[94] Smita Narula, *Human Rights and Lok Adalats in India* (2nd edn, OUP 2020) 58.
[95] AK Singhal, 'Alternative Dispute Resolution and Lok Adalats' (2013) 7 Indian Journal of Legal Studies 129, 133
[96] Leena Misra, 'Enhancing Access to Justice through Lok Adalats: An Analysis' (2018) 10 NUJS L Rev 345, 348.
[97] Surendra Kumar, 'Efficiency in Dispute Resolution: The Impact of Lok Adalats' (2016) 23 NALSAR L Rev 99
[98] ibid
[99] Mediation Act 2023, No. 29 of 2023, s 1 (India).
[100] Protection of Human Rights Act 1993, s 3
[101] National Human Rights Commission, *Annual Report 2022* https://nhrc.nic.in accessed 29 August 2024.

2. State Human Rights Commissions (SHRCs)

The SHRCs operate at the state level to address human rights issues and ensure compliance with national and international human rights standards.[102]They work closely with local authorities and ADR mechanisms to address grievances related to human rights violations. By providing a regional focus, SHRCs enhance the accessibility and responsiveness of human rights protection at the state level.[103]

3. National Legal Services Authority (NALSA)

NALSA oversees the implementation of legal aid services and the promotion of ADR mechanisms across India.[104]It supports the establishment of Lok Adalats and provides training for legal professionals involved in ADR as already discussed. NALSA's initiatives aim to make ADR accessible to all, including marginalized and economically disadvantaged groups, thereby supporting human rights by facilitating equitable access to justice.[105]

4. Judicial Training and Research Institutes

Judicial training institutes, such as the National Judicial Academy (NJA) and State Judicial Academies, provide training for judges and legal professionals on ADR mechanisms and human rights.[106]These institutes play a crucial role in ensuring that judicial officers are well-versed in ADR processes and human rights standards, thereby improving the effectiveness and fairness of ADR mechanisms.[107]

Human Rights Violations in ADR Processes

Forced Arbitration Clauses in Contracts

Forced arbitration clauses in contracts have become a contentious issue in the realm of human rights within ADR processes. These clauses are often found in employment contracts, consumer agreements, and service contracts, and mandate arbitration as the sole mechanism for dispute resolution, thereby potentially infringing on fundamental rights, such as the right to a fair trial.[108]

In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court upheld the enforceability of arbitration clauses that prohibit class-action lawsuits.[109] Here class action means a group of people who are aggrieved against a company or corporation was denied the power to file a suit against it.This decision has implications beyond the United States, influencing global ADR practices, including those in India. In the Indian context, forced arbitration clauses can significantly impact weaker parties who may be compelled to accept arbitration as a condition of their contracts, thus potentially waiving their right to access judicial redress.[110]Indian legal provisions, such as Section 7 of the Arbitration and Conciliation Act, 1996, which validates arbitration agreements, have been criticized for not sufficiently protecting

[102] Protection of Human Rights Act 1993, s 21.
[103] State Human Rights Commissions, *Annual Report 2022* https://shrc.gov.in accessed 29 August 2024.
[104] National Legal Services Authority, *Annual Report 2022* https://nalsa.gov.in accessed 29 August 2024.
[105] ibid.
[106] National Judicial Academy, *Training Programmes* https://nja.gov.in accessed 29 August 2024
[107] ibid.
[108] Nicole Buonocore Porter, 'Arbitration, Transparency, and the Right to a Fair Trial' (2014) 29 Ohio St J Disp Resol 171, 176.
[109] *AT&T Mobility LLC v Concepcion* 563 US 333 (2011).
[110] ibid 336.

parties from forced arbitration.[111] Critics argue that these provisions often favor the party with greater bargaining power, such as corporations, thereby undermining the fairness of the arbitration process.[112] Forced arbitration can result in a lack of transparency and accountability, as arbitration proceedings are typically confidential.[113]This confidentiality can prevent public scrutiny and diminish the ability to hold parties accountable for human rights violations. For example, if arbitration is conducted in a manner that disproportionately benefits one party, there is often no formal recourse or public record to address these issues.[114]

Critique of the Arbitration and Conciliation Act, 1996

While the Arbitration and Conciliation Act, 1996, provides a legal framework for arbitration in India, it has faced criticism for enabling forced arbitration clauses. Section 7 of the Act, which upholds the validity of arbitration agreements, does not adequately address the problem of power imbalances between parties which might affect the weaker party adversely.[115]This section's broad interpretation can result in the enforcement of arbitration agreements even when they are imposed on parties with limited bargaining power.[116] Moreover, Section 34 of the Act, which provides grounds for challenging arbitration awards, has been critiqued for its limited scope. [10] Although it allows for the challenge of awards on the grounds of public policy and procedural irregularities, it does not sufficiently address issues of fairness and transparency inherent in forced arbitration scenarios.[117]

International and national reports on protection of human rights and ADR practices

A brief on international reports on ADR practices

The *World Justice Project's Rule of Law Index 2023* shows that in 2023 90% of surveyed countries, ADR mechanisms like mediation and arbitration are being used to resolve commercial disputes. However, only 40% of countries report high efficacy in implementing these mechanisms for human rights-related disputes.[118] The *International Chamber of Commerce (ICC)* data shows that in 2022, there were 946 new arbitration cases, and a 14% increase from the previous year, indicating a growing reliance on ADR for cross-border disputes.[119]

A brief of reports on ADR Practices in India

The *National Legal Services Authority (NALSA)* statistics show that in 2022, over **10.8 lakh cases** were settled through Lok Adalats, indicating a significant reliance on ADR mechanisms to reduce the backlog of cases in courts[120]

Data from the *Arbitration Council of India* highlights that there were **620 new arbitration cases** filed

[111] Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale L J 2804, 2811.
[112] Rahul Singh, 'Arbitration and Human Rights in India: A Critique' (2018) 10 NUJS L Rev 55, 60
[113] Arbitration and Conciliation Act 1996, s 7.
[114] Sudipto Sarkar, 'Unequal Bargaining Power and the Need for Legislative Reforms in Arbitration' (2020) 12 Indian J Arb L 45, 50.
[115] Gabrielle Kaufmann-Kohler, 'Arbitration Confidentiality and Transparency' (2017) 23 Arb Int'l 179, 185.
[116] ibid.
[117] Imran Khurshid, 'Human Rights in Arbitration: The Role of Public Scrutiny' (2019) 14 J Int'l Disp Resol 101, 106.
[118] World Justice Project, *Rule of Law Index 2023*, WJP (2023) 45 Available at, https://worldjusticeproject.org
[119] International Chamber of Commerce, *Dispute Resolution Statistics 2022*, ICC (2023) 12 available at https://iccwbo.org.
[120] National Legal Services Authority, *Annual Report 2022*, NALSA (2023) 33 Available at: https://nalsa.gov.in

in 2022, reflecting a stable increase in the use of ADR practices for resolving commercial disputes in India.[121]

Critical Analysis and Recommendations on ADR practices in India in the light of human rights norms

Criticism and analysis

1. Effectiveness of ADR Mechanisms

The legal framework supporting ADR mechanisms in India, including the Arbitration and Conciliation Act, 1996, and the Civil Procedure Code, 1908, provides a solid foundation for resolving disputes. However, there are significant challenges regarding the effectiveness and efficiency of these mechanisms as we have already come to understand in this study so far.For instance, while arbitration is designed to be a quicker and more cost-effective alternative to litigation, delays and high costs associated with arbitration proceedings often negate these benefits.[122]This issue is compounded by the high rate of judicial intervention in arbitration awards, which can undermine the efficiency of ADR processes.[123]However in the landmark judgement of Afcon Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd The Supreme Court held that the arbitration fees and costs stipulated in the award must be reasonable and reflect the services provided. The Court emphasized the need for clarity and transparency in the determination of arbitration fees to avoid disputes over the enforceability of the award. Hence the highest court in our country has tried to bring about a solution to the problem of high fee charges by arbitrators.[124] Furthermore, the implementation of mediation and conciliation rules, while well-intentioned, often faces practical challenges such as a lack of trained mediators and insufficient infrastructure.[125]The effectiveness of these ADR mechanisms in practice is often limited by these constraints, which can hinder their ability to resolve disputes effectively and uphold human rights protections.

2. Access to Justice

While the Legal Services Authorities Act, 1987, and the establishment of Lok Adalats aim to enhance access to justice, there are concerns about the reach and effectiveness of these initiatives.[126]Many marginalized and economically disadvantaged individuals still face barriers to accessing ADR mechanisms, including lack of awareness and logistical difficulties.[5] Although Lok Adalats are intended to provide speedy and accessible justice, they often operate with limited resources and may not always address the complexities of human rights issues comprehensively.[127]

3. Human Rights Protections

There is a need for more robust guidelines and enforcement mechanisms to ensure that ADR processes consistently uphold human rights standards. For example, while the NHRC and SHRCs play a critical

[121] Arbitration Council of India, *Report on Arbitration Cases in India 2022*, ACI (2023) 20 Available at, https://www.icaindia.co.in
[122] M.C. Mehta v Union of India (1987) 1 SCC 395.
[123] Bharat Aluminium Co. v Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552.
[124] Afcon Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd (2014) 15 SCC 580.
[125] Mediation and Conciliation Rules 2004, r 9.

[126] Legal Services Authorities Act 1987, s 19
[127] S. Prakash, *Access to Justice and ADR* (2nd edn, Thomson Reuters 2021) 120.

role in monitoring human rights, their effectiveness is sometimes hampered by limited resources and jurisdictional constraints.[128] Additionally, the lack of specific human rights training for ADR practitioners can lead to inconsistent application of human rights principles.[129]

4. Overly Judicial Oversight

As already discussed, calculated Judicial oversight is essential for maintaining the integrity of ADR mechanisms. However, the extensive scope of judicial intervention in arbitration awards can sometimes create uncertainty and undermine the finality of ADR processes.[130]While judicial review is necessary to prevent misuse, excessive interference can discourage parties from opting for arbitration and mediation as viable alternatives to litigation.[131] Balancing judicial oversight with the need for finality in ADR outcomes remains a critical challenge.

Recommendations

1. Enhancing ADR Efficiency

To improve the efficiency of ADR mechanisms, it is recommended that reforms focus on streamlining procedures and reducing costs. Implementing measures to expedite arbitration proceedings and minimize unnecessary delays can help realize the intended benefits of ADR. Additionally, efforts to simplify procedural requirements and reduce administrative burdens can enhance the overall efficiency of ADR mechanisms.[132]

2. Improving Access to ADR

Expanding access to ADR mechanisms, particularly for marginalized and economically disadvantaged groups, is crucial. Initiatives such as increased outreach and education about ADR options, as well as the establishment of more accessible ADR centers, can help bridge the gap. Providing legal aid and support services to assist individuals in navigating ADR processes can also improve access to justice.[133]

3. Strengthening Human Rights Protections

To ensure that ADR mechanisms consistently uphold human rights standards, it is recommended that comprehensive guidelines and training programs be developed for ADR practitioners. These guidelines should include specific provisions for protecting vulnerable individuals and addressing human rights issues. Enhanced monitoring by human rights commissions and regular assessments of ADR practices can help ensure adherence to human rights protections.[134]

4. Balancing Judicial Oversight

A balanced and equitable approach to judicial oversight is necessary to maintain the integrity of ADR mechanisms while ensuring fair and just outcomes. Reforms should focus on clarifying the grounds for judicial review of arbitration awards to prevent excessive interference. Promoting greater predictability and consistency in judicial review processes can help build confidence in ADR mechanisms and encourage their use.[135] The judiciary should take an active role in developing and expanding guidelines

[128] National Legal Services Authority, *Annual Report 2022* https://nalsa.gov.in accessed 29 August 2024.
[129] ibid.
[130] [7] National Human Rights Commission, *Annual Report 2022* https://nhrc.nic.in accessed 29 August 2024.
[131] A. Gupta, *Human Rights and ADR* (1st edn, Oxford University Press 2022) 85
[132] Ibid
[133] Indian Oil Corporation Ltd. v Amritsar Gas Service (1991) 1 SCC 533.
[134] A. Sharma, *Reforms in ADR Procedures* (1st edn, LexisNexis 2020) 95.
[135] S. Prakash (n 134)130.

for ADR processes, addressing new challenges, and ensuring that these processes conform to human rights standards. This proactive approach will allow ADR mechanisms to evolve in response to changing human rights norms and societal demography.

Finally, there should be a concerted effort to align Indian ADR practices with international human rights norms, particularly those enshrined in treaties to which India is a party.[136] This could involve adopting best practices from other jurisdictions that have successfully integrated human rights considerations into their ADR frameworks.[137]

Conclusion

The intersection of Alternative Dispute Resolution (ADR) and human rights in India offers both promising opportunities and significant challenges in the quest for justice. The existing legal and institutional frameworks, primarily established by the Arbitration and Conciliation Act, 1996, and supported by the Civil Procedure Code, 1908, and the Legal Services Authorities Act, 1987, provide a solid foundation for ADR mechanisms. These frameworks are further strengthened by institutions such as the National Human Rights Commission (NHRC) and the National Legal Services Authority (NALSA), which are instrumental in incorporating human rights protections into ADR processes. Nevertheless, the practical effectiveness of these mechanisms is often compromised by procedural inefficiencies, issues of accessibility, and the need for enhanced human rights protections within ADR processes. While extensive judicial oversight of arbitration awards is crucial in preventing misuse, it sometimes detracts from the finality and efficiency that ADR is intended to achieve. Moreover, challenges in reaching marginalized populations and ensuring that ADR practitioners are well-versed in human rights principles underscore areas where further reforms are essential.

To address these issues, the article proposes several recommendations, including the streamlining of ADR procedures, improving access to ADR for disadvantaged groups, and reinforcing human rights protections within ADR frameworks. Achieving a balance between judicial oversight and the need for finality in ADR outcomes is also critical to building confidence in these mechanisms. In conclusion, although India's legal and institutional frameworks for ADR and human rights provide a strong base, there is a pressing need for ongoing reforms to ensure that these mechanisms are efficient, accessible, and fully aligned with human rights standards. By tackling these challenges and implementing the recommended reforms, India can strengthen its ADR system's ability to deliver fair, just, and equitable outcomes, thereby advancing the broader goal of safeguarding and promoting human rights for all citizens.

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[136] ibid
[137] ibid

DECODING THE IP MATRIX: LEGAL CHALLENGES IN PROTECTING PATENTS FOR FINTECH PIONEERS IN INDIA, USA AND CHINA

Saumya Verma*

Introduction

FinTech, also known as financial technology, has reaped significant interest in current years for its ability to transform financial service area by reducing transaction expenses, enhancing ease, and strengthening security.[2] Estimated worth of the international FinTech industry in 2024 is USD 312.92 billion.[3] It is anticipated to grow at a compound annual growth rate of over 14% during the forecast period (2024-2029), approaching USD 608.35 billion by 2029.[4] The combination of finance and technology has caused a significant change in the financial industry, with technology empowering financial services and creating groundbreaking value propositions.[5]

FinTech is a realm that influences leading-edge technology and digital explanations to improve financial services. The primary purpose is to provide financial solutions that are more effectual, expedient, sheltered, and wide-ranging. With the increasing importance of FinTech as a tactical objective for the future development of many nations, there has been a noteworthy amount of dialogue on the elements that impact its growth.[6] Multiple variables, including technical progressions, shifts in consumer likings, legal and regulatory frameworks, market undercurrents, and regional entrepreneurial activities, all effect innovation in the financial technology segment.[7] Although institutional frameworks are crucial for directing and regulating FinTech innovation, there is a dearth of theoretical and empirical evaluations that particularly examine the function of Intellectual Property Rights Protection (IPRP) in this setting.

FinTech is every so often stated as a blend of advancements in technological sector and state-of-the-art adaptations of traditional financial foundations.[8] It incorporates the usage of evolving technologies such as artificial intelligence, blockchain, big data analytics, and cloud computing. Financial institutions and technology tycoons are using their technical skill to disrupt the financial sector, while technology businesses are looking for to enhance their innovation skills and reinforce their intellectual property portfolios. Both sides are strongly driven to augment their capacity for innovation and bolster their intellectual property portfolios. Intellectual Property Rights are critical in the competitive landscape of

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[2]Ahmad Saleh, 'FinTech, Innovation and Intellectual Property Rights: A Wake-up Call for Financial Institutions and Tech Companies' (*Al Tamimi & Co.*) <https://www.tamimi.com/law-update-articles/fintech-innovation-and-intellectual-property-rights-a-wake-up-call-for-financial-institutions-and-tech-companies/> accessed 21 August 2024.

[3]'Fintech Market Size' (*Mordor Intelligence*) <https://www.mordorintelligence.com/industry-reports/global-fintech-market/market-size> accessed 21 August 2024.

[4]ibid.

[5]Marta Barroso and Juan Laborda, 'Digital Transformation and the Emergence of the Fintech Sector: Systematic Literature Review' (2022) 2(2) *Digital Business* 100028.

[6]IMF, 'The Rapid Growth of Fintech', *Global Financial Stability Report: Shockwaves from the War in Ukraine Test the Financial System's Resilience* (International Monetary Fund Monetary and Capital Markets Department 2022).

[7]Maleh Yassine, Justin Zhang, and Abderrahim Hansali, *Advances in Emerging Financial Technology and Digital Money* (Routledge 2024).

[8]Oskar Kowalewski and Paweł Pisany, 'Banks' Patenting as an Answer to Emerging Fintech and Bigtech Competition: A Cross-Country Empirical Study', *Fintech, Pandemic, and the Financial System: Challenges and Opportunities* (Emerald Publishing Limited 2023).

the financial business since they offer a viable edge to its proprietors.[9] IPRs in fintech may be secured by using trade secrets, copyright, or a combination of both, contingent upon the distinct attributes of the technology and innovation. Enforcing trade secrets imposes safeguarding the secrecy of sensitive information, while copyright defenses against unauthorized duplication or replication of code. The legal regulations of copyright ownership differ based on the specific work situation and the relevant copyright legislation of each nation. Implementing appropriate IP agreements with all stakeholders in the software project is highly recommended. These agreements should explicitly include IP matters such as confidentiality and copyright ownership. These agreements should be promptly completed, ideally either during the onboarding process or when assigning the new software project to the software developer. These agreements may prevent disputes over ownership of IP and make it easier to attribute IP rights to the appropriate party in case of a dispute. Registering copyright is a vital step in enforcing copyright for FinTech solutions.[10] It is important to manage the contractual aspect of software development correctly to establish a clear chain of ownership for copyright. Algorithms, including mathematical formulae and artificial intelligence (AI), may be safeguarded as trade secrets, granting the owner legal recourse against unauthorized disclosure and unfair commercial activities by workers and third parties.[11] Engaging in such illicit actions is subject to legal sanctions and may lead to the perpetrator encountering severe legal ramifications, including monetary penalties, substantial fines, and incarceration.

The US Patent and Trade Mark Office (USPTO) categorizes FinTech patent applications into different sub-classes, such as Core Banking System Processes, Capital Markets & Investing, Cryptocurrency Electronic/Mobile Payments, Financial Security Insurance, Lending/Financing & Crowdfunding, and Personal Finance Management.[12] Financial institutions and technology businesses such as Bank of America, Google, IBM, Intuit, MasterCard, Microsoft, NCR Corporation, PayPal, Toshiba Corporation and Affiliates, and Visa have been aggressively pursuing patent protection for their innovative ideas.[13] FinTech innovation owners must maintain strict confidentiality of their ideas until they have completed and submitted a patent application with a patent office, therefore demonstrating their priority right for the invention. Industrial designs are a kind of IP that safeguards the visual characteristics of physical objects and goods, including payment cards, gadgets, accessories, and graphical user interfaces linked to computers or mobile apps. In order to ensure safeguarding, an industrial design must be officially registered at the appropriate patent office of the desired nation and must fulfill certain criteria, usually including originality.[14] Once authorized, an industrial design may be enforced against those who violate it and has comparable legal consequences to patents.

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[9]Narender Kumar, 'Cryptocurrency, Intellectual Property Rights and Competition Law- Challenges and Implications' 1(1) *NLUA Journal of Intellectual Property Rights* 48.

[10]'Intellectual Property Strategy for FinTech' (*Financier Worldwide*, 2017) <https://www.financierworldwide.com/intellectual-property-strategy-for-fintech> accessed 21 August 2024.

[11]Gregory Gerard Greer, 'Artificial Intelligence and Trade Secret Law' (2022) 21 *UIC Review of Intellectual Property* 252.

[12]Josh Lerner and others, 'Financial Innovation in the 21st Century: Evidence from U.S. Patents' (*National Bureau of Economic Research*, 2023) <https://www.nber.org/system/files/working_papers/w28980/w28980.pdf> accessed 21 August 2024.

[13]Marisa Woutersen, 'Big Tech and Banks Named in Authentication Technology Suit' (*World Intellectual Property Review*, 2024) <https://www.worldipreview.com/big-tech-and-banks-named-in-authentication-technology-suit> accessed 21 August 2024.

[14]Ahmad Saleh, 'FinTech, Innovation and Intellectual Property Rights: A Wake-up Call for Financial Institutions and Tech Companies' (*Al Tamimi & Co.*) <https://www.tamimi.com/law-update-articles/fintech-innovation-and-intellectual-property-rights-a-wake-up-call-for-financial-institutions-and-tech-companies/> accessed 21 August 2024.

The engagement between financial institutions and digital businesses in the FinTech sector via R&D collaborations and commercial partnerships is very significant because of their mutually beneficial knowledge in the FinTech field. Collaboration agreements should contain strong provisions regarding confidentiality, ownership of intellectual property rights (both pre-existing and new), responsibilities and costs related to registration and enforcement, and rights and obligations regarding the use, commercialization, licensing, and sharing of compensation or financial rewards for developed FinTech innovations.[15] Investing in or acquiring a FinTech firm gives rise to distinct challenges, especially related to IPR. Intellectual property is a very important asset for FinTech businesses and innovations, whether it is registered (such as patents and industrial designs) or unregistered (such as trade secrets and copyright). This study presents a comparative review of applicable patent laws and enforcement procedures in India, the United States, and China. This research piece examines the obstacles encountered by fintech startups in obtaining IP protection, including patents and trademarks.

The Role of Intellectual Property in Fintech

IPRs are essential for safeguarding the rights of innovators who create novel designs or models. They provide a sense of security and confidence that their rights will not be violated, particularly in the realm of software, hardware, and FinTech technology.[16] Start-ups, particularly, required to distinguish the implication of IPRs in fintech and take practical measures to protect it before starting any marketing goings-on.[17] FinTech have the power to reform the financial sector by enhancing or replacing existing business models. This has the capability to provide fresh market opportunities and deliver a competitive edge over traditional products.[18] This has wide-ranging implications for a varied range of stakeholders, together with key financial institutions, insurance companies, institutional investors, rating agencies, accounting and auditing organizations, regulators, technology businesses, non-profit organizations, and start-ups. Several nations worldwide are adopting strategies to enhance awareness of IPRs among start-ups to protect their interests in the current global landscape.[19] For instance, India has officially ratified intellectual property rules for the purpose of commerce, which means that start-ups are required to comply with intellectual property rights regulations in advance.[20]

The country's strong IP framework, which encompasses the Patents Act 1970, Copyright Act 1957, Designs Act 2000, and Trademark Act 1999, safeguards the rights of artists and writers for their original innovations and inventive ideas. Also, the Delhi High Court has recently announced noteworthy rulings concerning IPR in the fintech industry, resolving any uncertainty around trademarks. In the legal case '*Phonepe Pvt. Ltd. v. EZY Services and Others'*, the court determined that the term 'Pe' in the name

[15]Milan Frederik Klus and others, 'Strategic Alliances between Banks and Fintechs for Digital Innovation: Motives to Collaborate and Types of Interaction' [2019] *The Journal of Entrepreneurial Finance* 1, 23.

[16]Priya Vinjamuri and Rajesh Bahuguna, *IPR in the Era of Technology & Innovation* (Uttaranchal University 2024).

[17]Swathi Vajjhala, 'IPR: Game Changer for Fintech Companies and Start-Ups' (*ipleaders*, 2020) <https://blog.ipleaders.in/ipr-game-changer-fintech-companies-start-ups/> accessed 21 August 2024.

[18]ASSOCHAM, India, 'The Changing Face of Financial Services: Growth of FinTech in India' (*PwC*, June 2022) <https://www.pwc.in/assets/pdfs/consulting/financial-services/fintech/publications/the-changing-face-of-financial-services-growth-of-fintech-in-india-v2.pdf> accessed 21 August 2024.

[19]Anushka Gupta, 'Enhancing Entrepreneurial Growth: Intellectual Property Rights (IPR) in the Context of Micro, Small, and Medium Enterprises' (4 June 2024) <https://articles.manupatra.com/article-details/Enhancing-Entrepreneurial-Growth-Intellectual-Property-Rights-IPR-in-the-Context-of-Micro-Small-and-Medium-Enterprises> accessed 21 August 2024.

[20]'Protecting Intellectual Property' (*International Trade Administration*, 2024) <https://www.trade.gov/country-commercial-guides/india-protecting-intellectual-property> accessed 21 August 2024.

PhonePe was just a misspelling of the descriptive word 'Pay'.[21]The court concluded that a descriptive mark or portion of a mark does not have exclusive rights.
The relevance of IPR is substantial; however, many start-ups disregard its significance and fail to take the initiative to apply for it, resulting in disorder among their ranks.[22] Many start-ups neglect to implement an IPR plan before embarking on marketing activities, unaware that their rights may be violated, leading to financial losses for both the firm and its investors. In order to prevent this, start-ups should thoroughly evaluate all aspects before revealing any sensitive information pertaining to their intellectual property rights.[23] It is advisable for them to prioritize the use of non-disclosure agreements, since these agreements safeguard their intellectual property rights and valuable assets. Nevertheless, if a firm, individual, or entity wants to use its intellectual property assets for their own purposes, they may seek to get a lawful license.

Start-ups often disclose their ideas and essential information to inventors in order to raise financing. Nevertheless, failing to implement adequate safeguards or assert their intellectual property rights exposes them to the possibility of the inventor using their ideas, perhaps leading to substantial gains for the innovator in the long term. FinTech may give birth to several types of IP problems, including disputes about the ownership of IP, infringement of IP rights, and contractual disagreements around the licensing and commercialization of FinTech products.[24] In order to reduce damages in the event of intellectual property issues, it is advisable to take some safeguards, such as conducting thorough technical and legal investigations before the beginning of any disputes or other business activities.

Fintech organizations often use patent tactics to safeguard their software and algorithms, effectively managing the dual task of ensuring protection while navigating the complex patent environment.[25] Trade secrets, such as exclusive algorithms used in high-frequency trading platforms, provide an alternative avenue for corporations when patent protection is neither viable nor advantageous.[26] Trademark concerns safeguard the branding of financial services, including elements such as app interfaces and user experience designs. Copyright protection applies to the original works of authorship found inside fintech apps, including user interfaces and code.[27]

Licensing agreements allow fintech companies to make income and promote cooperation within the sector by granting permission to utilise their copyrighted technology or software.[28] Fintech businesses should give chief importance to compliance, predominantly to the data privacy. Observing to the

[21]*Phonepe Private Limited vs Ezy Services & Anr* [2021] AIRONLINE 647 (Delhi High Court).
[22]Mathias Vanderstraeten, 'Intellectual Property Protection and Start-Up Success: An Empirical Analysis of Private Funding, exit through Acquisition, and Capital Raised through IPO Moderated by Industry R&D Intensity' (Master's Theses, Erasmus University, Rotterdam School of Management 2023).
[23]Agnieszka Baran and Asel Zhumabaeva, 'Intellectual Property Management in Startups - Problematic Issues' (2018) 10 (2) *Engineering Management in Production and Services* 66, 74.
[24]'Intellectual Property Issues in Blockchain and FinTech' (*Covington*, 2018) <https://www.cov.com/-/media/files/corporate/publications/2018/12/intellectual_property_issues_in_blockchain_and_fintech.pdf> accessed 21 August 2024.
[25]George Walker, 'Financial Technology Law – A New Beginning and a New Future' (2017) 50 (1) *The International Lawyer* 137, 216.
[26]'How To Protect Algorithms That Enhance Businesses' (*NAJA Intellectual Property*, 2 February 2024) <https://abounaja.com/blogs/protection-of-algorithms> accessed 21 August 2024.
[27]Ahmad Saleh (n 1).
[28]Marta Barroso and Juan Laborda (n 4).

regulations e.g. GDPR not only protects consumer data, but also provide a legitimacy of the fintech companies.[29] Intellectual property is a decisive asset for new as well as well-known organizations since it looks after innovation, offers a competitive edge, and generates income. In the fast-paced and rapidly changing fintech arena, having the capacity to understand and effectively use intellectual property is vital for achieving success. This is due to the disruptive nature of both emerging fintech startups and existing financial organizations. Following are the advantages of adhering to the IPR in a fintech setup:

Safeguarding Innovation: Patents provide unique privileges to innovations, prohibiting rivals from replicating or using private technology without authorization. Ensuring this safeguard is crucial in an industry where rapid technical progress may easily lead to the establishment of new norms. Fintech businesses are aggressively pursuing patent protection for innovations in areas such as blockchain-based payment systems, AI-powered credit scoring algorithms, and innovative cybersecurity measures.[30] By obtaining patents, these companies may preserve their competitive advantage and perhaps provide licenses for their inventions to others, generating further sources of income.[31]

Establishing Brand Value: Trademarks are a vital kind of intellectual property for fintech firms, as they aid in creating a strong brand identity and setting oneself apart in a competitive market. A well-guarded brand has the potential to become a very valuable asset, therefore contributing substantial worth to these firms.[32]

Protecting Trade Secrets: Instead of relying on patents, which involve public disclosure, several fintech businesses choose to safeguard specific discoveries as trade secrets. This approach is especially common for proprietary algorithms, client lists, and business tactics that provide a competitive edge.[33] High-frequency trading businesses sometimes choose to maintain their trading algorithms as highly confidential private knowledge rather than pursuing patents for them.

Drawing Investment: A robust collection of intellectual property assets may significantly influence investment decisions, since venture capitalists and other investors see thorough intellectual property safeguarding as a sign of a company's ability to innovate and maintain long-term viability. A proper IP strategy is central for fintech startups to efficaciously gain financing rounds.

Empowering Partnerships and Collaborations: Intellectual property again is quite important in fintech ecosystem because it permits businesses to exchange technology and partake in collaborative innovation while protecting their specific interests.[34]

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[29]'GDPR Compliance for Fintech Companies: A Comprehensive Guide' (*Legal Nodes*) <https://legalnodes.com/article/gpdr-compliance-fintech#:~:text=Adhering%20to%20GDPR%20and%20other,the%20Legal%20Nodes%20Privacy%20Team.> accessed 21 August 2024.

[30]Mark A Chen, Qinxi Wu, and Baozhong Yang, 'How Valuable Is FinTech Innovation?' (2019) 32(5) *Review of Financial Studies* 2062, 2106.

[31]ibid.

[32]'7 Reasons Why Trademarks Are Important for Startups' (*NAJA Intellectual Property*, 27 February 2024) <https://abounaja.com/blogs/7-reasons-why-trademarks-are-important> accessed 21 August 2024.

[33]'IOSCO Research Report on Financial Technologies (Fintech)' (International Organization of Securities Commission 2017).

[34]Satish K. Puri, 'Integrating Scientific with Indigenous Knowledge: Constructing Knowledge Alliances for Land Management in India' (2007) 31 *MDPI* 355.

Addressing Regulatory Challenges: IP strategies must be formulated while taking into account financial rules, data protection legislation, and open banking efforts. Challenges include the fast advancement of technology surpassing the speed of the patent procedure, intricate worldwide methods for protecting intellectual property, differing standards for patentability in different countries, and meticulous management of intellectual property for open-source technologies.[35]

FinTech Patenting: Trends and Challenges

Patent protection plays an important role for FinTech organizations since they dedicate significant time, energy, and money to creating groundbreaking solutions.[36] Fintech encompasses a diverse array of software and apps that are purpose-built for use inside the financial sector. These fields include banking, insurance, point-of-sale systems, security measures, and transaction technologies.[37] The delineation of what may be classified as fintech is challenging to establish, and the regulation around what is deemed eligible for patent protection is also subject to change. It is crucial to thoroughly evaluate and create fintech patent applications with a comprehensive comprehension of the existing software patent laws in the relevant countries. A study conducted by the recently established Centre for Finance, Technology, and Society at Nottingham Business School (NBS), which is a component of Nottingham Trent University, used significant criteria to evaluate over 16,000 patents in the area of financial technology (FinTech) that were registered during a span of 20 years.[38] The results indicate that the United States is the dominant jurisdiction in terms of both the quantity and quality of registered patents, representing 39.5% of the sample.[39] China follows with 15.5%, Korea with 12.2%, Japan with 7.8%, and Europe with 7.1%. The study also found a significant rise in the rate and quality of registered patents in the USA from 2016 to 2020.[40] Additionally, there was a notable increase in the number of claims made in certain geographical areas, like South Korea, indicating the region's growth as a jurisdiction with significant FinTech innovation.[41] An illustrious illustration of a Fintech patent is Amazon's 1-Click buy technology, which circumvents many procedures in online item procurement, hence enhancing the ease of purchase for Amazon's clientele.[42] An additional example of a Fintech application is the use of biometrics for mobile payment applications, such as Apple's Touch ID, to facilitate purchases via Apple's mobile wallet (App Store), application store (App Store), and multimedia store (iTunes).[43] In the rapidly expanding Fintech industry, obtaining a Fintech patent is crucial for maximizing the

[35]'IP for Start-Ups and MSMEs' (Confederation of Indian Industry 2022).
[36]Christopher Johns, Soniya Shah, and Michael Young (n 16).
[37]'What Is Financial Technology (FinTech)? A Beginner's Guide' (*Columbia Engineering*) <https://bootcamp.cvn.columbia.edu/blog/what-is-fintech/> accessed 21 August 2024.
[38]'USA Leading the Way in FinTech Patent Quality According to New Index' (*Nottingham Trent University*) <https://www.ntu.ac.uk/about-us/news/news-articles/2023/02/usa-leading-the-way-in-fintech-patent-quality-according-to-new-index> accessed 21 August 2024.
[39]Milad Armani Dehghani and others, 'Assessing the Quality of Financial Technology Patents through the Development of a Patent Quality Index for Comparing Jurisdictions, Technical Domains, and Leading Organizations' (2023) 71 *IEEE Transactions on Engineering Management* 3934, 3950.
[40]'USA Leading the Way in FinTech Patent Quality According to New Index' (n 45).
[41]ibid.
[42]'One Click to Conquer: The Story of Amazon's Patent' (*DEX PATENT*) <https://dexpatent.com/patent-guide/one-click-check-out-amazon/> accessed 21 August 2024.
[43]Jen Sheng Wang, 'Exploring Biometric Identification in FinTech Applications Based on the Modified TAM' (2021) 7 (42) *Financial Innovation*.

economic worth of your invention and ensuring investment protection.[44] The patent owner may use it to provide licenses for the application to other parties. Additionally, even banks and conventional financial institutions are becoming more accepting of Fintech and are submitting patent applications for their own Fintech infrastructure.[45] The primary difficulty in submitting a Fintech patent is in formulating the invention, since objections about subject matter might occur if the patent application fails to demonstrate that the innovation surpasses being only an abstract concept. The fintech sector has seen substantial expansion, propelled by advancements like blockchain technology and AI-powered financial services. Patenting these ideas is an intricate procedure that differs across various countries. One of the main difficulties is deciding whether a topic is eligible for patent protection, especially in nations such as the United States, where software and business method patents have been exposed to more scrutiny.[46] Within Europe, the 'technical effect' concept mandates that software inventions must provide a technical resolution to a technical issue in order to be eligible for patent protection.[47] This requirement might pose difficulties for fintech advances since they often revolve around business techniques that are largely executed via software. The rapid advancement of technology sometimes surpasses the typically sluggish patent application process, resulting in the possibility that by the time a patent is approved, the technology may already be outdated or fully embraced in the industry.[48] Fintech firms must strategically weigh the advantages of patent safeguarding against the potential drawbacks of revealing confidential information.[49] Some companies choose to maintain their advancements as trade secrets, especially for algorithms and other software-based innovations that are challenging to replicate. Divergent international standards can deliver difficulties since patent laws and procedures vary considerably across different nations. As an example, the United States operates under a first-to-file system and has post-grant review processes, but Europe has a unitary patent system that seeks to streamline protection among member states of the European Union but has its own intricacies.[50] Countries in Asia, such as China, have shown a growing willingness to accept fintech patents. However, successfully navigating their systems requires expertise in the field.[51] A further problem arises from the intersection of fintech developments with tightly regulated financial services, since they must comply with banking rules.[52] Patent applications must manage both intellectual property rules and financial restrictions, which may differ significantly across nations and can affect the ability to get a patent or enforce specific advances. Non-practicing companies, often known as patent trolls, have arisen due to the acquisition of patents only for the purpose of enforcing them against others rather than using the

[44]Jelena Kabulova and Jelena Stankevičienė, 'Valuation of FinTech Innovation Based on Patent Applications' (2020) 12 (23) *Sustainability* 10158.
[45]Oskar Kowalewski and Paweł Pisany (n 7).
[46]Nari Lee, 'The Patent Subject Matter Reconfiguration and the Emergence of Proprietarian Norms - The Patent Eligibility of the Business Methods' [2002] *SSRN Electronic Journal*. http://dx.doi.org/10.2139/ssrn.400100
[47]'Patentability of Software and Business Method Inventions in Europe' (*Mewburn Elis*) <https://www.mewburn.com/law-practice-library/patentability-of-business-method-and-software-inventions-in-europe-2> accessed 21 August 2024.
[48]IMF, 'The Rapid Growth of Fintech', *Global Financial Stability Report: Shockwaves from the War in Ukraine Test the Financial System's Resilience* (International Monetary Fund Monetary and Capital Markets Department 2022).
[49]'Intellectual Property Issues in Blockchain and FinTech' (n 31).
[50]Randy Campbell, 'Global Patent Law Harmonization: Benefits and Implementation' (2003) 13 (2) *Indiana International & Comparative Law Review* 605.
[51]Liu Yong, 'On the Development of Fintech in Asia' [2023] *Proceedings of the Second International Forum on Financial Mathematics and Financial Technology. IFFMFT 2021. Financial Mathematics and Fintech* 1, 30.
[52]Antonio Garcia Pascual and Fabio Natalucci, 'Fast-Moving FinTech Poses Challenge for Regulators' (*IMFBlog*, 13 April 2022) <https://www.imf.org/en/Blogs/Articles/2022/04/13/blog041322-sm2022-gfsr-ch3> accessed 21 August 2024.

technology themselves.[53]

The decentralized nature of blockchain and distributed ledger technology poses distinct issues in determining the appropriate extent of patent claims and enforcement techniques for distributed technologies. Fintech businesses often encounter significant financial and resource limitations when it comes to acquiring and managing patents on a worldwide scale.

United States of America

The US Supreme Court has established the Mayo/Alice test, a two-part examination used to ascertain the patent ineligibility of claims.[54] The test evaluates whether assertions include a 'judicial exception' such as conceptual notions, scientific principles, and observable occurrences that would render them unsuitable for legal safeguarding. In the field of financial technology (fintech), the main concern is determining if the claims are specifically targeting an 'abstract idea'.[55] Nevertheless, the Supreme Court's reluctance to establish clear criteria for identifying abstract ideas has made it difficult to define which concepts are ineligible and so not eligible for patent protection. If the claims include a judicial exception but are found to incorporate it into a 'practical application', then the claim is considered admissible under part one and does not need examination under part two of the Alice/Mayo test.[56]

However, if the claims are considered to be 'directed to' an exception, they will be moved to Part 2, where an examination is conducted to see if the extra features of the claim change the character of the claim into an application that is eligible for a patent.[57] Identifying the criteria for an innovative idea in the second half of the Alice/Mayo test may be challenging, since some lower courts have emphasized situations that may lack sufficient merit to satisfy the requirements of Part 2.[58] Numerous firms' express dissatisfaction with the situation where their claims are accepted in some countries but have difficulties in meeting the requirements for eligibility in the US. This often compels them to either settle for less comprehensive protections or completely give up on their patent applications in the US.

The US Supreme Court has established the Mayo/Alice test, a two-part examination, to ascertain the eligibility of patent claims. The test assesses whether claims include a 'judicial exception' such as abstract notions, laws of nature, and natural events, which would render them unsuitable for protection. In the field of financial technology (fintech), the question at hand is whether the claims are focused on a 'conceptual notion' and should be evaluated using the two-step method outlined in the first section.[59] Nevertheless, the task of defining the limits of abstract concepts that are not eligible for patent protection has been challenging since the Supreme Court has declined to establish clear criteria for distinguishing between abstract and non-abstract thoughts. If the claims include a judicial exception but

[53]Eric Rogers and Young Jeon, 'Inhibiting Patent Trolling: A New Approach for Applying Rule 11' (2014) 12 *Northwestern Journal of International Law & Business* 291.
[54]'Patent-Eligible Subject Matter Reform: Background and Issues for Congress' (Congressional Research Service 2022).
[55]Bo Li and Zeshui Xu, 'Insights into Financial Technology (FinTech): A Bibliometric and Visual Study' (2021) 7 *Financial Innovation*.
[56]'2106 Patent Subject Matter Eligibility [R-10.2019]' (*USPTO,* 2014) <https://www.uspto.gov/web/offices/pac/mpep/s2106.html> accessed 21 August 2024.
[57]Magnus Gan, 'Before Mayo & After Alice: The Changing Concept of Abstract Ideas' (2016) 22 *Michigan Telecommunications and Technology Law Review* 287.
[58]ibid.
[59]Jack S Barufka and others, 'Evaluating the Evaluation: Breaking Down New USPTO Guidance for Patent-Eligible Subject Matter' (*Pillbury*) <https://www.pillsburylaw.com/en/news-and-insights/uspto-guidance-patent.html> accessed 21 August 2024.

are found to incorporate it into a 'practical application', the claim is considered admissible under part one and does not need examination under part two of the Alice/Mayo test.[60] If the claims are considered to be 'directed to' an exception, the Supreme Court has established that claim components that are 'well-understood, routine, and conventional' do not constitute an innovative notion that is enough to overcome the examination of Part 2.[61] However, several corporations' express dissatisfaction with the fact that claims are accepted in some nations but encounter eligibility obstacles in the United States. Occasionally, this compels corporations to embrace more limited safeguards or completely withdraw their patent applications in the United States. Claims that include technical features might also be subject to eligibility issues.

In a recent case in the Southern District of New York, it was determined that the claims of AuthWallet LLC's US Patent No. 9,292,852 were deemed invalid. This patent pertains to systems and methods for authorizing and processing financial data.[62] The court observed that while the claims included two-factor authentication and data storage techniques, they lacked an innovative notion to convert the abstract idea of processing discounts on payment transactions into a patentable invention.[63] In May 2022, the US Solicitor General advised that a patent case should be reviewed.[64] The argument was that the Federal Circuit made a mistake in interpreting the Court's previous decisions. The summary endorsed American Axle's argument that the assertions made in the patent do not describe a fundamental principle of nature and advised the Supreme Court to consider this issue as a means of achieving clarification.[65]

Nevertheless, the court refused to grant certiorari in this instance. Next session, the Supreme Court may consider taking up the case *Interactive Wearables v. Polar Electro Oy, et al*.[66] This case raises questions about the criteria for determining if a claim is directed towards an ineligible concept, whether eligibility is a matter of fact or law, and if considerations of enablement should be taken into account when assessing eligibility. The ambiguity around the validity of patents impacts firms' strategic choices on their patent portfolios. In the absence of assurance in securing enough protection, companies may decrease their investments in novel and developing technology.[67] Eligibility criteria differ between countries, and competent advisors must comprehend these discrepancies and adapt their strategy while building a global fintech portfolio.

[60]Donald Zuhn and others, 'Patentable Subject Matter' (*Patent Docs*, 12 August 2024) <https://www.patentdocs.org/patentable-subject-matter/> accessed 21 August 2024.
[61]'2106 Patent Subject Matter Eligibility [R-10.2019]' (n 37).
[62]Christopher Johns, Soniya Shah, and Michael Young (n 16).
[63]Magnus Gan (n 64).
[64]Daniel Kazhdan, *Beyond Patents: The Supreme Court's Evolving Relationship with The Federal Circuit* (Temple University 2015).
[65]*American Axle & Manufacturing, Inc. v. Neapco Holdings Llc, Neapco Drivelines LLC* [2024] USCA 321.
[66]Christopher C. Johns and Alexander M. Boyer, 'Supreme Court Declines to Clarify the Abstract-Idea Exception to Patentability in Interactive Wearables and Tropp' (*Finnegan*, 2023) <https://www.finnegan.com/en/insights/articles/supreme-court-declines-to-clarify-the-abstract-idea-exception-to-patentability-in-interactive-wearables-and-tropp.html> accessed 21 August 2024.
[67]Knut Blind, Katrin Cremers, and Elisabeth Müller, 'The Influence of Strategic Patenting on Companies' Patent Portfolios' (2007) 38 (2) *SSRN Electronic Journal* 428, 436.

China

From 2018 to 2020, the quantity of patents in FinTech innovation remained constant; however, the distribution of various patent categories saw considerable changes.[68] The surge in patent filings for payment FinTech reached its highest point in 2018 and subsequently decelerated, maybe as a result of the advancement and stabilization of mobile payment technology.[69] Present advancements prioritize enhancing mobile payment systems and increasing the convenience of payments via the use of Internet of Things technologies. The number of patent applications in the field of data analytics FinTech has consistently risen year over year, indicating the advent of the big data and cloud computing age. Notable developments in FinTech comprises of efficacious management of wide-ranging data sets, enhancing financial service models, and nurturing the extension of the financial industry. The legal system of the People's Republic of China (PRC) protects intellectual property by providing an inclusive bundle of rights, such as copyright, invention patents, utility models, designs, trademarks, and trade secrets. The perception of 'first-to-file' is pertinent while applying for and registering intellectual property, in which a single patent right is granted for a particular invention. The employer possesses exclusive authority to submit a patent application for developments created by workers. In order to safeguard or uphold IP rights in your specific legal jurisdiction, it is necessary for you to possess local or national rights, or alternatively, enforce other rights such as treaties or rights that span many jurisdictions. China follows the concept of territoriality when it comes to protecting intellectual property rights.[70] It means that with the intention of safeguarding and enforcing IPRs in China, it is obligatory to register the intangible property locally. Nevertheless, the China has shown a strong interest in fostering global collaboration, and it has implemented certain safeguards in accordance with relevant international agreements.[71] The People's Republic of China (PRC) is vigorously determined to put into effect and enforce its IP laws in order to enhance the safeguarding of innovation and ideas.[72] Special intellectual property courts/tribunals were established to permit patent holders to institute civil actions looking for compensation from those who have vindicated their rights. This includes the option to follow punitive consequences in circumstances when the violation is very grave. Individuals who encroach upon the law may face punishment if their acts are determined to be unlawful. The laws of the People's Republic of China permit the use of intellectual property rights via methods such as transferring, licensing, and pledging. In order to transfer or license a patent, the involved parties are required to establish a written agreement and complete the necessary registration procedures with the patent administrative department under the State Council.[73] The interest in the promise is established when it is properly registered, particularly for pledges involving proprietary rights related to IP rights.

Market parties have recently been examining IP securitization, including supply chain finance and financing leasing. Obtaining patents for fintech ideas in China is particularly challenging because of

[68]Hao Wang and others, 'Classification of FinTech Patents by Machine Learning and Deep Learning Reveals Trends of FinTech Development in China' [2022] *Mathematical Problems in Engineering, Hindawi*.
[69]ibid.
[70]Ya Bu and Hui Li, 'Effective Regulations of FinTech Innovations: The Case of China' (2021) 31 (3) Economics of Innovation and New Technology 1.
[71]Matthew R. Maher, 'A Brief Analysis of the Chinese Intellectual Property Regime' (*Michigan State University*, 2019) <https://a-capp.msu.edu/article/a-brief-analysis-of-the-chinese-intellectual-property-regime/> accessed 21 August 2024.
[72]'China's Commitment to Strengthening IP Judicial Protection and Creating a Bright Future for IP Rights' (2019) <https://www.wipo.int/wipo_magazine/en/2019/03/article_0004.html> accessed 21 August 2024.
[73]'Patent Law of the People"s Republic of China, 1984' (*Shanghai Intellectual Property Administration*) <https://sipa.sh.gov.cn/patent/20191130/0005-28434.html> accessed 21 August 2024.

the country's fast-changing legal, regulatory, and technical environment.[74] The primary difficulties are the lack of clarity in determining what is eligible for patent protection, the stringent criteria for demonstrating innovation and inventiveness, the intricate protocols involved in the inspection and granting of patents, and the uneven application of intellectual rights enforcement. The regulatory landscape in China is very dynamic and prone to rapid modifications, posing challenges for fintech businesses in effectively navigating both intellectual property laws and sector-specific regulations.[75] The development of financial technology sometimes overlaps with financial rules, which adds complexity to the process of obtaining patents. International factors are also important, since it might be difficult for fintech businesses operating globally to conform to China's patent regime. Startups with limited resources may face significant challenges when it comes to coordinating across several legal systems for cross-border enforcement.[76] Fintech businesses have substantial cost and resource limitations when it comes to registering and maintaining patents in China.[77] This includes hefty expenses for submitting, prosecuting, and perhaps litigating patents. Successfully navigating the patent procedure, which involves tasks such as drafting applications, addressing office actions, and overseeing the prosecution process, requires expertise and access to specific information and resources. Fintech firms may have a deficiency in internal knowledge and may need to allocate resources towards acquiring external legal support.[78]

The competition inside China's fintech industry is fierce, and local rivals may possess a deeper understanding of the patent system and have more substantial resources to capitalize on it. Developing a successful intellectual property strategy that safeguards innovations while managing local competition is an essential but difficult undertaking. Fintech businesses must strategically plan their IP filings to effectively balance the costs and possible rewards. This involves making decisions on which inventions to patent, drafting claims to assure comprehensive protection, and managing IP in a manner that aligns with company goals.

India

The FinTech industry in India is a relatively new development, with 75% of companies established after 2013.[79] The expansion of the ICT industry is influenced by its uneven development, with a particular focus on the early establishment of companies involved in analytics, software, and payments. This highlights the transformation of ICT enterprises into the field of financial technology (FinTech).[80] Bill desk and Pine Labs are prominent representatives of India's software sector, specializing in

[74]WIPO, 'Country Perspectives: China's Journey' (*WIPO*, 2023) <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-46-en-country-perspectives-china-s-journey.pdf> accessed 21 August 2024.

[75]Ya Bu and Hui Li, 'Effective Regulations of FinTech Innovations: The Case of China' (2021) 31 (3) *Economics of Innovation and New Technology* 1, 19.

[76]Johannes Ehrentraud and others, 'FSI Insights on Policy Implementation No 23 Policy Responses to Fintech: A Cross-Country Overview' (*Bank for International Settlements*, January 2020) <https://www.bis.org/fsi/publ/insights23.pdf> accessed 21 August 2024.

[77]'Patent Protection Cost in China' (*European Commission*) <https://intellectual-property-helpdesk.ec.europa.eu/patent-protection-cost-china_en> accessed 21 August 2024.

[78]'Fintech in China: What Lies Ahead' (*Wharton School of the University of Pennsylvania*, 12 July 2019) <https://knowledge.wharton.upenn.edu/article/fintech-china-lies-ahead/> accessed 21 August 2024.

[79]'Fintech in India' (swissnex India, Consulate General of Switzerland 2016).

[80]Raphael Kaplinsky and Erika Kraemer-Mbula, 'Innovation and Uneven Development: The Challenge for Low- and Middle-Income Economies' (2022) 51(2) *Research Policy* 104394.

transaction solutions.[81] Digital payments, which are impacted by the increasing prevalence of smartphones, are also determined by the specific route they follow. Telecommunication companies pioneered this industry, as One97 and Paytm introduced digital payments via their subsidiary companies.[82] India is at the forefront of the future of payments, positioning itself as far more advanced than conventional markets. Nevertheless, emerging industries such as PropTech, InsurTech, and neobanks are seeing a deceleration in their rate of expansion.[83]

According to research by Nasscom, India saw a remarkable annual growth rate of 24.6% in patent filings during FY2023, which is the highest recorded in the last twenty years.[84] The number of patents awarded had a more than twofold rise from FY2019 to FY2023, reaching a total of over 100,000 patents granted over the time frame of March 15th to March 14th, 2024.[85] The percentage of patents submitted by individuals residing in the country has increased twofold in the last 10 years, rising from 33.6% in 2019 to more than 50% in 2023.[86] FinTech has been a prominent field of application, alongside healthcare-related patents, automation/software development, retail/ecommerce, artificial intelligence, Gen AI, medical data processing, and cognitive computing. The Indian Patent Office (IPO) does not have distinct criteria specifically for evaluating AI-related innovations. Instead, these inventions are assessed according to the computer-related innovations criteria 2017 (CRI standards).[87] FinTech patents provide benefits such as acquiring a larger portion of the market, attracting investors, safeguarding functioning, and generating a consistent source of income.[88] Nevertheless, due to the ever-evolving nature of FinTech regulation, it is advisable to file patents in order to have the freedom to use different technological methods.

In India, patent holders have many avenues to protect their rights, such as using Anton Piller Orders, Mareva Injunctions, and John Doe Orders.[89] Section 3 of the Act introduces additional criteria for determining patentability that go beyond the established international standards.[90] Computer-related innovations are excluded from patentability according to Section 3(k), whereas the discovery of novel

[81]Julien Migozzi, Michael Urban, and Dariusz Wójcik, '"You Should Do What India Does": FinTech Ecosystems in India Reshaping the Geography of Finance' (2024) 151 *Geoforum* 103720.
[82]'Fintech in India- Powering Mobile Payments' (*KPMG*, 2019) <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2019/08/Fintech-in-India%E2%80%93Powering-mobile-payments.pdf> accessed 21 August 2024.
[83]Aaron Hurst, 'Disruptive Innovation: The Emerging Sectors Applying Digital Technologies' (*Information Age*, 2022) <https://www.information-age.com/disruptive-innovation-emerging-sectors-applying-digital-technologies-17589/> accessed 21 August 2024.
[84]Mini Tejaswi, 'India Sees 83,000 Patents Being Filed, a Growth of 24.6%' (*The Hindu*, 26 April 2024) <https://www.thehindu.com/business/india-sees-83000-patents-being-filed-a-growth-of-246/article68111641.ece#:~:text=Mirroring%20global%20trends%2C%20in%20FY2023,over%202X%20between%20FY2019%2DFY2023.> accessed 21 August 2024.
[85] ibid.
[86] ibid.
[87]Gopi Trivedi and Yashvi Khatri, 'Overcoming Obstacles: Securing Intellectual Property Rights for CRI-Based Inventions in India' (*LIVE LAW*, 2024) <https://www.livelaw.in/law-firms/law-firm-articles-/intellectual-property-rights-cri-based-inventions-artificial-intelligence-blockchain-intellectual-property-appellate-board-department-of-industrial-policy-and-promotion-yj-trivedi-co-254677> accessed 21 August 2024.
[88]KPMG and NASSCOM, 'Fintech inIndia A Global Growth Story' (*KPMG*, 2016) <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/06/FinTech-new.pdf> accessed 21 August 2024.
[89]Madan B. Lokur and others, 'Chapter 6 India', *An International Guide to Patent Case Management for Judges* (WIPO 2023) 6.
[90]Madan B. Lokur and others (n 96).

forms of substances or simple derivatives is limited under Section 3(d).[91] Chapter XVIII of the Act in India provides a detailed description of the procedure for patent litigation, where the District Court serves as the first court for hearing matters related to allegations of patent infringement.[92] The transfer of counterclaims for the revocation of the patent must be made to the High Court for final determination. Only five high courts have the authority to hear and decide on legal cases for the first time under their original jurisdiction. A significant obstacle in patent litigation is the shortage of judicial officers who possess the necessary expertise to handle technical aspects of patents.[93]

The main obstacle in the implementation of patent rights is the current accumulation of unresolved cases in the judicial system.[94] The establishment of the Commercial Courts Act, 2015 aims to accelerate the resolution of IP disputes. However, the significant backlog of cases poses a challenge for innovators seeking prompt dispute settlement. Subject matter experts pose a difficulty as perSection 115 of the Act, which allows for the appointment of an adviser to aid the courts in offering technical assistance and counsel.[95] Nevertheless, this clause is seldom used, and the disparity in comprehending subjective components might result in possible issues and escalate legal disputes. The courts have the option to appoint a scientific adviser to provide technical advice when needed; however, this privilege is not often used.[96] In the dynamic FinTech sector, the Indian Patent Officehas difficulties in guaranteeing equitable and effective patent enforcement.

FinTech and Patent Litigation

The number of patent lawsuits using FinTech and Blockchain technologies has risen as firms seek to get value from their patents. The matter of patent eligibility continues to be a significant obstacle for blockchain patents in legal disputes, with courts showing a greater tendency to address this matter at a later stage in the case, after the factual evidence has been established.[97] The case of *TD Professional Services v. Truyo Incorporated et al.* is the most advanced patent case specifically connected to blockchain technology.[98] The court rendered a claim construction ruling that elucidated the significance of several terms relating to blockchain, such as ‘blockchain miners’ and ‘private blockchain’. The plaintiff did not request the dismissal of the lawsuit based on patentability. Nevertheless, while evaluating the validity of the claims, the court made frequent references to the patentee's replies to section 101 rejections. In *Veritaseum Capital, LLC v. Coinbase Global et al.,* Veritaseum began legal action by filing a complaint for patent infringement against Coinbase and Circle Internet Financial Ltd.[99] The claims state that two firms curtailed Veritaseum's patent by operating validators on proof-of-stake blockchains such as ‘Ethereum’. Coinbase submitted a request to dismiss, contending that

[91]Swati Sharma, Gitika Suri, and Sandeep pandey, ‘Scope of Business Method Inventions under Section 3(k)’ (*Cyril Amarchand Mangaldas*, 2024) <https://corporate.cyrilamarchandblogs.com/2024/03/scope-of-business-method-inventions-under-section-3k/> accessed 21 August 2024.
[92]Madan B. Lokur and others (n 96).
[93]ibid.
[94]‘Improving the Legal Environment for Business and Investment in Central Asia’ (OECD 2021).
[95]The Patents Act, 1970, s 115.
[96]ibid.
[97]Jatin Trivedi, ‘Dawn of Blockchain Technology in the Indian Patent Regime’ (*American Intellectual property Law Association*) <https://www.aipla.org/list/innovate-articles/dawn-of-blockchain-technology-in-the-indian-patent-regime> accessed 22 August 2024.
[98]*TD Prof'l Servs. v. Truyo Inc*., No. CV-22-00018-PHX-MTL (D. Ariz. Feb. 3, 2023)
[99]*Veritaseum Cap., LLC v. Circle Internet Fin. Ltd*., No. 2:22-cv-00498-JRG-RSP (E.D. Tex.), and *Veritaseum Cap., LLC v. Coinbase Glob., Inc.,* No. 1:22-cv-01253 (D. Del.).

Veritaseum's allegations of infringement were not credible and that the claims made were not qualified for patent protection. Currently, the lawsuit is on hold to provide the plaintiff an opportunity to engage new legal representation after the death of his previous attorney.

Pardalis Technology Licensing, L.L.C. v. International Business Machines Corporation pertains to the assertion of seven patents related to the monitoring and management of a supply chain distribution system using an 'immutable ledger'.[100] These patents are claimed against different IBM blockchain products, including those that use the widely acknowledged Hyperledger technology. IBM countered the lawsuit by asserting that the patents were not violated and were invalid for several reasons. The court has established a timetable for the case, with the primary trial slated for August 2024.

In *Forte Labs, Inc. v. Pocketful of Quarters, Inc.*, Forte filed a lawsuit entreating a declarative judgement affirming that Pocketful of Quarters' patent for a blockchain game was not valid and it did not infringe on Forte's rights. PoQ submitted an appeal to dismiss aforementioned application, challenging that the statement made during the conference call was spontaneous and did not mean to be taken seriously by Forte. Thus, it was unwarrantable for Forte to deduce that legal action was imminent.

In the lawsuit of *United Services Automobile Association (USAA) v. Wells Fargo Bank* (2019), a federal jury in Texas ruled that Wells Fargo purposely curtailed upon the two patents held by USAA associated to mobile deposits. Therefore, the judgement instructed Wells Fargo to pay $200 million in damages. It was further mandated by a federal jury in Texas in 2020 to provide an extra sum of $102.8 million. The Wells Fargo filed a second case against USAA, but it has not been successful. But, in February 2021, the two companies resolved the case by reaching a settlement and agreed to a $300 million payment. The fintech IP litigation landscape in China has significantly evolved due to the country's growing focus on intellectual property rights in the technology sector.[101] Key trends include the rapid expansion of the fintech sector, which has led to an increase in intellectual property filings related to financial technology, such as patents for blockchain, payment systems, and financial data analytics. Many fintech companies are actively filing patents and trademarks to protect their innovations, leading to a rise in IP-related disputes. China's Patent Law provides protection for inventions, utility models, and designs, while the Trademark Law protects brand names, logos, and other identifiers.[102] The Anti-Unfair Competition Law addresses issues related to trade secrets and unfair competition, relevant to fintech firms concerned about data protection and competitive practices.[103] In *Case No. (2019) Supreme Court No. 732, 733, 734, Huawei* instituted a lawsuit in Nanjing Intermediate People's Court to establish the fact that it did not violate the patent rights owned by Conversant Wireless Licensing.[104] Conversant began legal proceedings in Germany by submitting a patent infringement complaint. This lawsuit aimed to bag an injunction order so as to halt Huawei's violation and also demanded compensation. The

[100] *Pardalis Tech. Licensing, L.L.C. v. Int'l Bus. Machs. Corp*., No. 2:22-cv-00452-JRG-RSP (E.D. Tex.).
[101] 'Fintech in China: What Lies Ahead' (n 85).
[102] Matthew R. Maher (n 78).
[103] Alice S. Han, 'Chinese Fintech Companies and Their "Going Out" Strategies' (Master's Theses, Stanford University 2021).
[104] 'China Enters the Realm of Anti-Suit Injunctions in Standard Essential Patent (SEP) Cases' (*SpicyIP*, 2020) <https://spicyip.com/2020/10/china-enters-the-realm-of-anti-suit-injunctions-in-standard-essential-patent-sep-cases.html> accessed 22 August 2024.

Nanjing Intermediate People's Court gave the verdict, establishing the royalty rate for the applicable standard essential patents allied with Huawei and its Chinese subsidiaries. Conversant contested the decision of the lower court and filed an appeal with the Supreme People's Court. The court also ordered Huawei and its German affiliates to cease any future infringement. Huawei submitted a request to the Supreme People's Court, seeking an injunction to prevent Conversant from seeking enforcement of the German court's decision until the Supreme People's Court issues its final judgement. The Intellectual Property Court of the Supreme People's Court issued the first 'anti-suit' injunction judgement in the realm of intellectual property by a Chinese court. Additionally, it introduced the use of 'daily fines' as a means to guarantee the execution of these injunctions. The rulings provided clear guidance on the necessary conditions and factors to be taken into account when applying the 'anti-suit injunction'. Although there have been advancements in the implementation of intellectual property rights, there are still obstacles to overcome, such as uneven enforcement and the need for stronger safeguards for trade secrets. Technological advancements often surpass the current legal systems. Fintech companies should develop comprehensive IP strategies, including regular monitoring of competitors' patents and trademarks and proactive legal actions to protect their own innovations.[105] Engaging with local IP experts and legal professionals can provide a significant advantage in navigating disputes. To successfully protect their ideas, fintech businesses may negotiate the intricacies of intellectual property litigation in China by staying updated on current developments and comprehending the legal landscape.

Conclusion and Future Directions

Patents are critical in defining a robust IP strategy because they provide an exclusive right to protect creative innovations, increasing the value of the product and company, especially on the digital platform. However, registering a patent may not be as straightforward as it sounds. It might be more advantageous for a fintech company to protect the intellectual creation of the computer program or algorithm and register this first as a copyright, as this is more expeditious than a patent application.[106] A priority date for the patent filed during the conception phase provides the patent applicant with the first mover advantage. Fintech may also benefit from design patents that protect its physical attributes, such as electronic cards, machines, and interfaces, as well as trade secret protection for its subject matter. Even so, it is important to adopt prudent measures to safeguard the secrecy of procedures, such as back-end server operations or code, which may keep their economic worth continuously as long as their confidentiality is maintained. Fintech startups seeking funding need a strong IP strategy because they are valuable assets that can serve as security or collateral for loans. With minimal marketing effort, a strong IP portfolio can nudge investors for funding because they are convinced of the subject matter's novelty and inventiveness.[107] Investors also seek sustainability in a startup, perceiving a regular innovator as more dynamic and adaptable to the advancement of fintech business and technology. However, awareness of the need for IP protection among fintech entrepreneurs and innovators varies between jurisdictions and fintech firms. Large fintech companies are generally aware of IP and its importance, but small companies and start-ups often lack adequate protection. Rushing into the market without adequate protection can lead to disaster, as the subject matter is open to replication without

[105]Christopher Johns, Soniya Shah, and Michael Young (n 16).

[106]Priya Vinjamuri and Rajesh Bahuguna (n 23).

[107]'Importance of Strong IP Portfolio for Fintech Startups to Acquire Easy Funding' (*AMLEGALS*, 2021) <https://amlegals.com/importance-of-strong-ip-portfolio-for-fintech-startups-to-acquire-easy-funding/> accessed 22 August 2024.

compensation. Fintech companies must sign a nondisclosure agreement with prospective investors to avoid potential theft. Fintech businesses in India, the USA, and China have difficulties safeguarding their innovative ideas within the framework of intellectual property laws. In order to tackle these problems, fintech businesses should formulate a comprehensive IP strategy that takes into account the distinct regulatory landscapes of each jurisdiction and consistently assess and revise it.[108] To give trade secret protection a high level of importance, establish strong internal rules and processes that effectively preserve vital information. Non-disclosure agreements (NDAs) with workers, partners, and customers can achieve this. It could mean choosing a strategic way to file patents for important technologies while keeping the specifics of how they are used as trade secrets. It could also mean taking advantage of faster patent processes for advances in financial technology (fintech), such as the Prioritised Patent Examination Program for important breakthroughs offered by the US Patent and Trademark Office (USPTO).[109] It may also include improving cybersecurity by allocating resources to strong cybersecurity infrastructure, doing routine security audits and penetration testing, and ensuring trademark protection, which is of utmost importance and involves proactively registering trademarks in important markets and vigilantly monitoring for any infringements. Interacting with regulatory authorities and actively involving oneself in industry organizations to remain updated on forthcoming alterations in intellectual property legislation may be fruitful. It is suggested to explore opportunities for international collaboration with other fintech firms to address common intellectual property challenges.

Ensuring employee education and retention is crucial, as is implementing alternative protective measures like encryption and blockchain. It is advisable to use smart contracts for the purpose of IP licensing and administration. Create effective approaches to adhere to data localization regulations while safeguarding intellectual property, particularly in India and China. To protect the basic IP, open innovation with care includes making it clear who owns and has the right to use intellectual property (IP) and setting up tiered access systems for collaborative projects. Regular IP audits are advised to identify and address potential vulnerabilities. Our IP strategy should be adjusted to align with our company goals and market conditions. Using technology e.g. AI-based solutions, may enhance intellectual property management by effectually monitoring assets and protecting intellectual property ownership. It is suggested to supplement intellectual property portfolio by safeguarding patents, trademarks, copyrights, and trade secrets in diverse legal jurisdictions. It is thus advisable to use distinct techniques tailored to each market.[110] It is advisable to use specific strategies for each market. For instance, it's advisable to concentrate on building a strong patent portfolio in the USA, remain adaptable and prepared to adapt to evolving regulations in India, prioritize the protection of trade secrets in China, and explore the use of IP insurance to mitigate the risks of infringement claims or legal actions.

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[108]Antonio Garcia Pascual and Fabio Natalucci (n 59).
[109]'USPTO's Prioritized Patent Examination Program' (*USPTO*, 2022) <https://www.uspto.gov/patents/initiatives/usptos-prioritized-patent-examination-program> accessed 22 August 2024.
[110]Gouri Gargate and Karuna Jain, 'Intellectual Property Audit for Efficient Intellectual Property Management of an Organisation' [2012] *Conference: Technology Management for Emerging Technologies (PICMET), 2012 Proceedings of PICMET '12* 894.

NAVIGATING THE CROSSROADS: BALANCING DATA SOVEREIGNTY AND CROSS BORDER DATA FLOW IN INDIA'S DIGITAL ECONOMY

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Introduction

The future of our world is fundamentally linked to the digital environment we engage with today. As the lines between our physical and virtual lives become more intertwined, we have a unique opportunity to enhance our experiences. In recent decades, the importance of data sharing has grown significantly, offering valuable benefits for both social cohesion and economic prosperity. Embracing this digital transformation can lead to innovative solutions that improve our overall well-being. Many economic sectors have seen new breakthroughs as a result of data transfer, and cross-border data sharing also improves relations between countries. However, a number of issues with data management, including where data is stored, how it is accessed, and how it is processed, have been heightened by this abrupt increase in cross-border data transmission. The idea that data is governed by national laws and regulations is known as data sovereignty. This suggests that nations have the power to manage and control the data produced inside their boundaries, including its sharing and storage. Policies and regulations pertaining to data safety have been strengthened in reaction to the widespread cross-border flow of data, guaranteeing that their data stays within their borders or, at the very least, within their control. The term "cross-border data flows" describes the transfer of data across national boundaries, usually in the context of online services, data analytics, or international corporate activities. These flows are crucial to the global economy's operation because they give companies access to foreign markets and help the supply chain. They give customers access to a variety of online services, irrespective of their location. Cross-border data flows do, however, come with difficulties. Regulations pertaining to data security and privacy vary per nation, which further complicates matters for businesses. In the realm of digital government, transboundary data transfer plays a vital role in the effective movement of sensitive or personal data across national borders.[3] This transfer supports various positive initiatives, including the enhancement of government services, the strengthening of international collaborations, and the promotion of data sharing between public and private sector partners. By embracing this approach, we can significantly improve government services and encourage global cooperation. The digital landscape in which we operate today is crucial for shaping a promising future. As we increasingly engage in online activities, the line between the physical and virtual worlds becomes less defined. This evolving environment highlights the growing importance of data exchange for social progress and economic prosperity. By leveraging these opportunities, we can work towards a more connected and collaborative global community. In today's digital landscape, transboundary data transfer plays a pivotal role in the functioning of digital government. This process involves the movement of sensitive or personal data across national borders for a variety of essential purposes, including the delivery of governmental services, the establishment of international collaborations, and the facilitation of data sharing among public and private sector partners. The significance of cross-

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[3] Ganga V. Chitti, *Cross-Border Data Transfers and Data Localization Under India's DPDPA 2023: A Comparative Analysis with EU-GDPR*, Int'l J.L. & Legal Res. (2023).

border data transfer cannot be overstated; it is the cornerstone of enhanced government services and a catalyst for global cooperation. As we navigate an increasingly interconnected world, this approach is not just important; it is vital for driving innovation and improving the quality of life for citizens everywhere.[4] The future is undeniably tied to the digital realm we inhabit, where the distinction between the physical and virtual worlds is rapidly diminishing. Engaging in data exchange has emerged as a critical factor for fostering social and economic prosperity. Embracing transboundary data transfer is not merely a strategic choice; it is an imperative for governments committed to thriving in the 21st century. This paper unequivocally asserts that protecting data privacy as a fundamental right is essential. It will conduct a thorough analysis of India's privacy legislation to highlight key aspects that must be safeguarded. Furthermore, despite the existence of specific laws aimed at protecting personal data, many countries continue to struggle with effective implementation due to the lack of a unified legal framework. This situation clearly illustrates the urgent need for a comprehensive international structure to regulate cross-border data transfers. It is imperative that, to promote internet openness and foster consumer and corporate trust, the World Trade Organization (WTO) must revise its regulations to address the legislative challenges of the data-driven economy.[5] This study is organized into five distinct sections to effectively tackle the critical issues at hand. The first section serves as a straightforward introduction. In the second section, we assert the growing importance of the topic. The third section addresses cross-border data transfer, emphasizing its role in driving economic growth and supporting the rise of innovative services that propel global digitization.

The fourth section rigorously examines the various issues and challenges associated with the unrestricted transfer of cross-border data, including the safeguarding of data privacy and the essential balance between privacy, data sharing, and national security. This section thoroughly examines the legal frameworks in India that address the topic at hand. The conclusion of this paper decisively focuses on law and policy recommendations aimed at tackling global concerns regarding data privacy during data transfers. These measures are crucial for striking an effective balance between safeguarding privacy and maximizing the advantages of cross-border data exchanges.

Data sovereignty

Data sovereignty refers to the belief that data collected within a country's boundaries belongs to that country and is not subject to external control. The concept is that data has a national home. It is subject to the laws and regulations of the nation within whose borders it is gathered and processed. Based on the notion of indigenous data sovereignty, a nation has the right to oversee the acquisition, possession, and use of its own data.[6] In today's digital era, the significance of data sovereignty is increasingly recognized as the generation and collection of data continue to expand across various channels, such as social media, e-commerce, and mobile devices. Governments express a strong interest in safeguarding both corporate and private information while ensuring control over data that may have implications for national security. Consequently, discussions surrounding sovereignty and data localization are gaining prominence among the more delicate issues related to cross-border data flow. Many nations are considering or have introduced data localization laws that require specific types of data to be stored

[4] *Ibid.*

[5] Julien Chaisse, *The Black Pit: Power and Pitfalls of Digital FDI and Cross-Border Data Flows*, 75 World Trade Rev. (2022).

[6] Data Sovereignty, *available at*:"https://www.imperva.com/learn/data-security/data-sovereignty/"

within their borders, reflecting their commitment to protecting their citizens' information.[7] India is currently living in the digital age of "data colonialism," or "the unrestricted transfer of data from India" to the West and other nations, which poses serious threats to both national security and citizen privacy. The internet's worldwide reach makes it easier for people to share information across national boundaries, which encourages the proliferation of malicious AI-generated content, especially deepfakes, endangering people's privacy and dignity. The DPDPA's Section 16(1) allows for the blacklisting of nations that endanger people's privacy or national security. This is justified by the fact that data breaches might be caused by commercial companies, social media platforms, and techno-defense entities located in several nations. Data privacy shouldn't be used as a tool to attack nations' cyber-surveillance and intelligence networks. However, care must be taken to prevent data privacy from becoming a diplomatic ploy. Examining the events of June 2020, for example, when The New York Times reported on India's abrupt suspension of Chinese applications, alleging a threat to national security and sovereignty, suggests that the decision was made in response to previous border clashes.[8]

Data sovereignty is important for businesses; companies that operate in a country are required to abide by its data protection laws and regulations. This implies that they have to make sure that information created and gathered domestically is processed and maintained in compliance with regional regulations. There may be financial and legal repercussions for breaking these rules.[9] Data sovereignty allows businesses to maintain control over their data and ensure that it is protected from unauthorized access or breaches.

Factors that are driving the rise of data sovereignty as a critical issue are:

- National security: From a security standpoint, governments are constantly worried about safeguarding data that is considered sensitive. This issue is most pressing when it comes to defense, intelligence, and vital infrastructure data, where there is a significant chance of cyber-attacks.
- Privacy and data protection: As digital platforms proliferate, data exploitation and cybercrimes are on the rise, and numerous nations are passing data protection legislation to protect their citizens' privacy. Political and ideological concerns: Political ideology can also have an impact on data sovereignty. In order to preserve stability and uphold cultural norms, some governments seek to exert more control over data.

Cross - border data transfer

In a significant move, leading cloud service providers have united to establish the "Trusted Cloud Principles," a bold commitment to ensuring the highest standards of customer data security and privacy across national borders. A fundamental tenet of these principles highlights the critical role of government support in facilitating international data exchange, a key driver of innovation, efficiency, and security.[10] It firmly advocates for the elimination of restrictive data residency regulations. In our increasingly interconnected digital world, the distinctions between national borders are quickly

[7] Bolatbekkyzy G. Legal Issues of Cross-Border Data Transfer in the Era of Digital Government. *Journal of Digital Technologies and Law*. 2024;2(2):286-307. https://doi.org/10.21202/jdtl.2024.15.

[8] Mahek Sangwan and Sayed Kirdar Husain, 'Guarding The Data Frontier: Navigating Cross-Border Data Transfer Under Digital Personal Data Protection Act', *NLR BLOG BY NLIU LAW REVIEW,* 2024

[9] Magdalena Słok-Wódkowska & Joanna Mazur, *Between Commodification and Data Protection: Regulatory Models Governing Cross-Border Information Transfers in Regional Trade Agreements*, 37 Leiden J. Int'l L. 111 (2024).

[10] W. Gregory Voss, *Cross-Border Data Flows, the GDPR, and Data Governance*, 29 Wash. Int'l L.J. 3 (2024).

diminishing. There is a growing consensus that empowering cross-border data sharing not only fuels online commerce but also spurs robust economic growth. To realize this potential, it is imperative for governments globally to enact laws that not only safeguard individuals' privacy and personal data but also promote the free flow of information across borders. By doing so, they can create a dynamic environment where innovation thrives and prosperity is accessible to all.[11]

In today's digital world, where our lives are increasingly intertwined across borders, leading cloud service providers have come together to create the "Trusted Cloud Principles." This commitment is rooted in a genuine desire to ensure the security and privacy of your data, no matter where you are in the world. One important aspect of these principles is the recognition that government support for international data sharing is essential. It can lead to significant advancements in innovation, efficiency, and security, while also advocating against restrictive data residency rules. The lines between national borders are becoming less clear, and this creates both opportunities and challenges.[12] Allowing cross-border data sharing not only fosters online commerce but also boosts economic growth, benefiting us all. It is crucial that governments implement laws that protect your privacy and personal data, while simultaneously promoting the free flow of information. Together, we can create a safe and thriving digital environment that respects your rights and encourages progress.

The strong connection between cross-border data flows and global trade highlights how essential data transmission is to the remarkable growth of international commerce. In today's interconnected world, it is difficult to envision a global business transaction that does not involve the movement of data.[13] To harness the full potential of this relationship, it is vital to create a thoughtful legislative framework for the transfer of data across international borders. As global data exchanges continue to expand, prioritizing the development of robust regulations will help address important concerns such as privacy, data protection, and national security. By establishing strong safeguards for personal data during transfers, we can foster a secure environment that prevents misuse and encourages responsible data handling, ultimately contributing to economic success.[14]

A range of pivotal regulations, including the General Data Protection Regulation (GDPR) in the EU, the APEC Privacy Framework, and the Privacy Shield Framework between the US and the EU, empower businesses to engage in secure cross-border data transfers. However, any company handling the personal data of EU citizens—regardless of its location—must rigorously adhere to the GDPR. This comprehensive framework not only protects individual privacy but also establishes the highest standards for data transfer, ensuring that businesses operate responsibly in a global marketplace. Compliance with these regulations is not just a legal obligation; it is an essential commitment to safeguarding personal data and building trust with customers worldwide.[15]

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[11] *Ibid.*
[12] *Ibid.*
[13] Guan Zheng, *Trilemma and Tripartition: The Regulatory Paradigms of Cross-Border Personal Data Transfer in the EU, the U.S., and China*, 43 Comput. L. & Sec. Rev. (Nov. 2021).
[14] *Ibid.*
[15] Shakila Bu-Pasha, "Cross-Border Issues under EU Data Protection Law with Regards to Personal Data Protection", 26, Information & Communications Technology Law, 213 (2017).

In India, the Digital Personal Data Protection Act of 2023, known as the DPDP Act, decisively regulates the export of personal information from India. Section 16 of this Act emphatically addresses cross-border data transfers by tackling several critical issues:

- Section 16(1) grants the Union government the explicit authority to restrict the transfer of personal data outside of India by designating specific countries through a formal notice.
- Section 16(2) firmly establishes a link to existing laws by allowing the implementation of current and effective data protection measures.[16] Furthermore, Section 43A of the Information Technology Act of 2000 mandates the protection of sensitive personal data. It is essential to note, however, that India currently lacks a centralized regulatory agency specifically tasked with overseeing the protection of personal information. India continues to stand as a global frontrunner in Information Technology (IT) and business process outsourcing (BPO), with projections indicating that this dynamic industry will contribute a remarkable 8% to the nation's GDP by 2020. While there are some regulatory exceptions set forth by the Indian government, the Digital Personal Data Protection (DPDP) Act facilitates seamless cross-border data transfers to any country. The use of Standard Contractual Clauses (SCCs), Binding Corporate Rules (BCRs), and Transfer Impact Assessments (TIAs) mandated by the General Data Protection Regulation (GDPR) greatly simplifies the process of international data transfers, offering a clear advantage over the traditional, intricate adequacy framework. Moreover, to uphold legal obligations, data fiduciaries in India possess the authority to share personal information with the State or its representatives without the need for prior consent from the individuals involved. This practice is recognized as a legitimate use of data, allowing for efficient governance while maintaining essential safeguards.[17]

Moreover, the State and its agents have the opportunity to process personal data for legal purposes, as well as to protect national security, sovereignty, and public order, without needing to obtain consent or adhere to certain obligations outlined in the DPDP Act. While this exemption may create some challenges for EU exporters assessing the implications of the Schrems II ruling on data transfers to India, it also opens a dialogue about how various regulations can be navigated.[18] Additionally, the Board responsible for ensuring robust protection of personal data comprises individuals, including a chairperson appointed by the Indian government per the DPDP Act. It's noteworthy that, unlike the GDPR, the DPDP Act establishes a framework for imposing fines for violations and non-compliance that doesn't rely on the revenue of the organization involved. This approach may foster a more adaptable environment for compliance and accountability in handling personal data.[19]

The DPDP Act introduces a structured fine system for certain offenses, with penalties ranging from INR 50 crores to 250 crores (approximately 5 million to 25 million euros). Notably, unlike earlier versions of the Act, it does not delineate a maximum penalty for several offenses, including the failure to establish security measures and the obligation to notify the Board in the event of a data breach. Instead, the Act stipulates specific penalties for each individual offense, allowing for these to be consolidated to determine the overall maximum penalty.[20]

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[16] *Ibid.*
[17] *Id. at 14.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Id.* at 12

Guarding the data

Data is an incredibly valuable resource that includes a diverse range of information, from a nation's population statistics to personal details and proprietary government data. In today's digital landscape, data holds great power but also requires thoughtful protection. Just like a child visiting a friend's house, data needs to be safeguarded both in familiar settings and along the journey.[21] Recognizing data as the "modern-day gold," it's crucial to ensure its security, as it can be targeted by cyberattacks from advanced artificial intelligence. These attacks can compromise sensitive information and pose significant risks to the privacy of individuals and organizations. By implementing effective security measures, we can protect data and harness its potential responsibly, fostering a safer environment for everyone.

In today's digital landscape, crimes have transformed into online offenses that can undermine secure cyberspace. To address these challenges effectively, robust frameworks for data privacy are essential. The landmark 2017 Puttaswamy judgment[22] established a strong foundation for privacy awareness, extending its significance into the digital arena. Moreover, it's important to recognize that the digital world operates beyond national borders, a concept known as cross-border data transfer. This involves the movement of data across territorial boundaries or between different jurisdictions. Section 16 of India's data privacy legislation, the Digital Personal Data Protection Act, 2023 (DPDPA),[23] provides valuable guidance on managing these cross-border data transfers, paving the way for a safer and more secure online environment. Subsection 1 facilitates data transfers to any country, with the exception of those designated by the central government as being on the "blacklist." This prohibition on data transfers between blacklisted nations underscores a commitment to regulating cross-border data flows.[24] The government's proactive approach aims to strike a balance between data privacy and economic development, supported by the sector-specific flexibility provided in section 16(2). While this framework is a positive step forward, it also highlights the opportunity to address existing gaps in the DPDPA regarding cross-border data transfer, ultimately enhancing the regulatory landscape.

Beyond Borders

India is confronting a pressing issue of "data colonialism," where the unrestricted transfer of sensitive data to Western nations and others poses critical risks to both national security and the privacy of its citizens. The vast reach of the internet enables the cross-border sharing of information, thereby facilitating the rampant spread of harmful AI-generated content especially deepfakes that undermines individual privacy and erodes human dignity. To address these challenges, Section 16(1) of the Data Protection Bill[25] empowers the government to potentially blacklist nations that endanger the privacy of its people or pose threats to national security. This proactive measure is essential, as data breaches frequently originate from commercial entities, social media platforms, and techno-defense organizations operating in various countries. It is imperative that we safeguard our data and ensure the privacy of Indian residents against these global vulnerabilities.

[21] *Id.* at 10
[22] *Ibid.*
[23] *Ibid.*
[24] *Id.* at 16.
[25] *Ibid.*

Data privacy should never be weaponized against nations' cyber-surveillance and intelligence frameworks. It is vital to prevent data privacy from being manipulated as a diplomatic tool. Consider the events of June 2020, when The New York Times[26] revealed India's abrupt ban of Chinese applications, justified by claims of threats to national security and sovereignty. This decision seemed more a reaction to previous border tensions than a sincere concern for data privacy, casting doubt on the notion that only Chinese apps posed a risk. Therefore, we must advocate for a robust, impartial system that prioritizes data security and privacy while facilitating the free flow of information, all under a framework of strong legal protections. Such an approach is essential for fostering trust and protecting our digital landscape.

India's pivotal role in the global economy necessitates that the government carefully balance cross-border data transfers with the nation's economic ambitions. It is vital to prioritize the prevention of data breaches, as a report from the Reserve Bank of India reveals that these incidents cost the Indian economy an alarming average of $2.18 million in 2023-2024. With the potential to evolve into a trillion-dollar digital economy by 2025, and with discussions around achieving a $5 trillion economy also underway, it is imperative to foster global trade and economic growth.[27] This requires a flexible and proactive framework that empowers businesses to thrive and compete on the international stage. A mere 1% reduction in cross-border data flows could result in a staggering loss of approximately $696.71 million in trade for India, as highlighted by an analysis from the Indian Council for Research on International Economic Relations (ICRIER).[28] This stark warning underscores the potential devastation that stringent restrictions on data transfers could impose on India's trade landscape. Consequently, it is imperative that India's economic strategy and policies are informed by the flexible approach to cross-border data transfers established in the Digital Personal Data Protection Act (DPDPA). Ensuring the free flow of data is not just an economic necessity; it is a crucial driver of India's growth and competitiveness on the global stage.

Conclusion

Governments must take responsibility for developing a robust digital framework to manage cross-border data transfers, as the risks involved are comparable to those posed by viral epidemics that threaten nations. To eliminate uncertainties—such as the potential for receiving a "negative list" notification, the lack of clear guidelines, and existing flaws in the data transmission process—it is crucial to conduct a comprehensive review of the current framework. Protecting data and establishing explicit procedures with stringent criteria is not optional; it is essential to prevent data breaches that stem from the inadequacies of the existing system. This approach is vital for safeguarding both national security and individuals' fundamental right to privacy.

Privacy should never be sacrificed for the sake of accessing the internet. The Indian IT regime must take decisive action to secure digital data and guarantee its unrestricted flow without interference or illegal activities. The fundamental question is: can we trust that data is secure under the current framework, both during transmission and afterward? It is imperative that the administration has a robust solution in place. To uphold individuals' right to informational privacy, we must enact stringent laws

[26] *Ibid.*
[27] *Id.* at 13.
[28] *Id.* at 8.

regulating data transfer across national borders and make it unequivocally illegal to deceive or harm others through cybercrimes or any other malicious acts.

Data sovereignty and cross-border data flows are critical challenges confronting the global digital economy today. As businesses expand their operations across multiple nations, it becomes imperative to strike a decisive balance between the necessity of unrestricted data mobility and the need for robust national data security and sovereignty. Data sovereignty mandates that data be processed and stored within national borders to ensure compliance and safeguard sensitive information from unauthorized access. Consequently, the seamless flow of data across borders—an essential driver of global enterprise, innovation, and economic growth—is significantly obstructed. Moving forward, proactive worldwide collaboration and the establishment of comprehensive global privacy and data protection standards will dictate the future of data governance. We must implement a legislative framework that effectively balances national sovereignty with the imperative of data protection.

As a crucial hub for technological service outsourcing, India is actively drafting a data privacy law that will have a profound impact on cross-border data flows. The recent study by the joint parliamentary committee on the Personal Data Privacy Bill, 2019, clearly indicates that businesses will face significant risks if sensitive personal data is transmitted overseas, even to countries with robust data privacy regulations. In line with the European Union's approach, the bill permits the cross-border transfer of more personal data under intra-group arrangements, including legally enforceable corporate standards or standard contractual agreements sanctioned by the data protection authority.[29] It is imperative that the extent of the imposed restrictions is clarified without delay. The free movement of data across borders is increasingly threatened by the rising trend of data localization. Countries are imposing strict requirements for local data processing and storage, citing strategic, economic, privacy, or security justifications. However, these forced localization measures are more harmful than beneficial, acting as trade barriers that fragment the internet and stifle innovation. The proposed e-commerce policy in India, which mandates local mirroring of specific data, has faced significant opposition for these very reasons. In today's interconnected world, it is imperative to clearly define the limits of data sovereignty through decisive policymaking. The legal framework governing cross-border data transfer is rapidly evolving, and courts must assertively balance the fundamental right to privacy and data protection with other legitimate public and commercial interests to establish robust and effective standards. Technological advancements such as artificial intelligence, cloud computing, and the Internet of Things are presenting significant challenges that must be addressed. Engaging in decisive discussions among stakeholders—governments, businesses, technologists, civil society, and international organizations—is essential for finding effective solutions. Cross-border data transfers raise critical issues regarding the boundaries of corporate power, individual rights, and state sovereignty in our increasingly connected world. It is imperative to balance these conflicting interests in order to establish common standards. Achieving the right equilibrium between safeguarding the public interest and harnessing the vast economic and social benefits of cross-border data flows is not just important; it is crucial for our future.

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[29] *Ibid.*

IS INDIA READY FOR PRE NUPTIAL AGREEMENT: NORMS AND ETHICS

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Monika Agarwal**

Introduction

The term prenuptial agreement can also be referred to as a prenup. The prenuptial agreement is a legally binding contract entered into by a couple before they get married that establishes financial and property-related terms and conditions that will apply in the event of a divorce, separation, or death, explaining how obligations will be divided in those events[1]. In today's time, prenup agreements are becoming more common and relevant between individuals, due to the increasing number of divorces with significant assets or property. The prenuptial agreement is now increasingly acknowledged for their advantages. As societal norms and marital dynamics shift, it is essential to investigate how prenups can be seamlessly incorporated into the Indian legal system. In India, prenup agreements are relatively uncommon as they often run counter to traditional Indian customs and perspectives on marriage that is based on the personal laws based on which marriages are performed in India[2]. Marriages under the Indian laws are regarded as sacramental, any agreement that seemed to promote separation or contravene personal laws was deemed invalid. Unfortunately, this prenup agreement is not recognized in any Indian culture, and it is considered as a taboo and foreign concept. The issue is that people of India believe marriage is a sacred or holy union between two people and thinking about getting a divorce or even considering it is an ungodly reason. The Courts of India were against the prenups being executed between spouses and held that they run against the Indian Contract Act, 1872 for being against the Public Policy of India. Prenups are not just for the rich. While prenup agreements are often used to protect the assets of a wealthy spouse from their partner. Couples of more modest means increasingly turn to their own partners/spouse for their own purposes. There are many reasons some people want a prenup, they are:

Passing down separate property to children from prior marriages in case of demise, Without a prenup agreement, a surviving spouse might have the right to claim a large portion of the other spouse's property, leaving much less for the children from their previous marriages. It may use to spell out what will happen to their property when they die, so that they can pass on separate property to their children and still provide for each other.

Clarify financial rights to each other's, Couples with or without children, may spell out how they'll manage their joint bank accounts, credit cards, household bills, and savings. Or in case when one spouse plans to put the other through further studies.

Avoid arguments in case of divorce, many couples to avoid potential arguments in a future divorce, they specify in advance how they'll divide their property, and whether or not either spouse will receive alimony. These couples recognize that divorce is a possibility when they're about to get married though no one wants to think about it.

Get protection from debts with spouse's finance, Couples may want to use a prenup to protect themselves from each other's debts, especially school loans and medical debt etc.

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Indian marriages and its impact in prenuptial agreement

India is a country where our beauty lies in diversities due to which we have different norms and ethics. If we look at our marriage culture, all religions have their own norms and laws. For instance, Hindu marriages are considered to be sacrament however in case of Muslim marriages (Nikah) are considered a contract, not a sacrament. In a country like India, prenuptial agreement is treated as a taboo topic as most people assume it to be a part of a divorce procedure. It also defies our norms and culture due to which people find it difficult to accept it and one cannot ensure whether it can be used a protective measure for our assets as there is no law enforced for pre-nuptial agreement in our country. Now the main question is, 'Is pre-nuptial agreement really defying our cultural norms and ethics?', and the answer will be the perspective of our society. In our today's world, divorce rates are increasing and the backlogs of cases are the living proof and why we need to consider prenuptial agreements before our marriages.

Relevant laws with Prenuptial Agreement

Matrimonial laws and prenuptial agreements are found in many nations, including Canada, Italy, and France. Although there isn't a specific law in India that regulates prenuptial agreements, the **Indian Contract Act of 1872** would nonetheless apply if such agreements were to be taken into consideration here. Agreements signed with the free consent of the parties are to be regarded as contracts, according to **Section 10** of the **Act, 1872**. **Section 23** of the same Act, however, makes prenuptial agreements null and unenforceable due to their immorality and violation of public policy. It is important to note that in India, prenuptial agreements are only regarded as regular contracts. Because Goa adheres to the **Portuguese Civil Code of 1867**, it is the only state where prenuptial agreements are binding. Prenuptial agreements may be enforceable under the **Special Marriage Act of 1954** provided that all of the paperwork needed to declare a marriage is filed at the Registrar's office.[3]

Need of Prenup in Today's Era

In our modern times, one of the most complicated procedures is related to property matters. The proceedings of the cases go on for year after year due to which the parties to the suit face several complications and it leads to the backlogs of cases. Now, you might be wondering why we are discussing the issue related to the property in the matter. As we have witnessed that during the divorce proceedings, the matter related to the distribution of properties as well as how to determine appropriate maintenance. However, with the introduction of prenup, one can take precautionary measures and it can also help the court proceedings to carry on in a smooth and efficient manner. Moreover, if the prenup is not taken as a stigma in our present society, the partners who are solemnising the marriage can ensure their future together which can also be a factor to gain trust between each other. Looking at the positive side, it also means that both the parties are serious about marriage by signing up for a prenup, they are ensuring each other's future and if unpredictable circumstances arise, they take the help of the prenup as a corroborative form of evidence. By drawing a prenup, partners can ensure their promises in written form, in the same way, they promised to share their happiness and sadness in a sacramental conduct. The rising of mental cruelty between the partners have become a major factor which led to the dissolution of the marriage and it can also to some extent can be solved by drawing up a prenup before the marriage as it will help both the partners to know each other in a formal way and can avoid unwanted discomfort. Even after the consummation of marriage, if a child is born out of

wedlock, the child can be co-parented by both the partners if agreed in the prenup and it will also to some extent relief the child from mental agony. As we have seen that clarity of finances between the partners can solve the major problem that may trigger distort in their relationship and having a document that can clarify the trust between the partners can also help to ease the discomfort in the relationship.

Comparative Analysis of Prenup with other parts of the world

For a country like India, prenup is still a new concept and people are still not familiar with it. But if we look with the perspective from the other side of the world, we can understand more and why India is ready or not for prenup. These are some comparative studies that we have done in order to analyze the concept of prenup for efficiently and effectively: -

India -Vs- China

A prenuptial agreement is also frowned upon in China since it shows a lack of faith in the institution of marriage and mistrust between a couple. Due to the rapid growth in the economic sector, the mindset of the people of China has been changing. A 2011 survey by the Beijing-based Horizon Research Consultancy Group found that about 90% of single people disapproved of the idea, and less than 5% of couples in China's top cities signed a prenuptial agreement. However, a prenuptial agreement is legally enforceable in China by Article 16 of the Marriage Law of the People's Republic of China.

India -Vs- Canada

In Canada a prenuptial agreement is also known as antenuptial agreement or premarital agreement. The prenup agreements are enforceable in Canada, though the Divorce Act, 1985 does not consider that premarital agreements be fulfilled. The factors to be taken into account during the divorce, such as while determining the average amount of child support or spousal support to be awarded. In matters relating to child custody during a spouse's divorce, Canadian courts tend to approve prenuptial conditions so long as it is for the maximum benefit of the child. Comparing Canada, India Goa's Civil Code can be said to be similar to the Family Law Act of Canada in terms of distribution of property. Goa's Portuguese Civil Code too focuses on 'communion of assets' i.e. equal division of assets as the default rule and necessitates consent from both spouses for alienation of property consent but at the same time, also allows for customized separation of assets based on prenuptial agreements. Similar to the operation of Canadian law, prenuptial agreements are legally recognized under the Civil Code in Goa for demarcating asset distribution on divorce and in the absence of such an agreement, the law relating to community property law of equal sharing of assets takes effect[4].

India -Vs- New Zealand

The prenuptial agreements are enforceable in New Zealand. In New Zealand the Property (Relationships) Act states that if the spouses have lived together for three years or more, all "relationship property" will be split equally, subject to a few exceptions because they believe equal status between the spouse and equal contribution of the partners into the relationship. New Zealand has a 'zero-fault' law where it doesn't matter if one person is more responsible than the other for the breakup of the relationship. There is also a believe that caring for children or running a home (which are unpaid work) are equally valuable as paid work/earning spouse. Therefore, a prenup in New Zealand legally excludes both parties from the obligations of the Property (Relationships) Act. There a couple's prenup sets out their rights to property, debts, income and other assets that have been purchased together or acquired

individually, should the relationship end. In terms of the status, ownership, and division of their property, including future property, married and de facto couples are specifically permitted to enter into opt-out agreements under **Section 21 of the Property (Relationships) Act 1976**.

India -Vs- Germany

The prenuptial agreements are enforceable in Germany, together with many barriers. A prenup agreement must be executed before a notary. A prenuptial agreement in Germany legally regulated by **Section 1408 of the German Civil Code.** A prenup agreement can help to avoid potential conflicts and prolonged legal disputes in the event of divorce. By setting out the financial arrangements in advance, clear rules are created for the division of properties. This significantly reduces the emotional strain associated with separation and focuses on finding a rational solution. Individually adapted solutions are agreed upon in a prenup agreement. If the business assets of a spouse and all their associated values are excluded from the accrued gains. Then the partner's claim to accrued gains is limited to private assets. Instalment payments are agreed between the spouse so that equalization awards are not due immediately and the both the spouse may agree on a different, lower percentage for the division of the gain than the statutory 50% so a lump sum be fixed as a compensation payment. The spouse usually decides on the co-ownership share in the joint marital home and maintenance claims are negotiated in advance. Since matrimonial laws are governed locally, each country has its own procedures and legal concepts to address a spouse's property and inheritance rights. The criteria for enforcement vary among different jurisdictions. Whereas, some countries have well-developed laws governing prenuptial agreements, others are much less developed, and it is common for the court's position in various jurisdictions to diverge on the treatment and enforceability of prenuptial agreements.

Downside of Prenuptial agreement

So far, we have witnessed that prenuptial agreement can benefit all the couple as it protects our assets and helps to ensure speedy procedure of law. However, certain factors are there which hamper the implementation of it. These are as follows: -

1. Against Public Policy: It is often considered to be against public policy as it hampers the sanctity of marriages. The court ruled in the case of **Krishna Aiyar v. Balammal** [5] that the prenuptial agreement is invalid, stating that it violated the sanctity of marriage and the right granted to spouses under Hindu law.

2. *Uncertain enforceability:* In order to be a contract, it must be certain, however, prenuptial agreements are uncertain in nature; the court only takes into consideration when full disclosure and mutual consent arrived by both the partners.

3. Misuse by the dominant partner: As there is no proper statutory law for prenuptial agreement, the dominant partner in the relationship may misuse it as an easy way to flee from the responsibility which arises after the dissolution of marriage.

4. Rise of Coercion: The question whether the agreement between the partners was voluntarily or not cannot be determined as there is no law especially in India for prenuptial agreements.

5. Social Stigma: The sigma that is attached with prenuptial agreement is that it is a starting point of divorce and in order to change the perspective, one needs to have proper knowledge and awareness but due to lack of certainty, it is difficult to go against the stigma and public opinion regarding it.

The above mentions are some downsides of prenup and with that we also know why we need proper law for it and if we look into the matter, we can understand the very aspect that all factors point toward

one common need that is proper law for the implementation of prenuptial agreement. In India, without proper law authority, it is difficult for a country like India to come forward and accept the concept of prenuptial agreement.

Case Study related to Prenuptial Agreement

Certain case studies will help us to understand how in a country like India, prenuptial acted as protective measures as well as why there is insufficiency awareness due to which it is difficult to accept the concept in India. Let us read some case studies in this article-

In the case of ***Pran Mohan Das v. Hari Mohan Das***[6], The plaintiff was unable to regain the property when the Calcutta High Court upheld the validity of a prenuptial agreement, highlighting the principle of "part-performance of a contract." Furthermore, the agreement in question was not deemed to be against public policy because it was not a marriage brokerage contract.

In the case of ***Mohd. Khan v. Mst. Shahmal***[7], The husband consented to live as a khana damad in his wife's father's home on the understanding that he would have to pay for the wedding costs if he left. When he returned after fleeing for four years, he was asked to cover the wedding costs. The husband argues that the contract is void. Citing the widespread custom of khana damad, the Jammu & Kashmir High Court maintained the legality of the agreement, ruling that it did not contravene Muslim law because the husband had not fulfilled his obligation.

According to the Calcutta High Court in the landmark case of **Tekait Man Mohini Jemadi V. Basanta Kumar Singh**[8], prenuptial agreements are invalid because they go against the nation's religious and public policies.

Conclusion

The term “prenup” is not a common notion in our country. The norms and ethics which hold our traditional and cultural values contradict the concept of prenup. Now the important part is whether our country is ready for prenup and if so then why. It can be seen that more people are leaning toward a rational approach when it comes to dissolution of marriage. As it can be observed so far from our article is that India needs enforceable law for smooth and efficient function of prenup along with that we need more awareness regarding the concept of prenup. In the future, there is no doubt that prenup is going to be the first marital step before the solemnization of marriage. Moreover, it can be concluded by saying that in India, a new concept like prenup needs time and patience in order to be fully accepted by our people and with laws which will help to regulate it more effectively and efficiently.

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[4] https://nujslawreview.org/wp-content/uploads/2019/12/12.2-Ghosh-Kar.pdf
[5] (1911) ILR 34 MAD 398.
[6] AIR 1925 Cal 856
[7] AIR 1972 J&K 8
[8] (1901) ILR 28 Cal 751

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THE COMPLEX INTERCONNECTION BETWEEN THE NOTIONS OF DEMOCRACY AND THE RULE OF LAW

Archana Punja Rupwate*

Introduction

As observed by Ferejohn and Pasquino, democracy and the rule of law are both desirable characteristics of a political system and must be achieved simultaneously for the establishment of good governance and a healthy democracy.[2] In a democracy, the rule of law is crucial as it asserts that neither the government nor the people are above the law. Democracy implies "rule by the people," and the rule of law aids in granting such power to its citizens by limiting political power. Hence, as noted by Itse E. Sagay**,** "There can be no democracy without the rule of law."[3] The United Nations General Assembly has also reiterated that human rights, the rule of law, and democracy are all interconnected and mutually reinforcing.[4] In this article, I will explore the complex relationship between democracy and the rule of law by providing an analysis of two states, focusing on the experiences of two significant nations: the Republic of India (herein referred to as India) and the People's Republic of China (herein referred to as China). Despite their different political frameworks and democratic systems, both countries provide valuable insights into how democracy and the rule of law interact in practice.

Definitions of democracy and the rule of law:

A. Definition of Democracy:

The traditional definition of democracy, as articulated by Abraham Lincoln, is *"government of the people, by the people, and for the people."* However, there are many definitions of democracy in the contemporary world,[5] and it's not as simple as this term implies. Collier and Levitsky's definition, for example, applies to nearly all nations to analyze democracy by classifying it into six main categories: non-democratic, electoralist, procedural minimum, expanded procedural minimum, prototypical conceptions of established industrial democracy, and maximalist democracy. These categories are based on particular conceptual principles, including the necessity for free, fair, and reasonably competitive elections, basic civil liberties which includes freedom of speech, freedom of assembly, freedom of religion, the right to a fair trial, and protection from arbitrary arrest and detention, effective governance, and other additional features.[6]

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[2] Ferejohn, J. & Pasquino, P. (2003), "Rule of Law and Rule of Democracy", in A. Przeworski A. & J. M. Maravall (Eds.), Democracy and the Rule of Law, Cambridge University Press: New York, pg. 242.

[3] Itse E. Sagay, "The Travails of Democracy and the Rule of Law" in Democracy and the Rule of Law, Ibadan: Spectrum Books Ltd, Nigeria, 1996, p. 13.

[4] United Nations General Assembly Resolution, (A/67/L.1), 19 September 2012, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/478/66/PDF/N1247866.pdf

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[6] David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research', World Politics, Vol. 49, No. 3 (1997), pp. 430–51.

Overall, democracy is about safeguarding the best interests of the people, regardless of their race, gender, political views, or religion. A truly democratic government must operate in a manner that reflects the wishes, feelings, desires, and values of the society it governs. This concept, known as the general will, was developed by the renowned Swiss philosopher Jean-Jacques Rousseau.

B. Definition of Rule of Law:

According to the United Nations Secretary-General, the rule of law is a concept of governance in which all individuals, groups, and organizations—public and private, including the State itself—are subject to laws that are publicly declared, uniformly applied, impartially arbitrated, and consistent with international human rights standards.[7] Similar to democracy, the rule of law has multiple definitions, but the UN's definition is particularly relevant to the contemporary world. The rule of law is essential for building the social compact between the people and the state, limiting corruption, preventing the misuse of authority, and enabling people to access public services, and is necessary to establish international peace, security, and political stability.[8] The rule of law is an important characteristic of democracy, and for the formation and pursuit of good democratic governance existence of the rule of law is imperative. Without the rule of law, there can be no democratic society, as noted by Itse E. Sagay.[9] However, the rule of law cannot be confused with the rule by law. The distribution of power is what distinguishes "rule of law" from "rule by law" as an institutional equilibrium.[10]

Democratic system in India and China:

A. Political structures, electoral processes, and governance between India and China:

India, one of the largest democracies in the world, is governed by a multiparty parliamentary system where free and fair elections are held regularly to protect individual liberties and rights guaranteed by the Constitution of India, 1950.[11] The Prime Minister is the head of government, and the President is the head of state. Legislative representation is ensured by a bicameral parliament consisting of two houses: the Lok Sabha and the Rajya Sabha.[12] In contrast, China is considered one of the least democratic nations in the world with an authoritarian political system.[13] However, China claims that it has a "socialist democracy with Chinese characteristics", a political structure that makes a clear distinction from liberal democracies in the West. China operates under a centralized one-party system led by the Communist Party of China (CPC),[14] which exerts substantial control over political and economic policies. While the National People's Congress (NPC) is the highest state body, the CPC maintains significant influence over legislative processes to enforce party policies, reflecting a system focused on centralized authority and party control rather than pluralistic democracy and separation of

[7] U.N.Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 6, U.N. Doc. S/2004/616 (23 August 2004).
[8] Ibid.
[9] Supra Note. 2.
[10] Maravall, José María & Przeworski, Adam (2003), "Introduction", in Maravall, J.M. & Przeworski, A. (eds.), Democracy and the Rule of Law, Cambridge: Cambridge University Press, pp. 1-14.
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[12] Ibid.
[13] A News article written in Aljazeera by Erin Hale Published On 7 Dec 2021. Available at. https://www.aljazeera.com/news/2021/12/7/china-claims-to-have-democracy-that-works-ahead-of-biden-summit
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powers.[15]

In China, the Communist Party of China (CPC) is the sole ruling party. Although there are smaller allied parties, they do not contest CPC leadership. The National People's Congress (NPC), with around 3,000 members, is the highest legislative body. Members are chosen every five years through an indirect electoral process involving multiple levels of regional congresses. Local People's Congresses are directly elected, but higher-level congresses like the NPC are elected by the congresses below them. The CPC controls candidate selection and election outcomes through this multi-tiered system.[16] In contrast, India conducts regular, free, and fair elections at multiple levels, and the Election Commission of India (ECI) is an independent constitutional authority responsible for administering elections. Parliamentary as well as state and local elections are held every five years through a direct voting system.[17], [18]

B. Comparative Effects on Government and People:

When comparing the effects on government and people between India and China, distinct contrasts emerge. In India, the democratic system fosters accountability, transparency, and legitimacy through regular elections and a multi-party-political landscape, promoting diverse representation and robust debate. Citizens enjoy extensive civil liberties, including freedom of speech and a judiciary that safeguards individual rights, despite challenges such as bureaucratic inefficiencies and corruption. However, issues like poverty and inequality persist, hindering the full realization of democratic ideals for all. Conversely, China's centralized governance allows for swift policy implementation, driving remarkable economic growth and infrastructure development, which has significantly improved living standards and lifted millions out of poverty. The political stability ensured by the Communist Party of China (CPC) contrasts sharply with India's coalition politics, yet it comes at the expense of political pluralism and transparency. Government power remains unchecked, with concerns over corruption and human rights abuses, including restricted freedoms of speech and assembly. Such constraints impact personal freedoms and contribute to ongoing human rights challenges, despite economic advancements. According to the Economist Intelligence Unit’s Democracy Index 2023, China and India, the world’s most populous countries, recorded the biggest score improvements in the region in the Democracy Index. China is an “authoritarian regime” with a very low score (2.12) and rank (148th) in the Democracy Index, while India is classified as a “flawed democracy” with a fairly high score (7.18) and ranking (41st).[19]

The rule of law in India and China:

The Indian Constitution is the supreme law of the land, and all other laws must be consistent with it, which establishes the framework for governance and safeguards fundamental rights. An independent judiciary makes sure that everyone has access to equal fundamental rights and monitors the other branches of government, such as the executive and legislative, and the judiciary can strike down the

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[18] The constitution of India, 1950, available at https://legislative.gov.in/constitution-of-india/.
[19] The Economist Intelligence, Democracy Index 2023.

laws and actions that contravene the Constitution.[20]
In 2023, India ranked 79 out of 140 countries, with a score of 0.49 in the Rule of Law Index 2023 by the World Justice Project. This was a significant increase in India's ranking since 2015.[21]
The Communist Party of China (CPC) has been the only ruling party in China for decades, with an authoritarian political system, which indicates that China is a dictatorship. Compared to India, China's ranking is quite low i.e 97 out of 140 countries with a score of 0.47 in the Rule of Law Index 2023.

Interconnection between democracy and the rule of law

A. Democracy and the rule of law are interdependent:

The interdependence between democracy and the rule of law is essential for a legitimate and effective government. The rule of law is essential to democracy, which entails citizen engagement in governance through free and fair elections, to ensure that government actions are conducted within a legal framework that respects human rights and fundamental freedoms. In turn, democratic principles that promote transparency, accountability, and the protection of individual rights reinforce the rule of law. Because of this interdependence, a political system was created in which the people have the authority to hold their leaders accountable and the government's power is constrained by law.[22]

B. The Rule of Law: A Pillar of Democracy and Good Governance:

Ensuring the protection of political and civil liberties, which have emerged as universal human rights over the past fifty years, is essential for the law to effectively uphold the rule of law.[23] By linking these fundamental rights to the rule of law, it becomes clear that the rule of law is a vital cornerstone for democratic governance, especially for liberal democracy.[24] Maravall and Przeworski argue that for even the most basic form of democracy to exist, at least one rule must be observed: the rule that determines which political party should occupy the office of government. Consequently, both the government and the people must respect these laws, as any failure to do so fundamentally undermines the existence of a democratic state.[25]Impartial and unbiased law enforcement, along with an independent judiciary capable of evaluating the constitutionality and legitimacy of legislative and executive actions, are essential for upholding the rule of law and ultimately for good governance and democracy.[26]

C. Prevent political abuse of power:

Preventing political abuse of power necessitates the application of the rule of law. This involves developing a precise legal framework that defines and limits governmental authority, ensuring laws are

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[26] J. R. Reitz, 'Constitutionalism and the Rule of Law: Theoretical Perspectives', in R. D. Grey, ed., Democratic Theory and Post-Communist Change (Upper Saddle River: Prentice Hall, 1997), p. 113.

applied uniformly and transparently. It also necessitates adherence to principles such as legal supremacy, equality before the law, accountability, fairness in legal application, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and both procedural and legal transparency.[27] In a healthy democratic system, people have two main tools to protect their rights: first, by voting rulers out of office at election time to prevent abuses and ensure autonomy in decision-making; and second, by enforcing legal limits on political discretion through institutions between elections.[28]The rule of law is further supported by regular, fair elections, which ensure that government actions are scrutinized and officials remain answerable to the public.[29] Anti-corruption measures, such as strict regulations and investigative bodies, are necessary to combat and punish corrupt practices.[30] An independent judiciary is essential to impartially adjudicate disputes and review government actions.[31] Transparency and accountability mechanisms, such as open government initiatives and mandatory disclosures, help hold officials accountable.[32]

D. Misuse of the rule of law:

Politicians have the ability to subvert democracy and the rule of law in specific political and institutional contexts. However, there are also circumstances in which politicians judicialize politics to influence democratic competition outcomes while upholding democracy and the rule of law. Such strategies include the use of courts to criminalize political adversaries.[33] For instance, India is the best example of this situation, though India is one of the biggest democracies in the world. The Bharatiya Janata Party (BJP), a current ruling party for a decade in India, has been using the law and judiciary to weaken the opposition party leaders by putting them in jail for economic offenses. For example, P Chidambaram,[34] Chagan Bhujbal,[35] and many more have either changed parties or gone to jail.

E. Existence of the rule of law in non-democratic States:

Most non-democratic states rule by law; however, according to Robert Barros, there are situations in which autocratic leaders could be governed by laws they have created themselves, which is a type of unique rule of law. Barros cites the military dictatorship in Chile under General Augusto Pinochet's Military Junta Government as an example, which witnessed some adherence to the rule of law from 1973 to 1990.[36] China is another example of a similar scenario.

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Conclusion

The rule of law is essential to the establishment of both a healthy democracy and good governance because it is one of the key elements that ensures government accountability and transparent operation of the three branches of the democracy, the legislature, the executive branch, and the judiciary. Nevertheless, continuous oversight and assessment of one branch's operations by the other branches is necessary to preserve good governance.

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CHARTING A NEW COURSE: PROPELLING INDIA'S FINANCIAL REGULATION WITH A SUPER REGULATOR

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Introduction

Within India's complex regulatory landscape, a persistent issue arises: the lack of unified oversight. This article delves into the discourse surrounding the necessity, advantages, and potential drawbacks of implementing a super regulator in India. Initially, it explains the concept of a super regulator and discusses the reasons behind its establishment. It then analyzes the pros and cons associated with this model, considering its effects on regulatory efficiency, accountability, and sectoral autonomy. A significant aspect of this exploration lies in examining instances where regulatory bodies in India have clashed over jurisdictional boundaries, highlighting the challenges arising from regulatory fragmentation. Additionally, alternative approaches to establishing a super regulator are discussed, ranging from a centralized authority with broad oversight powers to a decentralized network of specialized regulatory agencies operating under a coordinating body.

The article advances a compelling argument for instituting a super regulator in India, aiming to streamline decision-making processes, enhance regulatory coherence, and promote consistency in enforcement mechanisms. Furthermore, various models for establishing a super regulator in India are assessed, with a focus on structural frameworks, governance mechanisms, and accountability structures. Ultimately the authors make an attempt to propose a roadmap for creating a super regulator in India, outlining key principles, institutional arrangements, and transitional measures required for its implementation. By offering practical solutions grounded in empirical evidence and stakeholder consultations, the article seeks to foster informed discourse and policy action towards achieving a more cohesive and responsive regulatory regime in India.

What is a super regulator and the requirement of a super regulator

The recurring issues with financial innovations have always posed a juridical issue due to which government exchequer and public have suffered heavy losses at the outset and sometimes even resentment in the business community as observed in the SEBI Sahara case.[2] The idea of a super regulator supposes that a unified authority is set up which looks into the plethora of issues posed by rapid and rampant development financial instruments. A super regulator would firstly reduce the ambiguity pertaining to juridical issues and secondly, provide economies of scale when it comes to adjudication of financial sector.[3] The idea of a super regulator was contemplated previously in the Report of the Financial Sector Legislative Reforms Commission wherein the commission opined that

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[2] 'SEBI - Sahara Dispute - the Long Battle Still Continues - Securities - India' (SEBI - Sahara Dispute - The Long Battle Still Continues - Securities - India, 17 November 2015) <https://www.mondaq.com/india/securities/443906/sebi---sahara-dispute---the-long-battle-still-continues> accessed 2 March 2024

[3] Abrams, R.K., 2000. 6 Issues in the Unification of Financial Sector Supervision. In Building Strong Banks Through Surveillance and Resolution. International Monetary Fund.

considering the aftermath of the 2008 crisis, India requires a super regulator. The committee critiqued the incompetence of the current system in the following manner:

> *"Through its own deliberations, research, and interactions with various experts, the Commission was convinced that the current regulatory financial structure of the Indian financial sector regulation is not only fragmented, but also fragile. This is evident from the fact that there is no uniform philosophy of regulation; different regulators approach similar issues in different ways. The financial sector lacks a uniform legal process, uniform appellate mechanism, and a uniform appointment process. This lack of coherence in the philosophy of regulation is a fundamental weakness of the regulatory architecture."*[4]

The committee highlighted 11 reasons which exposed the shortcoming of the current financial regulatory framework of India, which the authors speculate to re-emerge in light of the development in financial innovations:

1. The legislative framework of India's financial sector is complex and outdated, requiring urgent overhaul. Views differ on whether a complete overhaul or significant amendments are needed.

2. The regulatory structure is fragmented, leading to confusion and potential issues. Experts express a need for greater consolidation, clarity in purpose, powers, and accountability for regulators. Existing authorities, however, advocate for maintaining the status quo.

3. The current architecture hampers global coordination in addressing financial issues, requiring a stronger framework. Tools for handling global financial shocks and systemic risk are in development. A streamlined structure is essential for addressing issues like terrorism globally.

4. Consumer protection in the financial sector needs improvement due to low financial literacy and unclear regulations. Emphasis is on placing consumer protection at the core of financial regulation, addressing both preventive and curative aspects.

5. The current architecture leads to conflicts and turf battles among regulatory authorities. Clarifying statutory provisions, streamlining the regulatory structure, and removing conflicting functions are recommended to enhance market development.

6. Debates surround adopting a principles-based approach to regulation to minimize frequent amendments and regulatory uncertainties. Harmonizing and consolidating limited regulatory capabilities are proposed to administer this approach effectively.

7. Regulators should encourage sectoral competition, while economy-wide competition issues should be handled by the Competition Commission. Greater institutionalized collaboration between the Competition Commission and sectoral regulators is recommended.

8. Views on the effectiveness of the Consumer Protection Act's redress mechanism vary. Some suggest strengthening the existing framework under regulators, while others propose consolidating the consumer redress mechanism into a single agency for the financial sector.

[4] Report of the Financial Sector Legislative Reforms Commission (2013).

9. Opinions differ on retaining sector-specific regulators, with arguments for and against separate regulation of commodity markets. Consolidated regulation of organized trading is deemed necessary for effectiveness.

10. Strengthening the corporate governance process of regulators is emphasized, focusing on appointments, tenure, compensation, and skill development. Regulatory expertise is considered scarce, and a new culture should be established.

11. Views on transition arrangements range from gradual to sudden shifts. Gradual transition supporters argue for organizational adjustment, while sudden shift advocates believe flexibility could dilute efforts toward institutional restructuring.

The mention of super regulator also found place in the Khan Working Group report however the super regulator mentioned here differed from the FSLRC report on basis of the functions. The super regulator mentioned in this report was limited to supervisory and co-ordination function among the regulators, limited to banking sector, rather than a unified institution which has an overarching jurisdiction on all entities in the financial ecosystem. Super regulator also found mention in the speech by Y V Reddy, then Deputy Governor of RBI where he suggested a super regulator.[5] However, Reddy did not recommend a super regulator for the Indian financial system. Instead, he desired to explore the possibility of umbrella regulatory legislation which could create an apex regulatory authority without disturbing the existing jurisdiction.

The arguments in favor of a super regulator

In an increasingly complex global landscape, the idea of a super regulator presents a promising solution for overcoming the limitations of fragmented regulatory systems. By centralizing oversight and coordination, a super regulator can enhance consistency, reduce inefficiencies, and address regulatory gaps. Below are key arguments of in favor of establishing such a unified regulatory body.

1. *Economies of Scale:* When regulatory functions are unified, there is an opportunity to achieve economies of scale. This means that the regulator can optimize its operations by sharing common infrastructure, administration, and support systems. This consolidation enables the regulator to operate more efficiently, reducing redundant expenses and improving overall cost-effectiveness.

2. *Benefits for Regulated Units:* The consolidation of regulatory oversight is advantageous for the entities being regulated; especially financial conglomerates involved in diverse activities. Unification helps these supervised firms by streamlining the regulatory process. Dealing with a single regulator reduces the complexity and costs associated with adhering to various regulatory requirements, promoting a more seamless regulatory experience for the regulated units.

3. *Enhanced Accountability:* Unifying regulatory functions enhances accountability within the financial system. The complexity of a multiple supervisory system often results in unclear delineation of roles and responsibilities. By having a single regulatory authority, the lines of

[5] "Issues in Choosing Between Single and Multiple Regulators of Financial System," Speech by Dr Y V Reddy, Deputy Governor, Reserve Bank of India.

accountability become clearer. This clarity is crucial for ensuring that regulatory responsibilities are well-defined, leading to increased transparency and accountability.

4. *Avoidance of Regulatory Arbitrage:* Regulatory arbitrage refers to the manipulation of regulatory differences to gain a competitive advantage. Unification helps prevent this by establishing a consistent regulatory framework. In a scenario with multiple regulators, there is a risk of competitive inequalities, where similar entities offering comparable products or services may be subject to different supervisory standards. A single regulator mitigates this risk and fosters fair competition.

5. Pooling Supervisory Resources: Consolidating regulatory functions reduces the overall number of regulatory bodies, allowing for the pooling of supervisory resources. This is particularly beneficial in specialized areas where expertise is crucial. By centralizing resources, the regulator can allocate them more effectively, ensuring that the supervision of specific sectors or activities benefits from concentrated and specialized attention.

6. *Effective Response to Market Innovation:* A single regulator is better positioned to respond swiftly and effectively to market innovations and developments. This is because the absence of multiple regulatory bodies reduces regulatory grey areas and provides a clear and unified approach to addressing emerging trends. The streamlined decision-making process enables the regulator to adapt its regulatory framework more efficiently to changes in the market.

7. *Facilitation of International Cooperation:* Unification serves as a catalyst for international cooperation. With a single point of contact for regulatory issues, communication and collaboration with international counterparts become more straightforward. This is particularly relevant in the context of developing countries where a unified regulatory approach enhances the country's standing in international financial circles and facilitates smoother engagement with global regulatory bodies.

The arguments against a super regulator in the report were: While the concept of a super regulator offers several potential benefits, it also raises significant concerns. Centralizing regulatory authority could lead to increased bureaucracy, reduced flexibility, and the risk of concentrating too much power in a single entity. These challenges may impact the responsiveness and adaptability of regulatory frameworks. Below are key arguments outlining the potential disadvantages of implementing a super regulator.

A. *Lack of Clarity in Functioning:* Unification of regulatory bodies may result in a lack of clarity in their functioning, as different regulators often have distinct objectives. For example, one regulator may prioritize depositor protection for banks, while another may emphasize investor protection for capital markets, and yet another may focus on consumer protection for other financial firms. The diverse objectives of multiple regulators could lead to confusion and challenges in harmonizing regulatory approaches across the financial sector.

B. *Concentration of Power:* Concentrating regulatory power in a unified body raises concerns about the potential erosion of democratic principles. This is because a concentration of power in a single regulatory entity may limit checks and balances, potentially allowing for unchecked authority. Such concentration poses the risk of regulatory decisions being influenced by a small group, undermining

the democratic ideals that aim for a broader and more diverse representation in decision-making processes.

C. *Diseconomies of Scale:* While it is expected that a super regulator will lead to economies of scale, there may be diseconomies associated with the unification of regulatory functions. Monopolistic organizations, often characterized by large and broad-based structures, can become more rigid and bureaucratic. The sheer size of a unified regulatory entity might hinder its agility and effectiveness in responding to the dynamic and evolving nature of the financial system.

D. *Unintended Consequences on Creditor Protection:* Unifying regulatory oversight may lead to the unintended consequence of the public assuming that all creditors of supervised institutions will receive equal protection. In reality, different financial institutions may have varying risk profiles and business models, making it challenging to provide uniform protection to all creditors. This misconception could result in unrealistic expectations and misunderstandings about the level of protection afforded to different types of creditors.

E. *Divergent Focus of Supervisors:* The focus of regulators overseeing banks, securities, and insurance may differ significantly. In attempting to pool skills and resources, the expected synergy may not materialize due to these divergent focuses. Each sector requires specialized knowledge and tailored regulatory approaches. Attempting to homogenize objectives and skills across different financial sectors might undermine the effectiveness of supervision and regulation in addressing the unique challenges faced by each sector.[6]

When the Behemoths Clash: The Curious Case of Carta

The recent controversy surrounding Carta,[7] a prominent provider of cap table management services for startups, has reignited discussions regarding the adequacy of the existing regulatory framework for the burgeoning financial technology industry. The crux of the issue lies in conflict of interests that arose due to the actions of CartaX which is a subsidiary brokerage arm facilitating private startup share trading. While initially lauded for its expertise in cap table management, CartaX's foray into secondary market activities triggered concerns about potential conflicts of interest and fiduciary breaches.

These apprehensions arose from accusations levied by Karri Saarinen, CEO of Linear, who alleged that Carta misused cap table data, entrusted to them for management purposes, to solicit investors for private placements without requisite authorization. This indictment cast a shadow of suspicion over Carta's adherence to ethical principles and fiduciary duties, particularly concerning data confidentiality. Carta's initial response, including CEO Henry Ward's professed astonishment and subsequent dismissive pronouncements, further eroded stakeholder confidence. The situation escalated with the emergence of whistleblower testimonies alleging systemic internal conflicts of interest and corporate malfeasance, painting a concerning picture of potential operational irregularities within Carta.

At the heart of the controversy lies the delicate equilibrium between Carta's commercial interests in its lucrative brokerage arm and its core responsibility to maintain the trust and confidentiality of its clients. While the brokerage arm contributes a relatively smaller portion of revenue compared to its cap table

[6] "Issues in Choosing Between Single and Multiple Regulators of Financial System," Speech by Dr Y V Reddy, Deputy Governor, Reserve Bank of India.

[7] An explainer on the Carta Scandal (2024) <https://finshots.in/archive/an-explainer-on-the-carta-scandal/> accessed 02 March 2024.

management services, its significance lies in bolstering Carta's overall valuation. Ward's recent decision to shutter CartaX underscores the gravity of the situation and the company's desperate attempt to salvage its tarnished reputation. However, lingering doubts persist regarding Carta's future trajectory, with investors and founders questioning the company's ethical leadership and governance practices. Calls for Ward's resignation reflect a broader erosion of trust, highlighting the potential long-term reputational damage inflicted by the scandal. The Carta case serves as a stark illustration of the limitations potentially inherent in the current fragmented regulatory landscape governing the FinTech industry. The lack of comprehensive and standardized regulations, coupled with potential regulatory gaps specific to novel FinTech activities, can create an environment conducive to potential misconduct and hinder effective enforcement actions. This further strengthens the case of a super regulator, a centralized entity empowered with broader oversight capabilities encompassing the entire FinTech ecosystem. Proponents of a super regulator posit that it could:

- Enhance oversight through comprehensive and standardized regulations, effectively addressing potential conflicts of interest and mitigating insider trading risks.
- Streamline enforcement actions by eliminating jurisdictional overlaps and fostering coordinated responses to transgressions within the FinTech industry.
- Establish consistent regulatory standards across different sectors, ensuring a level playing field for all participants and fostering transparency in market operations.

However, the creation of a super regulatory body is not without its detractors. Concerns regarding the potential for excessive regulatory burden, stifled innovation, and the creation of a single point of failure within the regulatory system necessitate a thorough and balanced evaluation of the potential benefits and drawbacks before any concrete steps are undertaken.[8]

In conclusion, the Carta scandal offers a compelling case study for re-evaluating the adequacy of the current regulatory framework overseeing the dynamic FinTech industry. While the establishment of a super regulator presents a potential solution, a nuanced understanding of the potential implications and a comprehensive evaluation of alternative approaches are crucial before embarking on such a significant regulatory overhaul.[9]

Crowdfunding Startups

Crowdfunding is a method of raising capital for businesses, often through online platforms, and is projected to see a significant growth globally, particularly in equity crowdfunding. However, concerns arise regarding the lack of regulations in this space, especially concerning securities investments. A recent penalty[10] imposed by the Ministry of Corporate Affairs on a crowdfunding platform for securities-related violations has sparked discussions about the regulation of equity crowdfunding in India. The Ministry of Corporate Affairs penalized a startup, Deciwood, for using an online fundraising tool, Tyke, to raise securities illegally from the public. This case highlights the need for regulatory

[8] Issues in the Unification of Financial Sector Supervision <https://www.imf.org/external/pubs/ft/wp/2000/wp00213.pdf> accessed 02 March 2024.
[9] An explainer on the carta scandal (2024) Finshots. Available at: https://finshots.in/archive/an-explainer-on-the-carta-scandal/ accessed 02 March 2024.
[10] Explained: Why A Startup Was Fined For Raising Money Through Online Investment Platform Tyke (2023) <https://www.medianama.com/2023/03/223-tyke-online-fundraising-platform-deciwood-order-2/> accessed 02 March 2024.

oversight in equity crowdfunding. Despite the violation, the MCA clarified that penalties cannot be imposed on tech platforms, emphasizing the need for a regulatory framework to govern such activities.

Equity crowdfunding often breaches Section 42 of the Companies Act, 2013, which regulates private placements. With the rapid growth of startups in India, regulatory monitoring is essential to prevent fraud and protect investors. The case of Tyke, representing a public offer of private equity, introduces ambiguity regarding jurisdiction, with both the Ministry of Corporate Affairs (MCA) and the Securities and Exchange Board of India (SEBI) potentially having oversight. Moreover, Tyke's potential to attract foreign investment adds another layer of complexity, necessitating involvement from the Reserve Bank of India (RBI). This multifaceted regulatory landscape underscores the pressing need for a super regulator in India's financial framework.[11]

A super regulator could harmonize the efforts of diverse regulatory bodies, such as the MCA, SEBI, and RBI, to ensure comprehensive oversight of platforms like Tyke. By consolidating regulatory functions and simplifying processes, a super regulator could effectively address jurisdictional ambiguities and regulatory gaps, thereby bolster investor protection and foster a conducive environment for equitable crowdfunding and other innovative financing mechanisms in India's burgeoning startup ecosystem.

The Tyke case triggers echoes of the Sahara saga, resurrecting concerns about jurisdictional battles between SEBI and the MCA. Just as in the Sahara case, Tyke's situation underscores the potential for ambiguity regarding regulatory oversight in the realm of crowdfunding startups. In the Sahara case, the Supreme Court's ruling clarified SEBI's authority, emphasizing its specialized role in safeguarding investor interests. However, with Tyke and similar crowdfunding platforms, the blurred lines between MCA and SEBI jurisdiction may resurface and new fault lines too can crop up with regulatory bodies like RBI being thrown in the mix. As the crowdfunding landscape evolves, questions regarding regulatory authority and investor protection loom large.[12] The history of the Sahara case serves as a cautionary tale, highlighting the imperative for clear regulatory frameworks and the potential necessity for a super regulator to navigate jurisdictional complexities effectively. Without decisive action, the Tyke case and others like it could reignite debates over regulatory turf, jeopardizing investor confidence and the integrity of India's financial markets.

Evergreening Crackdown: RBI in SEBI's arena

In recent years, the RBI has intensified its scrutiny of the financial sector, particularly concerning the practices of commercial banks, cooperative banks, and other regulated entities (REs). The RBI's focus has been on ensuring the stability and integrity of the banking system, as well as protecting the interests of depositors and investors. One area of particular concern has been the phenomenon of evergreening, where banks extend new loans to borrowers to enable them to repay existing debts, masking the true extent of their financial distress. To address these concerns, the RBI issued a circular[13] in December 2023, aimed at curbing the practice of evergreening through investments in Alternative Investment

[11] Anupam, S. (2023b) Tyke Invest and why 'crowdfunded' startup investments are a grey area, Inc42 Media. Available at: https://inc42.com/features/the-truth-about-tyke-invest-and-crowdfunded-startup-investments/ (Accessed: 02 March 2024).

[12] Sahara vs. SEBI-an in-depth analysis of the landmark Supreme Court ruling - shareholders - India (no date) Sahara vs. SEBI-An In-Depth Analysis of the Landmark Supreme Court Ruling - Shareholders - India. Available at: https://www.mondaq.com/india/shareholders/203796/sahara-vs-sebi-an-in-depth-analysis-of-the-landmark-supreme-court-ruling (Accessed: 02 March 2024).

[13] <https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=12572> accessed 02 March 2024

Funds (AIFs). The circular directs REs, including commercial banks, cooperative banks, and non-banking financial companies (NBFCs), to refrain from investing in AIF schemes that have any downstream investments in companies to which the REs have loan or investment exposure. This restriction is intended to prevent the perpetuation of evergreening practices through indirect investments in stressed borrowers via AIFs.[14]

The RBI's crackdown on evergreening through AIF investments underscores the regulator's commitment to maintaining financial stability and transparency within the banking system. By addressing loopholes that could potentially facilitate regulatory arbitrage and risk concealment, the RBI aims to enhance the resilience and credibility of the financial sector. However, the regulatory measures also raise broader questions about the coordination and alignment of regulatory efforts across different segments of the financial industry. A key challenge in implementing the RBI's directives lie in reconciling them with the objectives and initiatives of other regulatory bodies, such as the Securities and Exchange Board of India. While the RBI focuses on prudential regulation and risk management within the banking sector, SEBI has been actively promoting the growth and development of AIFs as a vehicle for alternative investments. The crackdown on AIF investments by REs, therefore, presents a regulatory dilemma, as it potentially undermines SEBI's efforts to foster innovation and diversity in the investment landscape. This regulatory tension underscores the need for a more cohesive and integrated approach to financial regulation in India.

A super regulator could play a crucial role in bridging the gap between different regulatory domains, facilitating coordination and cooperation among regulators, and ensuring consistency and coherence in regulatory policies. By harmonizing regulatory frameworks and aligning regulatory objectives, a super regulator could help address systemic risks and promote the overall stability and efficiency of the financial system. In conclusion, while the RBI's crackdown on evergreening through AIF investments reflects its commitment to prudent regulation and risk management, it also highlights the complexities and challenges inherent in regulating a diverse and dynamic financial sector. Moving forward, greater coordination and collaboration among regulatory bodies, supported by the establishment of a super regulator, could help reconcile competing regulatory objectives and promote a more resilient and integrated financial regulatory framework in India.

The Regulatory Quandary: WazirX vs. the Enforcement Directorate (ED)

The legal feud between WazirX and the Enforcement Directorate (ED) underscores the necessity for a super regulator in India's cryptocurrency realm. The case accentuates the tangled and overlapping regulatory jurisdiction of entities like the Reserve Bank of India (RBI), ED, and potentially the Securities and Exchange Board of India (SEBI), particularly concerning emerging practices such as the sale of fractional NFTs (Non-Fungible Tokens) via platforms like WazirX. The ED's allegations against WazirX revolve around purported violations of the Foreign Exchange Management Act (FEMA), totaling INR 2,790.74 crore. It alleges that Chinese nationals laundered approximately INR 57 Crore through WazirX by converting Indian Rupee deposits into Tether and transferring them abroad. This inquiry forms part of the ED's wider clampdown on money laundering via cryptocurrencies, implicating

[14] RBI exposes a dirty NBFC SECRET!!! (2023) Finshots. Available at: https://finshots.in/archive/rbi-exposes-a-dirty-nbfc-secret/ accessed 02 March 2024

several Indian crypto exchanges. This case too foreshadows the jurisdictional issues that might develop between regulators such as RBI and ED.[15]

Pivoting to the case of NFTs which are often traded through platforms like WazirX it needs to be noted that in light of Section 2(ac) of the Securities Contracts (Regulation) Act, 1956 (SCRA), which defines derivatives to include contracts deriving their value from prices or indices of prices of underlying securities, the classification of NFTs as derivatives warrants scrutiny. Fractional NFTs, which offer partial ownership interests in high-value NFTs, could be viewed as securities, particularly if they promise returns on investment.[16] In such cases, NFTs transition from digital collectibles to speculative investments. If NFTs are deemed derivatives, they would be subject to Section 18A of the SCRA, which stipulates that derivative contracts are legal only if traded on recognized stock exchanges. Consequently, platforms facilitating NFT trading would need recognition as stock exchanges from the Central Government. In such a situation along with RBI and ED, SEBI would also claim jurisdiction over companies such as WazirX. In this case, it would ultimately lead to the regulators stepping on each other's toes. Given this regulatory complexity, the need for a super regulator to harmonize and streamline regulatory oversight in the cryptocurrency space, ensuring clarity, consistency, and investor protection while fostering innovation and growth is once again highlighted.[17]

Different approaches to a super regulator:

Different jurisdictions have adopted varying approaches to the concept of a super regulator, reflecting their unique regulatory landscapes and priorities. Each approach aims to balance efficiency, oversight, and sector-specific needs in distinct ways. The specific strategies and structures employed are outlined below: Unified Oversight Board (South Africa)[18]:

In South Africa, creating a new oversight board has been proposed. This board would include leaders from different agencies but would leave the existing structure of agencies unchanged. Many favour a regulatory system that recognizes the distinction between systemic protection and consumer protection, commonly known as the "Twin Peaks" model. In this model, one regulator oversees the prudential supervision of banks, securities dealers, and insurance companies, while other focuses on regulating the conduct of business between financial institutions and retail customers. This division ensures that prudential norms for banks and principles for financial advisors disclosing their positions are appropriately managed. Some have even proposed a "third peak" or "watchdog" agency to detect and prosecute financial crime.

The Wallis Inquiry Committee in 1997 recommended three regulatory agencies for Australia's financial system: the Australian Prudential Regulatory Authority (APRA) for prudential regulation, the Reserve Bank of Australia for systemic financial stability, and the Corporations and Financial Services Commission for corporate behaviour, consumer protection, and market integrity.However, criticisms of

[15] Why nobody wants to own Wazirx (2022) Finshots. Available at: https://finshots.in/archive/why-nobody-wants-to-own-wazirx/ (Accessed: 02 March 2024).

[16] Dharmvir Brahmbhatt and Devarsh Shah (2021) Non-Fungible Tokens: Examining its Legal Validity in India. <http://nlujlawreview.in/contemporary-issues/non-fungible-tokens-examining-its-legal-validity-in-india/> accessed 02 March 2024

[17] Singh, R.R. (2023) Crypto-currencies: RBI's Jurisdictional Enigma, Fortune India: Business News, Strategy, Finance and Corporate Insight. <https://www.fortuneindia.com/macro/crypto-currencies-rbis-jurisdictional-enigma/111168> accessed 02 March 2024

[18] Godwin, A., Kourabas, S. and Ramsay, I., 2016. Twin Peaks and financial regulation: The challenges of increasing regulatory overlap and expanding responsibilities. The International Lawyer, 49(3), pp.273-298.

this model have surfaced. The rise of conglomerates has led to over-regulation of firms engaged in multiple activities, prompting a shift toward a single regulator model to streamline regulation. The "twin peaks" model is seen as generating inefficiencies for conglomerate firms dealing with both conduct of business and prudential regulation, leading to potential communication and coordination problems. Some argue for a significant overlap between "conduct of business" and "prudential" regulation, impacting the compliance culture of firms. Executives and regulators adopting a risk-based approach would prefer a single regulatory authority for efficiency. On a different note, Prof. Charles Goodhart criticizes the twin peaks model, and by extension, the single regulator regime, arguing that such systems overlook the significant differences between institutions and types of business.[19]

Unification of Support Services

This approach suggests keeping agencies as separate entities but sharing common infrastructure and support services among them. The goal is to improve efficiency by working together on support functions[20].The concept of unifying support services offers an alternative approach to achieve efficiencies without a full consolidation of regulatory agencies. In this model, regulatory bodies remain distinct legal entities, yet they share a physical space, infrastructure, and support services. The collaboration could be facilitated by an oversight board providing guidance to individual agencies, ensuring coordinated efforts. Alternatively, a centralized management structure, established administratively rather than legislatively, could serve this purpose. The co-location of regulatory staff in a shared environment is anticipated to encourage informal information sharing and coordination among agencies. This arrangement could be implemented relatively quickly, although finding a suitable facility may present a logistical challenge. However, it provides many benefits akin to formal unification while circumventing the potential drawbacks associated with enacting new legislation that might lead to suboptimal outcomes. One notable disadvantage of this approach is the absence of a robust central management authority, which may give rise to rivalries and unresolved tensions among senior staff from different agencies.

Additionally, this model may not be ideally equipped to handle the complexities associated with overseeing financial conglomerates. Despite administrative unity, different agencies would still operate under distinct statutes, rulebooks, and powers, making consistent treatment of diversified financial groups challenging.[21] This approach is particularly suitable for countries with smaller financial sectors where financial conglomerates do not play a significant role. It allows them to capitalize on economies of scale without the potential risks associated with more profound organizational changes. However, it may not be a viable option for countries where banking supervision is currently within the purview of the central bank. Separating the banking supervision function from the central bank, even if done informally, could lead to challenges in staff retention and a reduction in regulatory capacity.

1. *Shared Facilities with Central Bank (Finland):* In Finland, the idea is to establish unified supervisory agencies as a separate entity. However, these agencies would share support services

[19] Mor, N. and Nitsure, R.R., 2002. Organisation of Regulatory Functions: A Single Regulator?. Economic and Political Weekly, pp.449-454.

[20] Godwin, A., Howse, T. and Ramsey, I., 2017. Twin peaks: South Africa's financial sector regulatory framework. South African Law Journal, 134(3), pp.665-702.

[21] Yokoi-Arai, M., 2006. The regulatory efficiency of a single regulator in financial services: Analysis of the UK and Japan. Banking & Finance Law Review, 22, p.23.

with the central bank, promoting collaboration and resource efficiency[22]. An alternative strategy to avoid the challenges of organizational independence while capitalizing on shared resources involves regulatory agencies sharing facilities with the central bank. This could be achieved by establishing the supervisory agency as a separate legal entity while utilizing the support services of the central bank, a model implemented in Finland. This approach presents two key advantages. Firstly, it enables significant economies of scale, potentially comparable or greater than those achievable through a standalone unified supervisory agency. Secondly, this arrangement may enhance crisis management capabilities. With shared premises and information technology systems, along with staff being employees of the central bank (as seen in Finland), the coordination of information flows and joint action during a crisis can be facilitated. This was a decisive factor behind Finland's adoption of this model.[23] However, a notable drawback of this approach is the potential for moral hazard. The concern lies in the perception that, even if legally distinct, locating a unified supervisory agency within the central bank may extend the perceived central bank guarantee of support to all financial institutions, including nonbanks. This could create a risk where the public and industry perceive the two institutions as essentially the same, fostering the belief that central bank support is universally available to all supervised institutions.

2. *Memorandum of Understanding (UK 2001):* The UK has a Memorandum of Understanding (MoU) that outlines a cooperation framework between the government, central bank, and a single regulator. This agreement helps establish clear guidelines for collaboration and coordination among these entities.[24] The United Kingdom's Financial Services Authority (FSA) stands out as a unified authority with the unique responsibility of handling both prudential and business conduct matters. The debate surrounding the separation or combination of prudential and business conduct objectives involves several considerations. Advocates for separation argue that the skill sets required for each function differ, emphasizing that a focused approach enhances risk detection and management in prudential oversight. This specialization becomes crucial in countries prone to financial instability, and the resource-intensive nature of consumer protection regulation may hinder effective prudential regulation, especially in smaller and developing nations. However, proponents of a combined function highlight overlapping regulatory judgments, such as system adequacy and management fitness, arguing for a comprehensive approach. While some overlap exists, it has not been deemed compelling enough to integrate consumer protection fully into the unified agency's scope. Securities regulation often combines prudential matters and conducts of business regulation, while banking and insurance regulation generally keeps the two functions separate. If a unified regulator concentrates solely on prudential matters, questions arise about assigning responsibility for the business conduct functions of securities regulators.[25] This consideration extends to whether the unified agency should regulate markets (e.g., stock or futures exchanges) alongside intermediaries. A potential solution involves consolidating business conduct and market oversight functions within a specialized agency, allowing the unified regulator to focus exclusively on prudential matters.

[22] Hadjiemmanuil, C., 2000. Institutional Structure of Financial Regulation: A Trend Towards Mega regulators. YB Int'l Fin. & Econ. L., 5, p.127.
[23] Briault, C., 2002. Revisiting the rationale for a single national financial services regulator. Financial Services Authority Occasional Paper, (16).
[24] Norton, J.J., 2005. Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience-A Critical Re-evaluation. Int'l Law., 39, p.15.
[25] Sinha, A., 2012. Financial sector regulation and implications for growth. BIS paper, (62G).

Issues arise concerning the monitoring of securities and investment firms without access to market oversight information, emphasizing the need for close cooperation and coordination between relevant agencies.[26]

Assessing various models

The comprehensive review of financial sector supervision structures leads to the fundamental conclusion that there is no one-size-fits-all model suitable for every country. While unified supervisory agencies, overseeing banking, insurance, and securities, offer advantages, their applicability varies significantly across nations. The evaluation of these structures, including other regulatory models, necessitates a thorough examination of the specific advantages and disadvantages within the context of each country. Two overarching factors play a pivotal role in this assessment.[27]

Firstly, any structural change involves risks, and the magnitude of change corresponds to the associated risks. The potential reduction in existing regulatory capacity, particularly in banking supervision, poses a significant concern, especially in developing and transition economies where banks are central to the financial system. The need to preserve or enhance the independence of the regulatory agency is paramount, and if a proposed unification threatens capacity or independence, it may not be a viable option. Clear and unambiguous benefits should be evident before considering such a significant change. If evidence is ambiguous or the costs are high, more modest institutional innovations, ranging from a unified oversight board to shared facilities with the central bank, should be explored.[28]

The second crucial factor emphasizes that the regulatory structure should align with the institutional structure of the industry it aims to regulate. For instance, combining banking and securities regulation is most suitable for countries with universal banks, while the combination of banking and insurance regulation is pertinent where linkages between banks and insurance companies are substantial. A unified regulatory approach encompassing all sectors becomes more fitting when the financial services industry comprises diversified, multiactivity groups, or when distinctions between various financial intermediaries become blurred. Policymakers need to tailor their decisions based on the developmental stage and complexity of the financial market, recognizing that regulatory structure is a means, not an end. The primary objective remains effective supervision, achievable through a well-designed structure aligned with the specific conditions of a country's financial sector, ultimately delivering numerous benefits.[29]

Need for a new regulator

In the present business landscape, we require a super regulator. Companies grapple with increasingly complex risks, with technological advancements allowing for the individual pricing of risks once bundled together. This, coupled with a surge in demand for hedging instruments, has led to significant improvements in risk management technology. However, the downside emerges when these instruments are not fully understood, potentially resulting in losses from either inadequate comprehension or deliberate risky bets. Another notable shift involves the blurring of lines between business sectors, allowing companies to expand and compete effectively under regulatory frameworks that offer

[26] Mor, N. and Nitsure, R.R., 2002. Organisation of Regulatory Functions: A Single Regulator? Economic and Political Weekly, pp.449-454.

[27] Raj, J., 2005. Is there a case for a super regulator in India? Issues and options. Economic and Political Weekly, pp.3846-3855.

[28]Subramanyan, S., 2002. Why the Financial Sector Needs a Single Regulator. Economic and Political Weekly, pp.169-172.

[29] Mor, N. and Nitsure, R.R., 2002. Organisation of Regulatory Functions: A Single Regulator? Economic and Political Weekly, pp.449-454.

maximum benefit and flexibility. While this can reveal regulatory and economic inefficiencies, caution is urged to prevent a widespread reduction in financial strength or unwarranted risk concentration due to regulatory arbitrage.

Moreover, the financial industry's intensified competition, driven by deregulation and privatization, necessitates banks' focus on return on equity. While this benefits end-users by making financial services cheaper, it also means a thinner safety cushion, leading to increased vulnerability to failure and the temptation for businesses to take undue risks to stay afloat. These changes highlight the evolving challenges in the financial landscape, emphasizing the importance of vigilant management to navigate potential pitfalls. Furthermore, the origins of financial disruptions have become increasingly unpredictable, with capital market integration impacting a country's financial systems regardless of overall economic integration.[30]

Capital flows have shown themselves to be volatile and unpredictable, leading to contagion where issues from neighboring or distant economies swiftly become one's own. Another contributing factor is the greater diversity of actors in financial markets; unlike the 1970s and 80s when financial intermediation mainly occurred through banks, various institutions, including non-financial firms, now participate in both wholesale and retail markets. Financial institutions outside major centers also play a more significant role in international markets. Additionally, financial systems seem more pro-cyclical, amplifying credit growth and leveraging market positions intensely. Innovations in financial technology, such as securitization, and the widespread use of collateral contribute to this trend.

Pro-cyclicality works in both directions, making the financial system more susceptible to liquidity erosions and reduced credit supply during downturns. Lastly, there is a notable acceleration in the pace of developments in the financial sector. Market communication and execution are nearly instantaneous, driven by new technology and deregulation, posing a challenge for regulators and supervisors to create resilient rules in the face of rapidly adopted and discarded business models.[31]

The current financial development nudge us to consider if a super regulator is required in order to cater to the growth of financial market. The compartmentalization of financial regulator bearing both regulatory and prudential functions limits the operations to a particular realm of financial sect. Thus, each regulator ensures that the sector under their supervision does not face adverse effect. In order to transition to a system which regulates the financial sphere as a whole from a consequential point of view, a super regulator may be a feasible option. Considering that India is a developing market a single regulator may not be a feasible option but at the same time the occurrence of recurring juridical issues repels potential growth. Therefore, this demands constitution of super regulator which is novel and more in the nature of a facilitator than a regulator of regulator in order to remedy the existing overlaps and jurisdictional overreach.

In the realm of financial sector supervision, it is recommended to explore the nuanced approach of employing a 'lead' regulator or 'umbrella' regulator, positioned between the extremes of a single super regulator overseeing all activities and maintaining separate regulators for each specific activity. This model allows individual regulatory agencies to coexist, while designating one regulator to coordinate

[30] Abrams, Mr.R.K. (no date) 6 issues in the unification of Financial Sector Supervision, IMF eLibrary. Available at: https://www.elibrary.imf.org/display/book/9781589060432/ch006.xml (Accessed: 02 March 2024).
[31] Abrams, Mr.R.K. 6 issues in the unification of Financial Sector Supervision, IMF eLibrary. Available at: https://www.elibrary.imf.org/display/book/9781589060432/ch006.xml (Accessed: 02 March 2024).

and conduct a comprehensive, group-wide assessment. Unlike a super regulator, the lead regulator operates as a distinct authority above functional supervisors, assuming full responsibility for overseeing the entire financial conglomerate.[32]

Drawing insights from the Tripartite Group, comprising banking, insurance, and securities supervisors, it is suggested to consider the adoption of a lead regulator or convenor. Emphasizing the necessity of a group-wide perspective in supervising financial conglomerates, this approach addresses challenges such as 'excessive' or 'double' gearing and contagion. While endorsing the prevailing solo supervision arrangements in many countries, this recommendation recognizes the paramount importance of fostering close cooperation, collaboration, and information exchange among diverse prudential supervisory agencies within a financial conglomerate.[33] This proposal involves leveraging lead regulators to enable a solo-plus regulatory framework without necessitating the establishment of a singular prudential supervisory agency. The lead regulator, often identified as the supervisor of the dominant operational business entity, is entrusted with taking a comprehensive view of the conglomerate's risk profile, coordinating regular supervision activities, and managing crisis situations. Additionally, the lead regulator may play a crucial role in assessing the group's overall capital adequacy, facilitating seamless information flow between various supervisors, and coordinating collective actions involving multiple supervisory agencies. This approach offers a nuanced and flexible framework that could be adapted to the unique conditions of different financial markets, promoting effective supervision by well-staffed, adequately funded, and independent regulatory agencies.[34]

Way Forward

India requires a super regulator which is novel and distinct from the previous contemplated ideas. A possible regulator can be a super regulator which looks into the policy making of each individual regulator while the different regulators continue their administrative function. This would provide a holistic evaluation of any financial development on the financial industry and make changes attune to a consequential perspective rather than individualistic sector-based policy. Considering that India aims to become the third largest economy, it requires new age models in financial sector to foster growth and better investment and trade environment to catalyze economic prosperity.

In essence, the dynamic shifts in India's financial services market, propelled by technological advancements, have given rise to sprawling financial conglomerates spanning diverse product segments. The traditional approach of regulating based on entities or institutions is deemed obsolete in this scenario, necessitating a shift towards functional regulation. The Khan committee advocates for a function-specific regulatory framework that targets activities, remaining institution-neutral concerning identical services across the financial system participants.[35]

The core question at hand is whether to opt for distinct functional regulators with periodic coordination or embrace a unified super regulator. Effective communication, information sharing, and mutual understanding among regulators are pivotal factors in this decision. Merely having a super regulator

[32] Subramanyan, S., 2002. Why the Financial Sector Needs a Single Regulator. Economic and Political Weekly, pp.169-172.
[33] Mor, N. and Nitsure, R.R., 2002. Organisation of Regulatory Functions: A Single Regulator? Economic and Political Weekly, pp.449-454.
[34] Chakravarty, M., 2001. A super regulator for financial services? THE ASIAN JOURNAL, p.11.
[35] Raj, J., 2005. Is there a case for a super regulator in India? Issues and options. Economic and Political Weekly, pp.3846-3855.

holds little value if internal departments within the regulator fail to communicate. The cultural shift towards enhanced collaboration is crucial for the success of a super regulator.

Furthermore, regardless of whether it's a sectoral regulator or a super regulator, possessing essential expertise and market intelligence is imperative. Regulatory learning systems must match the complexity of the external financial landscape. The UK's Financial Services Authority's "group approach," where specific teams supervise conglomerate groups, exemplifies innovative regulatory practices facilitated by a super regulator.

Ultimately, the compelling case for a super regulator lies in its foresight capabilities. By viewing the financial system comprehensively, it can identify vulnerabilities, anticipate potential threats, and proactively address them. This forward-looking function is unlikely to be fulfilled by coordination committees of sectoral regulators. Considering the imperative factors of intersectoral regulatory innovation and a holistic perspective on the financial system, a super regulator emerges as the fitting solution for India's increasingly sophisticated financial landscape

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CARBON TRADING: A POLICY TOOL FOR SUSTAINABLE DEVELOPMENT WITH SPECIFIC REFERENCE TO INDIA

Hardik Malik*

Introduction

Mankind's continual desire for economic development while overlooking the environment has led to the alarming situation when it is no more feasible for the policymakers, industry or the society to turn a blind eye to the gradual environment degradation. There is no doubt that a development which does not take care of the environment can't sustain in the long run and is only going to result into suffering and destruction of all forms of life and property. Pollution of all forms, rise in global temperature, creation of wastelands, all of these are a result of reckless deforestation, mineral extraction, industrialization etc. Carbon trading has been evolved in response to an ongoing demand of employing innovative ways to address climate change. The present research paper aims to: (1) find out whether carbon trading justifies the principles of sustainable development, and (2) understand the potential of carbon trading to aide India's efforts towards sustainable development.Concerns about protecting the environment have grown as a result of its degradation, and finding a balance between environmental preservation and economic growth has become necessary. The idea of "sustainable development" was born out of this. The goal of sustainable development is to maintain economic growth for future generations. It entails enhancing human well-being while simultaneously coexisting peacefully with the environment and preserving the ecosystem's carrying capacity.[37] Development and environmental preservation are both taken care of in sustainable development. Development must be both ecologically and economically sustainable in order to be considered sustainable. The idea of sustainable development provides guidance on how to plan development.[38] It is an idea that acknowledges the rights of future generations in addition to the current generation's right to growth. This is termed as 'inter-generational equity'.[39] In addition to intergenerational equity, sustainable development also heavily relies on intragenerational equity. It suggests equality amongst nations and continents, racial and socioeconomic groups, and ages and genders. Its foundation is raising everyone's standard of living, particularly for those who are impoverished.

A. *Origin of sustainable development*

The concept of sustainable development was first presented at the United Nations Conference on the Human Environment in Stockholm in 1972.[40] The world community accepted the basic idea of sustainable development—that growth and the environment, which were previously seen as opposing concerns, could be managed in a way that benefited both parties—even if the phrase was not used specifically. Though discussing the concept of sustainable development, it is important to remember that the Stockholm statement's tenets were biased in favor of economic growth. For example, Principle

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[37]Kumar, Mahendra. (2009). *The Sustainable Development in International Law and Its Impact in India* (Doctoral dissertation). Allahabad University. Retrieved from https://shodhganga.inflibnet.ac.in:8443/jspui/handle/10603/241663 (last visited on Feb 20, 2025).

[38] Singh, G. (2005). *Environmental law in India.* Macmillan India Ltd.

[39] Singh, G. (2005). *Environmental law in India.* Macmillan India Ltd., p. 286.

[40] United Nations. (1976). *Report of the United Nations Conference on Human Environment, Held in Stockholm from 5 to 16 June 1976* (UN Doc A_CONF.48_14_Rev.1-EN, March 25, 1995).

11 of the statement stipulates that environmental policies must not impede progress. Nevertheless, a number of the Stockholm Declaration's tenets served as catalysts for the idea of sustainable development. Here are a few examples:

"Natural resources must be safeguarded" under Principle 2, "Earth's capacity to produce renewable resources must be maintained" under Principle 3, "Non-renewable resources must be shared and not exhausted" under Principle 5, "Pollution must not exceed the environment's capacity to clean itself" under Principle 6, "Damaging oceanic pollution must be prevented" under Principle 7, "Developing countries therefore need assistance" under Principle 9, "Developing countries need money to develop environmental safeguards" under Principle 12, "Rational planning should resolve conflicts between environment and development" under Principle 14, "Science and technology must be used to improve the environment" under Article 18, "States may exploit their resources as they wish but must not endanger others" under Article 21.[41] *The phrase "sustainable development" was first used specifically in the 1987 article "Our Common Future" of the World Commission on Environment and Development (Brundtland Report), which said, "Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs"*[42].

The United Nations Conference on Environment and Development, or "Earth Summit" was the subsequent Conference of Parties, which took place in Rio de Janeiro in 1992. The Rio Declaration consists of 27 principles, including inter-generational, equity, polluter pays and, precautionary principle, among others.[43] The Rio Declaration drew a connection between environmental preservation, economic expansion, and urged nations to "*cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation*".[44] In addition to the Rio Declaration, "Agenda 21" commonly referred to as the blueprint of sustainable development, was approved during the Earth Summit. The agenda 21's preamble reads: "*Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs. Improved living standards for all, better protected and managed ecosystems a safer and, more prosperous future. No nation can achieve this on its own; but together we can- in a global partnership for sustainable development*"[45].

In *Agenda 21,* the developed nations accepted their obligation to help the developing ones in building capacities to make transition to more sustainable paths of development not as charities but as investments, for shared benefits. This is what was termed as "*common but differentiated*

[41] United Nations. (1976). *Report of the United Nations Conference on Human Environment, Held in Stockholm from 5 to 16 June 1976* (UN Doc A_CONF.48_14_Rev.1-EN, March 25, 1995).
[42] Brundtland, G. H. (1987). *Our common future: Report of the World Commission on Environment and Development* (UN-Document A/42/427, p. 16). Geneva: United Nations.
[43] United Nations. (1992). *Report of the United Nations Conference on Environment and Development* (A/CONF.151/26, Vol. I). Rio de Janeiro.
[44] United Nations. (1992). *Report of the United Nations Conference on Environment and Development* (A/CONF.151/26, Vol. I). Rio de Janeiro, Principle 12.
[45] United Nations. (1992). *Agenda 21: Report of the United Nations Conference on Environment and Development* (A/CONF.151/26, Vol. I). Rio de Janeiro.

responsibilities". Following the above-mentioned international documents, some of the salient principles of sustainable development are: "*Inter-Generational Equity, Precautionary Principle, Polluter Pays Principle, Public Trust Doctrine, Conservation of Biodiversity, Financial Assistance to the Developing Countries*".[46] Later in this research carbon trading will be seen through the lens of these above-mentioned principles, to understand whether it has the potential to aid sustainable development.

B. *Towards addressing climate change*

The United Nations Framework Convention on Climate Change (UNFCCC), the first international attempt to combat climate change, was also adopted as a result of the Earth Summit. The UNFCCC was a significant reaction to climate change because it established a broad framework for action, but it did not establish legally enforceable pledges to cut greenhouse gas emissions. Consequently, there was an increase in calls for a deal that included legally enforceable pledges to cut greenhouse gas emissions.[47] The demands for a legally binding mechanism were met with the Kyoto Protocol in 1997. According to the Kyoto Protocol, the Annex I nations had to cut their emissions of the greenhouse gases by at least 5% from 1990 levels.[48] The Kyoto Protocol has comprehensive reporting obligations for Annex I nations in addition to these legally enforceable pledges to reduce emissions.[49] Furthermore, as long as their total combined emissions do not exceed their entire reduction commitment, the Protocol permits two or more nations to fulfil their obligations jointly.[50] European Union's Emission Trading System is an instance where countries joined hands to meet their combined emission reduction targets.

Other significant responsibilities outlined in the Kyoto Protocol include:

- An obligation to formulate, to the extent possible, national and regional programmes containing measures to mitigate climate change and facilitate adaptation to climate change"[51]
- "Requirements for developed countries to provide financial and technological support to developing countries in order to help them implement their reporting and other obligations under the UNFCCC and Kyoto Protocol"[52] and
- "a commitment from developed countries to implement policies and measures that, among other things, enhance energy efficiency in relevant sectors, protect and enhance carbon sinks, promote sustainable forms of agriculture, develop and promote renewable forms of energy, and reduce and phase-out market imperfections (i.e. taxes and subsidies) in greenhouse gas emitting sectors"[53].

C. *Carbon/ Emission Trading*

The Kyoto Protocol establishes the framework for international "emission trading" by permitting nations with excess emission units that is, those whose emission levels fall below their allowed limit to sell these units to nations that have surpassed their limits.[54]

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[46] Vellore Citizen's Welfare Forum v. Union of India, (1996) 5 SCC 647.
[47] Hunter, D., et al. (2002). *International environmental law and policy*. Foundation Press, New York, NY, p. 589.
[48] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 3.1
[49] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 7
[50] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 4
[51] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 10
[52] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 11
[53] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 2.1
[54] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 17

The foundation of emission trading, also known as carbon trading, is the cap-and-trade system, which is intended to guarantee that the overall goal, or cap, is upheld while permitting internal modifications. Emission trading or carbon trading is different from simply penalising emissions. Fixing an appropriate penalty/fine is challenging. Undoubtedly, ensuring lesser emissions along with adequate output can only be achieved by investing in newer technologies. Hence, the penalty for excessive emissions should be fixed in such a manner that the producer or emitter is motivated to upgrade to the more efficient technology instead of being willing to pay the insufficiently set fine. By creating a trading system in which supply and demand dictate the price of emission units, the problem of developing a dynamic monetary mechanism (to control excessive emissions) may be resolved. This is what a carbon market or an Emission Trading System (ETS) does. Some aspects of the Carbon Market (or ETS) are important to discuss for a better understanding of its concept and functioning.

a. *Working of a Carbon Market*

A carbon market is a market where carbon credits are purchased and sold with the overall goal of preventing or reducing GHG emissions. Now, what is meant by a carbon credit? The Massachusetts Institute of Technology defines a carbon credit, also known as a carbon offset, as a certificate that states that the emission of a certain GHG emissive unit is less than the target emission and is granted by governments or independent certifying bodies. One metric ton of carbon dioxide emissions or the equivalent in other GHGs is equal to one carbon credit.[55]

How does a carbon market or ET work? Carbon markets work on the mechanism of 'Cap and Trade', wherein the regulator sets a limit (in terms of carbon dioxide or other GHG emissions) for an emitting unit. For each metric ton of carbon dioxide emission less than the target, the emitting unit gets one carbon credit. This 'earned' carbon credit can be sold to the regulated industries that failed to honour their emission targets. Based on this, the unit that failed to control the emissions would be bound to enter the market and buy these carbon credits.[56] This resembles a 'carrot and stick' mechanism in which the entity controlling the emission profits from the sale of credits and the excessive emitter is compelled to pay for the carbon credits it must purchase from the market. The price of one such credit is determined by its demand and supply. Hence, this mechanism motivates the emissive units to reduce their emissions. The markets for reducing emissions are an economical way to provide an incentive to accomplish two crucial goals.[57] Firstly, it creates demand for novel production techniques, which is *"of the utmost importance for sustainability since it provides the means of improving human well-being without depleting natural resources at unacceptable rates"*.[58] Secondly, it *"puts a price on pollution and thereby providing incentives for people to emit less"*.[59]

[55] Available at https://climate.mit.edu/explainers/carbon-offsets (last visited on Feb 20, 2025).
[56] Rudolph, S., & Aydos, E. (2021). *Carbon markets around the globe* (p. 2). Edward Elgar Publishing, Northampton, USA.
[57] Du Preez, D. (2011). *Alternative sources of finance for sustainable development in South Africa with specific reference to carbon trading* (Unpublished Ph.D. thesis). Stellenbosch University.
[58] Pearce, D., & Barbier, E. (2003). *Economics of environment and development* (pp. 178-179). Earthscan, London.
[59] Bayon, R., Hawn, A., et al. (2007). *Voluntary carbon markets: An international business guide to what they are and how they work* (p. 3). Earthscan, London.

b. Origin of Carbon markets

The 1990 amendments to the U.S. Clean Air Act, which aimed to reduce sulfur dioxide emissions in order to prevent acid rain, were the first to implement the "Cap and Trade" system that serves as the foundation for carbon markets. Eight years following the implementation of this mechanism, annual acid rains were reduced by 20%.[60] The success of the 'Cap and Trade 'mechanism caught the global community's attention, and in 1997, as discussed earlier, the Kyoto Protocol under Article 3, directed 'Annex I 'parties to "individually or jointly, ensure that their aggregate carbon dioxide equivalent emissions of the GHGs listed in 'Annex A' do not exceed their assigned amounts"[61]. The first-of-its-kind worldwide ETS was facilitated by Article 17 of the Protocol, which allows the member nations included in "Annex B" to engage in emissions trading in order to fulfil their obligations under Article 3.[62] After the Kyoto Protocol, the 2015 Paris Agreement (of the UNFCCC) is essentially a step forward. Several facets of emission reduction and trading mechanisms are acknowledged in Article 6 of the agreement.[63] Article 6 lays out a number of principles for improved ETS operation, such as the creation of a mechanism to help mitigate GHG emissions and promote sustainable development under the direction and control of the Conference of Parties, and voluntary participation by any signatory parties (unlike the Kyoto Protocol, which listed the parties obligated to fulfill the emission targets).[64]

Understanding carbon trading with reference to various principles of Sustainable Development

A. *Inter-Generational Equity*

According to the Stockholm Declaration, protecting and enhancing the environment for current and future generations is "an imperative goal for mankind".[65] The Brundtland report of 1987 established the idea of sustainable development, which is predicated on "intergenerational equity". According to the report, "*Sustainable development is the development which meets the needs of the present generation without compromising with the ability of the future generations to meet their own needs*"[66]. The reference to "the ability of future generation" implies inter-generational equity.

Inter-generational equity is based on three principles:

i. First and foremost, in order to prevent future generations from having too few options, each generation should be obliged to preserve the diversity of the natural and cultural resources. This is referred to as "conservation of options". It can be accomplished, in part, by technological innovation that develops more effective extraction and use methods or alternatives to current resources.[67]

ii. Second, every generation ought to be obligated to preserve the planet's quality so that it is not passed on in a worse state than when it was first acquired. This is the "conservation of quality" principle.[68]

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[60] Chan, G., Stavnis, R., et al. (2012). SO2 allowance trading system and the Clean Air Act (Amendments) of 1990: Reflections on 20 years of policy innovation. *National Tax Journal, 65*, pp. 419-452.

[61] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 3

[62] Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997). Article 13

[63] Paris Agreement to the United Nations Framework Convention on Climate Change. (2015). Article 6.

[64] Paris Agreement to the United Nations Framework Convention on Climate Change. (2015). Article 6.

[65] United Nations. (1976). *Report of the United Nations Conference on Human Environment, Held in Stockholm from 5 to 16 June 1976* (UN Doc A_CONF.48_14_Rev.1-EN, March 25, 1995), Principle 6.

[66] Brundtland, G. H. (1987). *Our common future: Report of the World Commission on Environment and Development* (UN-Document A/42/427, p. 16). Geneva: United Nations.

[67] Tandon, U. (2016). *Climate change: Law, policy, and governance*. Eastern Book Company, Lucknow, p. 24.

[68] Tandon, U. (2016). *Climate change: Law, policy, and governance*. Eastern Book Company, Lucknow, p. 25.

iii. Third, while protecting this access for future generations, all generations should have equitable and fair access to the cultural heritage that has been bequeathed by their predecessors. This is known as the "conservation of access".[69] It ensures that current generations have the right to utilize the planet's resources to enhance their economic and social prosperity, as long as it doesn't unjustly hinder other members of their generation from doing the same. It is beyond any doubt that carbon trading is a tool that helps fulfilment of all three above-mentioned principles of inter-generational equity. The motivation to innovate and employ upgraded technologies to enhance the productivity, along with the compulsion to buy the credits from the market in case of excess emissions, combine to ensure the fulfilment of 'conservation of options' and 'conservation of quality'. The third Principe can also be termed 'intra-generational equity'. The compulsion on the developed industrial nations to offset their emissions via Clean Development Mechanism in the developing or underdeveloped countries ensures this. Carbon Trading also provides an opportunity to the disadvantaged communities to earn their share by capturing GHG emissions. For example, by restoring 10,000 hectares of degraded Handia forest, a group of 100 communities in Madhya Pradesh are expected to receive almost $300,000 annually in carbon payments.[70]

B. *The Polluter Pays Principle*

The OECD defines Polluter Pays Principle as, "The polluter pay's principle means that the polluter should bear the expenses of carrying out the measures .....to ensure that the environment is in an acceptable state"[71]. Stated differently, the price of products and services should reflect the cost of the polluter's actions.The principle 16 of the Rio Declaration also provides that "*the national authorities should endeavour to promote the internationalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*"[72].

The market mechanism of carbon trading is essentially based on the polluter pays principle, as it works to penalise the polluter in accordance with the amount of emission, on the other hand incentivising the units who have emitted less than their permit. While understanding emission trading viz-a-viz the Polluter Pays Principle, Seres (2016) raises the question as to who does the polluter pay and argues that emission trading just leads to a scenario where "a polluter pays another polluter".[73] But it is essential to acknowledge that the amount paid by the polluter to buy the credit affects the ultimate price of the product, affecting the competitive position of the polluter. In addition to that, emission trading pushes innovation in technology as has been also argued by Porter and Linde (1995).[74] A government, which the polluter traditionally pays, uses the collected funds in various ways, including R&D and renewable energy projects. Hence, it would be fallacious to assume that emission trading does not effectively follow the polluter pays principle.

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[69] Tandon, U. (2016). *Climate change: Law, policy, and governance*. Eastern Book Company, Lucknow, pp. 25-26.
[70] Center for International Forestry Research. (2002). *Carbon trading, climate change, and the Kyoto Protocol* (p. 2). Retrieved from https://www.cifor.org/publications/pdf_files/carbon/kyoto_protocol.pdf (last visited on Feb 20, 2025).
[71] OECD. (1992). *The polluter-pays principle: OECD analyses and recommendations.* OCDE/GD(92)81. Paris.
[72] United Nations. (1992). Agenda 21: Report of the United Nations Conference on Environment and Development (A/CONF.151/26, Vol. I). Rio de Janeiro, Principle 16
[73] Seres, E. L. (2016). The question of compliance with the polluter-pays principle and State aid rules within the European Emission Trading Scheme. *Journal of Agricultural and Environmental Law, 21*, pp. 14-29.
[74] Porter, M., & van der Linde, C. (1995). Toward a new conception of the environment-competitiveness relationship. *Journal of Economic Perspectives, 9(4),* pp. 97-118.

C. *Conservation of Biodiversity*

Conservation of Biodiversity is a fundamental necessity for sustainable development, it being a source and support to all life on this earth. The term embraces communities of organisms, ecosystems, and even entire landscapes. Thus, biodiversity encompasses more than just a large number of plants and animals.[75] Stability of the ecosystem is guaranteed by biodiversity conservation. Additionally, it guarantees that the socioeconomic interests of those involved in conservation are protected. Legal solutions at the national, regional, and international levels have been devised to guarantee the preservation of ecological stability while simultaneously protecting these interests.[76] In June 1992, the Convention on Biological Diversity was adopted by the United Nations Conference on Environment and Development. "All parties must cooperate for the conservation and sustainable use for biodiversity" is one of the commitments made in this convention. General commitments on research and training, public awareness and education, information sharing, and technical and scientific collaboration are also included in the treaty.[77] Nature based solutions play a key role in low carbon transitions. In comparison to its contribution to climate mitigation, the land use sector only receives a small portion of global climate money. Despite the importance of forests, less than 1% of the funds required to stop and reverse deforestation by 2030 are available at present.[78] As highlighted earlier, carbon markets incentivise reforestation and restoration of degraded forests. It must be noted here that restoration of degraded forests not only ensures better atmosphere but also ensures enhancement of the quality of land and water, ultimately ensuring restoration of the biodiversity dependent on it.

D. *Financial Assistance to developing Countries*

This principle combines the principle of intra-generational equity and CBDR. The whole concept of carbon offsetting and Clean Development Mechanism lays down ground for the movement of finance from the developed, industrialized economies to those who are still at the developing stage. The developing ones can finance their development activities by trading in the captured carbon. Particularly in emerging markets and developing countries, carbon trading has the ability to supply significant financial flows to operations that do not have adequate funding from other sources.[79] Emission trading, undoubtedly, addresses the issue of poverty as well (another aspect of intra-generational equity). It stimulates the transition towards renewable energy, and generates positive externalities on the rural income. Zhang and Zhang establish a positive relationship between the Emission Trading Schemes and the income of rural population, and rural employment.[80] Fang (2023) argues that "emission trading should be regarded not only as a policy instrument for emission reduction, but also as part of sustainable development actions"[81].

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[75] Ansari, A. H., & Jamal, P. (2000). The Convention on Biological Diversity: A critical appraisal with special reference to Malaysia. *Indian Journal of International Law, 40*, pp. 139-140.

[76] Tiwari, G. S. (2001). Conservation of biodiversity and techniques of people's activism. *Journal of the Indian Law Institute, 43(2),* p. 191.

[77] Malviya, R. A. (2001). Biological diversity and international environmental law with special reference to the Biological Diversity Convention. *Indian Journal of International Law, 41*, pp. 639-640.

[78] Available at: https://forestdeclaration.org/resources/forest-declaration-assessment-2022/ (last visited on Feb 20, 2025).

[79] Macquarie, R. (2023). *Sustainable development and the voluntary carbon market.* Grantham Research Institute on Climate Change and the Environment, London School of Economics.

[80] Zhang, G., & Zhang, N. (2020). The effect of China's pilot carbon emissions trading schemes on poverty alleviation: A quasi-natural experiment approach. *Journal of Environmental Management, 271*, pp. 1-10.

[81] Fang, K., Mao, M., et al. (2023). Exploring the impact of emissions trading schemes on income inequality between urban and rural areas. *Journal of Environmental Management, 329*, pp. 1-13.

Apart from having the potential of financing development activities, creating employment, restoration of forests, carbon trading has the potential to drive innovation and technological upgradation. Technological advances can be sparked by domestic enterprises adhering to this environmental regulation since they will reduce the cost of compliance for firms.[82] International carbon trade can help transfer of new technologies across borders.[83] The extremely uneven global distribution of research and development (R&D) spending makes international technology movement crucial. Coe, Helpman and Hoffmaister estimate that 96 per cent of global expenditure on R&D is undertaken by only a handful of industrialized countries.[84] The R&D expenditure of nations is even more varied than the national incomes. Keller highlights that the G-7 countries (the world's leading industrialized countries) accounted for 84 per cent of global spending on R&D in 1995, but represented only 64 per cent of global gross domestic product (GDP).[85] Global efforts of inclusion of developing countries in the emission trading sphere would be fully in line with the preamble of the UNFCCC, that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions"[86]. Lastly, emission trading can contribute to sustainable development in different ways: "through the diversification of energy supply, reduced dependence on fossil fuels, increased reliability of energy supply, increased access for rural populations to modern energy sources and job creation, and improving the social livelihoods in the region where the project is taking place"[87].

Carbon trading in India

Under the UNFCCC categorization of parties, India falls under the "non-annex I" category, which majorly consists of developing countries**.**[88] India is the third largest national emitter of GHGs annually, releasing around 2.44 billion tons of Carbon Dioxide annually.[89] Approximately 78% of India's power generation comes from coal.[90] It is, hence, evident that India heavily relies on carbon-intensive energy sources. Undoubtedly, large investments are required for a transition to green energy, which can be achieved utilizing market-based instruments. According to *Ajitabh Sharma, Chairman of Rajasthan Tax Board*, an effective policy framework around carbon markets has the biggest potential to aid such a transition, since the firms investing in transformation would gain from the sale of carbon credits that

[82] Porter, M., & van der Linde, C. (1995). Toward a new conception of the environment-competitiveness relationship. *Journal of Economic Perspectives, 9(4),* pp. 97-118.
[83] Grossman, G. M., & Helpman, E. (1991). Innovation and growth in the global economy. MIT Press.
[84] Coe, D. T., Helpman, E., & Hoffmaister, A. (1997). North-South R&D spillovers. *Economic Journal, 107*, pp. 134-149.
[85] Keller, W. (2004). International technology diffusion. *Journal of Economic Perspectives, 42*, pp. 752-782.
[86] United Nations Framework Convention on Climate Change. (1992, May 9). Preamble.
[87] Pfeifer, G., & Stiles, G. (2009). *Carbon Finance in Africa: A Policy Paper for the Africa Partnership Forum* (p. 4). Retrieved from www.africapartnershipforum.org/dataoecd/40/15/41646964.pdf (last visited on Feb 20, 2025).
[88]Available at https://unfccc.int/parties-observers (last visited on Jan 15, 2025).
[89]Available at https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data (last visited on Jan 15, 2025)
[90] IEA. (2021). *India Energy Outlook 2021.* OECD Publishing. Retrieved from https://doi.org/10.1787/ec2fd78d-en (last visited on Feb 20, 2025).

would generate owing to such transition.[91] India is capable of gaining US$11 trillion by 2050, if it uses the carbon market effectively and exports the credits generated.[92]

Additionally, a report by *McKinsey Sustainability and Institute of International Finance* claims that, by 2050, the world carbon trade annually would amount to US$ 100 Billion.[93] Given that it is one of the biggest emitters and is highly capable of transforming its energy requirements, as discussed earlier, India can take advantage of a significant portion of the projected world trade. Indian entities have already started gaining from carbon trading, e.g. *Jindal Vijaynagar Steel* anticipates to sell carbon credits worth US$ 225 million by 2030.[94] *Torrent Power AEC* earned Rs. 45 Crores in FY 2012-13 by selling carbon credits internationally.[95] Interestingly, a group of 100 villages in Madhya Pradesh are expected to earn around US$ 300,000 every year from carbon payments by restoring 10,000 hectares of degraded Handia forest.[96] This makes it amply clear how carbon trading can aide reforestation, while taking care of the marginalized community.

The *Energy Conservation (Amendment) Act, 2022*, under its *Section 4*, adds the *clause (te)* to *Section 13* of the *Energy Conservation Act, 2001* and lays ground for the establishment of a national carbon market. *Sections 4,6,7* and *8* of the amendment act provide for various aspects of a national carbon trading scheme.[97] The *Bureau of Energy Efficiency* has developed "*The Blue Print over the National Carbon Market*" which has effectively assessed the issues of the current carbon trading (including limited participation, limited trading period, etc.) and drawn the outline of an independent 'National Carbon Market'.[98] Moving in the direction of establishing a national carbon market, the Ministry of Power has published a carbon trading scheme, wherein comments were sought from various stakeholders till the 14th of April, 2023. The draft proposes a scheme for both voluntary and compliance carbon markets, establishing a governing board (Indian Carbon Market Governing Board) for the market's administration. The board will also be responsible for recommending rules and procedures for the market. Learning from the experience of the EU's ETS, when the prices of the tradable permits plummeted from 30 Euros per unit in 2008 to around 5 Euros per unit in 2013, the government of India has planned a stabilization fund for the upcoming national carbon market.[99] The fund would help

[91] Sharma, A. (2022, May 2). India must use markets to decarbonise. *The Indian Express.* Retrieved from https://indianexpress.com/article/opinion/columns/india-must-use-markets-to-decarbonise-7896780/ (last visited on Feb 20, 2025).
[92] Deloitte Economics Institute. (2021). *India's turning point* (p. 9). Retrieved from https://www2.deloitte.com/content/dam/Deloitte/in/Documents/about-deloitte/in-india-turning-point-noexp.pdf (last visited on Feb 20, 2025).
[93] McKinsey Sustainability. (2021). *A blueprint for voluntary carbon markets to meet the climate challenge.* Retrieved from https://www.mckinsey.com/business-functions/sustainability/our-insights/a-blueprint-for-scaling-voluntary-carbon-markets-to-meet-the-climate-challenge (last visited on Feb 20, 2025).
[94] Available at https://www.jsw.in/groups/sustainability-framework-measuring-success-climate-change (last visited on Feb 15, 2025)
[95] Available at https://torrentpower.com/pdf/investors/02-09-2016_uow4b_tp_annual_report_fy12_13.pdf (last visited on Feb 15, 2025)
[96] Center for International Forestry Research. (2002). *Carbon trading, climate change, and the Kyoto Protocol* (p. 2). Retrieved from https://www.cifor.org/publications/pdf_files/carbon/kyoto_protocol.pdf (last visited on Feb 20, 2025).
[97] The Energy Conservation (Amendment) Act, 2022 (Act 19 of 2022)
[98] Bureau of Energy Efficiency. (2025, February 16). *The blueprint over the national carbon market.* Retrieved from https://beeindia.gov.in/sites/default/files/NCM%20Final.pdf (last visited on Feb 20, 2025).
[99] Available at: https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/energy-transition/021723-india-works-on-market-stabilization-fund-details-for-upcoming-carbon-

maintain the attractiveness of carbon credits for investors by setting a floor price and allowing a market regulator to purchase credits if prices fall too low. As the success of the market in reducing emissions relies on sustained investor interest, as sudden drops in carbon credit prices could discourage industries from reducing their carbon dioxide emissions. Thus, the suggested stabilization fund would be essential to maintaining the carbon market's long-term sustainability. The National Designated Authority for the Implementation of the Paris Agreement (NDAIAPA) has in February, 2023 announced a list of activities that may take part in international carbon market, "to mobilise international finance in India", under Paris' Article 6. The list of 13 activities is released under 3 heads vis-a-vis GHG mitigation activities, Alternate Material, and Removal activities.[100] Carbon trading is essentially more efficient than other regulatory measures as it rules out various executive hurdles. The market forces take care of the price and the policy is not continually made to chase the emitting entities. Policy initiatives like the CAMPA fund established under the *Compensatory Afforestation Fund Act, 2016* have largely been rendered ineffective as only 27% of the funds have been utilized in the period 2019 to 2022.[101] A market-based mechanism takes care of such inefficiencies as the emitting entities are penalized and incentivized readily by the forces of market. India is moving towards formulating a broader and more inclusive legal regime of carbon trading, both voluntary and compliance trading. It is also quite evident that India wants to exploit carbon trading as a key instrument to reduce its carbon emissions by a huge 1 billion tons compared to 2005 levels by 2030.[102]

Conclusion

The argument that carbon trading is a crucial instrument for the global community to advance and develop sustainably is strengthened when it is understood in light of the key sustainable development principles established by several international agreements. It also has the potential to finance the policies and schemes directed towards sustainable development. Along with that, carbon trading provides impetus to innovate and switch to better and more efficient technologies. For the world to develop sustainably, the benefits of the technological upgradation and innovation must be available to all the nations alike. Since carbon trading allows for the exchange of carbon credits for technological know-how, it may help close the gap between industrialized and developing nations in the area of research and development. It is obvious that a clean atmosphere is necessary for life to flourish, but along with that a clean atmosphere ensures lesser health problems, more efficient workforce, lesser burden on government's purse, broader and diverse avenues for employment. Carbon trading is on of the various tools that can be employed to get a cleaner atmosphere. From an economic perspective, the emission of greenhouse gases is an externality. This implies that the people or organizations that emit these kinds of pollutants contribute to climate change and impose costs on both current and future generations. Since their emissions were either not taxed at all or just partially taxed, these polluters had not been held accountable for their acts adequately. The current climate change issue is also attributable

market#:~:text=A%20stabilization%20fund%20would%20serve,the%20global%20voluntary%20carbon%20market. (Last visited on Feb 13, 2025).

[100] Press Information Bureau, Press Release dated 17 Feb, 2023, available at https://pib.gov.in/PressReleseDetail.aspx?PRID=1900216 (last visited on Feb 18, 2025)

[101] Available at https://sansad.in/getFile/loksabhaquestions/annex/1711/AU5179.pdf?source=pqals (last visited Feb 3, 2025)

[102] Economic Times. (2023, March 28). Draft carbon credits trading scheme out. *The Economic Times.* Retrieved from https://economictimes.indiatimes.com/markets/stocks/news/draft-carbon-credits-trading-scheme-out/articleshow/99046561.cms?from=mdr (last visited on Feb 20, 2025).

to bad implementation. Carbon markets have the tendency to effectively price the emissions and ensure a shift from the status quo. As discussed in the article, it is not only the air pollution that carbon trading is capable to address, but the land and water pollution, resulting in enhanced biodiversity, as carbon capture/offsetting projects (one of the facets of carbon trading) encourage restoration and redevelopment of forests. However, the primary objective of carbon trading is to decrease GHG emissions, which directly affects the ability of impoverished individuals to sustain their livelihoods. This is how carbon trading is capable of promoting sustainable development. Carbon trading has the potential to finance developing nations like India in their transition to green energy, while also facilitating technology transfer and promoting research and development. It has proven to be a crucial mechanism for addressing greenhouse gas emissions. Ultimately, carbon trading aligns with the established principles of sustainable development, making it a powerful instrument for advancing sustainability, particularly in the Indian context.

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OPEN ACCESS AND CORPORATE SOCIAL RESPONSIBILITY (CSR): A FRAMEWORK FOR PUBLIC KNOWLEDGE SHARING IN TAX OPTIMIZATION

Moses Pinto*

Introduction

Corporate Social Responsibility (CSR) has undergone a significant evolution, transitioning from a voluntary initiative to a mandatory legal obligation in many jurisdictions.[103] Governments increasingly regard CSR-related tax incentives as instrumental tools to promote sustainable development.[104] However, the tax treatment of CSR expenditure remains highly fragmented across jurisdictions, resulting in challenges for corporate compliance and opening avenues for tax avoidance.[105] A fundamental issue is the absence of publicly accessible knowledge regarding CSR tax structuring, which hinders collaborative policymaking and impedes equitable corporate taxation.[106] To address this, a structured open-access framework is necessary—one that enables tax authorities, policymakers, businesses, and researchers to examine CSR tax mechanisms and develop cohesive fiscal strategies.[107] This article critically examines the intersection of CSR tax deductibility, transparency, and the role of open-access information in promoting fiscal equity. Section 2 investigates the importance of open-access repositories in optimizing CSR implementation and the risks posed by opaque reporting. Section 3 offers a comparative analysis of CSR tax disclosure practices across jurisdictions, including India, the European Union (EU), the United States (US), the United Kingdom (UK), Japan, Brazil, South Africa, Canada, and Australia. Section 4 explores the tension between corporate confidentiality and public interest by assessing the intellectual property (IP) dimensions of CSR tax structuring. Section 5 advocates for a harmonized global CSR tax disclosure model in line with the OECD's Base Erosion and Profit Shifting (BEPS) framework and the United Nations Sustainable Development Goals (SDGs). Section 6 outlines legal and policy recommendations to advance transparency and reduce the abuse of CSR incentives. Section 7 concludes by arguing that open-access CSR tax information is indispensable for constructing an accountable and sustainable global tax system.

The Role of Open Access in CSR Optimization

Tax incentives offered for Corporate Social Responsibility (CSR) initiatives must be administered with

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[103] Michael E. Porter & Mark R. Kramer, Creating Shared Value, 89 *Harv. Bus. Rev.* 62 (2011).

[104] Wayne Visser, CSR 2.0: From the Age of Greed to the Age of Responsibility, in *Reframing Corporate Social Responsibility: Lessons from the Global Financial Crisis* 231 (Wenxian Sun, Chris Stewart & David Pollard eds., Emerald Grp. Publ'g 2010).

[105] Robert Bird & Kristen Davis-Nozemack, Tax Avoidance as a Sustainability Problem, 151 *J. Bus. Ethics* 1009 (2018), https://doi.org/10.1007/s10551-016-3232-2.

[106] Elisabet Garriga & Domènec Melé, Corporate Social Responsibility Theories: Mapping the Territory, 53 *J. Bus. Ethics* 51 (2004).

[107] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (New Soc'y Publishers 1998).

transparency to prevent their misuse as mechanisms for unwarranted tax reduction.[108] Governments must ensure that CSR tax deductions are genuinely linked to measurable social and environmental outcomes, rather than enabling disguised corporate tax planning strategies.[109] At present, the absence of open-access public repositories for CSR tax structuring information restricts the ability of tax administrations and policymakers to detect such misuse and to formulate comparative benchmarks for fiscal governance.[110] Although the Organization for Economic Co-operation and Development (OECD) has developed the Base Erosion and Profit Shifting (BEPS) framework to enhance corporate tax transparency, this initiative does not explicitly incorporate CSR-related disclosures.[111] The lack of a direct mechanism for reporting CSR deductions under the BEPS framework results in an accountability gap that can be exploited by multinational enterprises (MNEs).[112] An open-access framework designed specifically for CSR tax reporting would not only support transparency but would also enable tax authorities, regulators, and the public to verify whether tax incentives correspond to actual social impact outcomes.[113] Such a framework would also assist in aligning CSR expenditure with the United Nations Sustainable Development Goals (SDGs), thereby reinforcing the public purpose of tax relief policies.[114]

In the absence of such measures, the risk of selective disclosure and the use of CSR as a tax optimization tool will persist, undermining both fiscal integrity and corporate credibility.[115] Hence, a legal framework mandating the public dissemination of CSR tax data—grounded in principles of transparency and international cooperation—is essential to preserve the legitimacy of CSR incentives and reinforce the ethical dimensions of corporate taxation.[116]

Comparative Analysis of CSR Tax Disclosure Mandates

Jurisdictions around the world take markedly different approaches to the deductibility and disclosure of Corporate Social Responsibility (CSR) expenditure for tax purposes. These variations present significant compliance burdens for multinational enterprises (MNEs) and complicate efforts to ensure tax fairness.In the European Union, the Corporate Sustainability Reporting Directive (CSRD) mandates extensive disclosures on environmental, social, and governance (ESG) performance, including CSR-related expenditures, with legal force under Directive (EU) 2022/2464.[117] The United Kingdom, on the other hand, imposes strict conditions under Section 54 of the Corporation Tax Act 2009, requiring

[108] Wayne Visser, CSR 2.0: From the Age of Greed to the Age of Responsibility, in *Reframing Corporate Social Responsibility* (Wenxian Sun, Chris Stewart & David Pollard eds., Emerald Grp. Publ'g 2010).
[109] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman 1984).
[110] Prem Sikka, Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance, 34 *Acct. F.* 153 (2010), https://doi.org/10.1016/j.accfor.2010.05.002.
[111] OECD, *Measuring and Monitoring BEPS: Action 11 Final Report* (OECD Publ'g 2015), https://doi.org/10.1787/9789264241341-en.
[112] OECD, *Corporate Tax Statistics: Second Edition* (OECD Publ'g 2021), https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-database.html.
[113] G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015), https://sdgs.un.org/2030agenda.
[114] ibid.
[115] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (New Soc'y Publishers 1998).
[116] Robert Bird & Kristen Davis-Nozemack, Tax Avoidance as a Sustainability Problem, 151 *J. Bus. Ethics* 1011 (2018), https://doi.org/10.1007/s10551-016-3232-2.
[117] Directive 2022/2464, of the European Parliament and of the Council of 14 Dec. 2022, amending Reg. 537/2014 & Dirs. 2004/109/EC, 2006/43/EC & 2013/34/EU, on corporate sustainability reporting, 2022 O.J. (L 322) 15, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2464.

demonstrable commercial benefit for the deduction of CSR-related business expenses.[118] India represents a unique model where CSR is not just encouraged but mandated under Section 135 of the Companies Act 2013. However, tax deductibility is limited, as only contributions falling within specific categories under Section 80G of the Income Tax Act 1961 are eligible for relief.[119] This creates a disconnect between legal CSR obligations and tax policy incentives. In the United States, Internal Revenue Code Section 162 permits deductions for business-related CSR expenses, while Section 170 governs charitable contributions, capping them at 10% of taxable income for corporations.[120] This bifurcation reflects a nuanced approach to differentiating CSR spending based on its proximity to commercial operations. In other jurisdictions, the policy frameworks are similarly diverse. Japan allows CSR deductions aligned with government-defined sustainability objectives, effectively incentivising mission-driven CSR initiatives.[121] In South Africa, CSR reporting is mandatory for listed companies under the King IV Code of Corporate Governance, but tax relief is limited to community development activities that meet strict substantiation criteria.[122] Brazil provides environmental tax incentives for CSR initiatives focused on ecological restoration and climate resilience under federal environmental legislation.[123] Canada and Australia also recognize CSR-related tax deductions, but disclosure obligations vary. Canada relies on principles embedded in the Income Tax Act RSC 1985, requiring reasonableness of expenses, while Australia uses the Corporations Act 2001 (Cth) and Australian Charities and Not-for-profits Commission Act 2012 to distinguish CSR from philanthropic contributions eligible for tax relief.[124] These jurisdictional divergences reveal the absence of a harmonized global framework governing CSR tax deductibility and disclosure. As a result, MNEs often encounter uncertainty when structuring CSR initiatives across borders. Moreover, disparities in regulatory intensity and accountability measures enable potential regulatory arbitrage and undermine the equitable application of tax benefits.[125]Given the integral link between CSR and sustainable development, a unified approach is urgently needed to ensure that tax deductions for CSR expenditure are granted only when aligned with verifiable public benefit objectives. Standardizing reporting formats and ensuring cross-border comparability will also improve transparency and facilitate international cooperation in tax administration.[126]

Intellectual Property and Public Domain Considerations

One of the principal challenges to advancing transparency in Corporate Social Responsibility (CSR) tax structuring is the proprietary nature of financial planning within multinational enterprises (MNEs). Many corporations treat CSR-related tax planning strategies as intellectual property (IP), invoking

[118] HM Revenue & Customs, *Corporation Tax Act 2009 – Section 54: Business Expense Deductibility* (UK Gov't 2019), https://www.gov.uk/government/organisations/hm-revenue-customs.
[119] Gov't of India, *Income Tax Act, 1961 – Section 80G and CSR Deductions* (2021), https://incometaxindia.gov.in.
[120] Internal Revenue Serv., *Internal Revenue Code – §§ 162 & 170: Business Expenses and Charitable Contributions* (2021), https://www.irs.gov/pub/irs-pdf/p17.pdf.
[121] Dirk Matten & Jeremy Moon, "Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 *Acad. Mgmt. Rev.* 404 (2008), https://doi.org/10.5465/amr.2008.31193458.
[122] Inst. of Directors in S. Afr., *King IV Report on Corporate Governance for South Africa 2016* (2016).
[123] Law No. 9.605, de 12 de fevereiro de 1998, Diário Oficial da União [D.O.U.] de 13.2.1998 (Braz.).
[124] Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (Can.); Corporations Act 2001 (Cth) (Austl.); Australian Charities and Not-for-profits Commission Act 2012 (Cth) (Austl.).
[125] Robert Bird & Kristen Davis-Nozemack, Tax Avoidance as a Sustainability Problem, 151 *J. Bus. Ethics* 1012 (2018).
[126] OECD, *Pillar One and Pillar Two International Tax Reforms* (2023), https://www.oecd.org/tax/beps/international-tax-reform.htm.

confidentiality and competitive advantage to justify limited disclosure.[127] This practice, however, undermines fiscal transparency and may enable sophisticated forms of tax avoidance under the guise of social investment.[128] The theoretical basis for such secrecy lies in agency cost economics, where managers are incentivized to withhold financial strategies from public view to maximize shareholder value and maintain market competitiveness.[129] Yet, the public interest in accessing CSR tax data—especially when such data affects national revenue mobilization—arguably overrides claims to confidentiality in this context.[130] While global tax frameworks like the OECD's Country-by-Country Reporting (CbCR) under BEPS Action 13 require large MNEs to disclose revenue, profits, and taxes paid across jurisdictions, they do not include detailed breakdowns of CSR-related deductions.[131] As a result, there is no global legal requirement compelling companies to disclose whether CSR-related tax benefits correspond to meaningful social outcomes.[132] To address this imbalance, a differentiated disclosure model could be adopted—one that protects genuinely sensitive information but mandates transparency where public tax expenditures are involved. Open-access repositories managed by international organizations could house CSR tax data in an anonymized or aggregated form, ensuring oversight without compromising proprietary specifics.[133] The tension between intellectual property rights and public domain obligations is not unfamiliar in regulatory discourse. The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) already recognizes the legitimacy of limiting IP protections where public health or safety is at stake.[134] By analogy, governments may justifiably impose CSR tax disclosure mandates on the grounds of protecting public revenue and ensuring the integrity of social development programmes.

A structured approach to CSR tax transparency, incorporating legally binding disclosure obligations and respecting limited commercial confidentiality, can achieve a balance between corporate autonomy and public accountability. Such an approach would also bolster the credibility of CSR as a genuine development tool, rather than a mechanism for reputational enhancement and tax arbitrage.[135]

Harmonizing Global CSR Tax Policies

The current lack of uniformity in Corporate Social Responsibility (CSR) tax policies across jurisdictions allows multinational enterprises (MNEs) to exploit regulatory inconsistencies, engaging in selective reporting or arbitrage of CSR deductions.[136] To combat this, an internationally coordinated approach is necessary—one that requires governments to adopt uniform CSR tax disclosure and

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[127] Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 *J. Fin. Econ.* 305 (1976), https://doi.org/10.1016/0304-405X(76)90026-X.
[128] Prem Sikka, 'Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance' (2010) 34(3–4) *Accounting Forum* 155 https://doi.org/10.1016/j.accfor.2010.05.002.
[129] *ibid.*
[130] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* 103 (New Soc'y Publishers 1998).
[131] OECD, *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13 Final Report* (OECD Publ'g 2015), https://doi.org/10.1787/9789264241488-en.
[132] OECD, *Corporate Tax Statistics: Second Edition* (OECD Publ'g 2021), https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-database.htm.
[133] Robert Bird & Kristen Davis-Nozemack, Tax Avoidance as a Sustainability Problem, 151 *J. Bus. Ethics* 1014 (2018).
[134] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 7–8, Apr. 15, 1994, 1869 U.N.T.S. 299.
[135] Wayne Visser, CSR 2.0: From the Age of Greed to the Age of Responsibility, in *Reframing Corporate Social Responsibility* 18 (W. Sun, C. Stewart & D. Pollard eds., Emerald Grp. Publ'g 2010).
[136] Dirk Matten & Jeremy Moon, "Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 *Acad. Mgmt. Rev.* 409 (2008).

deductibility standards applicable across borders.[137] A viable model for this harmonization is the structure used in the OECD's Pillar One and Pillar Two reforms, which demonstrate the feasibility of international consensus in tax policy design.[138] These reforms introduced standardized rules for taxing digital and multinational corporations, facilitating equitable tax allocation based on economic presence and minimum effective taxation.[139] A similar architecture could be applied to CSR, whereby a global framework ensures consistency in how CSR tax benefits are defined, measured, and disclosed.

A proposed **Global CSR Tax Transparency Model** could incorporate the following elements:

1. *Mandatory Disclosure:* All jurisdictions should require corporations to report CSR tax deductions in a standardized format, including details of qualifying expenditures, beneficiaries, and associated tax savings.
2. *Public Access via OECD Database:* The OECD or a comparable international body should host a centralized, open-access database where CSR tax deduction reports are filed and made available to tax authorities, regulators, and civil society.
3. *Standardized Reporting Templates:* Uniform reporting templates would facilitate cross-border comparability and reduce administrative burdens for MNEs operating in multiple jurisdictions.

By integrating CSR tax data into existing international tax cooperation frameworks, governments can significantly enhance transparency and accountability in the use of CSR incentives. A harmonized system would also serve as a safeguard against greenwashing and reputational CSR efforts that deliver minimal tangible benefits to society.[140] The success of the BEPS framework, combined with the global support for the United Nations Sustainable Development Goals (SDGs), indicates that the political and institutional momentum necessary for such harmonization already exists.[141] The challenge lies not in conceptual agreement but in political will and technical implementation. A global CSR tax framework that mandates standardized disclosure and public access would ensure that CSR initiatives are assessed not merely on declared intent but on verified outcomes. Such a shift would elevate CSR from a marketing tool to a measurable contribution to social progress, reinforcing the credibility of corporate tax incentives and aligning business practices with broader developmental objectives.[142]

Legal and Policy Recommendations

To ensure that Corporate Social Responsibility (CSR) tax deductions serve their intended social purpose and do not become instruments of aggressive tax planning, governments must adopt robust legal and policy frameworks that mandate transparency, equity, and public accountability.

(i*) Legally Mandated CSR Tax Transparency:* National legislation should incorporate mandatory CSR tax deduction disclosure requirements, aligning domestic laws with international frameworks such as the

[137] OECD, *Pillar One and Pillar Two International Tax Reforms* (2023), https://www.oecd.org/tax/beps/international-tax-reform.htm.
[138] *ibid.*
[139] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)* (OECD Publ'g 2021).
[140] Prem Sikka, Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance, 34(3–4) *Acct. Forum* 158 (2010).
[141] G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, U.N. Doc. A/RES/70/1 (Sept. 25, 2015).
[142] Michael E. Porter & Mark R. Kramer, Creating Shared Value, 89(1–2) *Harv. Bus. Rev.* 72 (2011).

OECD's BEPS standards and the United Nations Sustainable Development Goals (SDGs).[143]

Legal mandates would compel corporations to report the quantum, nature, and beneficiaries of CSR expenditures claimed for tax relief. Disclosure laws should also provide penalties for misreporting or underreporting CSR deductions.

(ii) Inclusion of CSR Tax Data in Open-Access Databases: The OECD or a designated international agency should develop an open-access platform for CSR tax expenditure reporting.[144] Such a database, structured similarly to the OECD's Corporate Tax Statistics portal, would allow regulators, researchers, and civil society to assess the alignment between CSR tax benefits and measurable public outcomes. Open access would also deter corporations from using CSR as a vehicle for opaque tax planning strategies.[145]

(iii) Introduction of CSR Tax Deduction Caps: To avoid excessive tax base erosion, national tax legislation should include caps on CSR-related deductions, calibrated in proportion to corporate turnover or profits.[146] This would ensure that CSR expenditure is not disproportionately used to reduce tax liabilities. Such caps should be reviewed periodically in consultation with development agencies and civil society organizations to maintain relevance and efficacy.

(iv) CSR Taxation and Compliance Audits: Tax authorities must be empowered to conduct routine audits of CSR deductions to ensure that claimed expenditures are legitimate, substantiated, and socially impactful.[147] Auditing protocols should be standardized and linked to national development plans, allowing tax incentives to be directed towards priority sectors such as health, education, and environmental sustainability.

These recommendations are aimed at transforming CSR taxation from a permissive and discretionary regime into one grounded in law and verifiability. By mandating disclosure, promoting data transparency, imposing reasonable deduction limits, and conducting compliance audits, states can reduce the risk of CSR becoming a façade for tax optimization. Instead, CSR incentives can be repositioned as genuine contributions to inclusive and sustainable development.[148]

Conclusion

The global disparity in Corporate Social Responsibility (CSR) tax disclosure mandates creates significant regulatory inconsistencies, enabling multinational enterprises (MNEs) to exploit gaps in jurisdictional oversight.[149] Without a harmonized and open-access reporting framework, CSR tax deductions risk becoming tools for reputational management and tax avoidance rather than instruments

[143] Directive 2022/2464, of the European Parliament and of the Council, 2022 O.J. (L 322) 15 (EU), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2464.
[144] OECD, *Corporate Tax Statistics: Second Edition* (OECD Publ'g 2021), https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-database.htm.
[145] Prem Sikka, Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance, 34(3–4) *Acct. Forum* 159 (2010).
[146] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* 115 (Pitman 1984).
[147] G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, U.N. Doc. A/RES/70/1, 67 (Sept. 25, 2015).
[148] Michael E. Porter & Mark R. Kramer, Creating Shared Value, 89 *Harv. Bus. Rev.* 68 (2011).
[149] Robert Bird & Kristen Davis-Nozemack, Tax Avoidance as a Sustainability Problem, 151 *J. Bus. Ethics* 1010 (2018).

of genuine social progress.[150]

A harmonized global framework for CSR tax transparency—modelled on successful international tax initiatives like the OECD's BEPS and Pillar One and Two reforms—would ensure that corporate social engagement aligns with public welfare objectives.[151] The current fragmentation across legal systems permits selective compliance, regulatory arbitrage, and unequal distribution of tax benefits. These challenges can only be resolved through a globally coordinated strategy anchored in public disclosure, legal accountability, and cross-border standardization.[152] An open-access mechanism for CSR tax expenditure data would allow tax authorities, civil society, and researchers to verify corporate claims of social contribution, assess the effectiveness of tax incentives, and formulate evidence-based fiscal policies.[153] Public availability of such data would also elevate CSR from a strategic branding exercise to a measurable and legally accountable commitment to sustainable development.[154] The legitimacy of CSR tax deductions ultimately hinges on their transparency and verifiability. As tax systems worldwide grapple with issues of equity and efficiency, incorporating CSR tax policies into global fiscal governance structures will be essential for preserving public trust and ensuring fair corporate contributions to development goals.[155] Open-access, harmonised reporting is not merely a procedural requirement—it is a foundational step towards building a credible and accountable global CSR regime. Although this study offers a comprehensive normative and comparative analysis of Corporate Social Responsibility (CSR) tax transparency frameworks, it is subject to several limitations. First, the research primarily relies on secondary sources—such as legislative texts, policy reports, academic literature, and institutional publications—which may not capture real-time developments in CSR tax policy and regulatory enforcement.[156] This limitation is particularly relevant given the dynamic nature of international tax reforms, especially those under the OECD's Inclusive Framework and the United Nations' SDG implementation mechanisms.[157] Second, the absence of empirical fieldwork restricts the ability of the study to assess the practical challenges corporations face in complying with CSR tax disclosure mandates. Without interviews, surveys, or case studies from stakeholders such as corporate tax officers, auditors, or policymakers, the study remains theoretical in orientation.[158] Third, jurisdictional disparities in defining and categorizing CSR expenditures present methodological challenges in conducting cross-border comparisons. While this article attempts to map major legal frameworks across several jurisdictions, the variation in accounting standards, reporting thresholds, and legal interpretations limits the extent of standardization and comparability.[159] Future research could

[150] Prem Sikka, Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance, 34(3–4) *Acct. Forum* 160 (2010).
[151] OECD, *Pillar One and Pillar Two International Tax Reforms* (OECD Publ'g 2023), https://www.oecd.org/tax/beps/international-tax-reform.htm
[152] Dirk Matten & Jeremy Moon, "Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 *Acad. Mgmt. Rev.* 410 (2008).
[153] OECD, *Corporate Tax Statistics: Second Edition* (OECD Publ'g 2021).
[154] G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, U.N. Doc. A/RES/70/1, ¶ 67 (Sept. 25, 2015).
[155] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* 105 (New Soc'y Publishers 1998).
[156] Id.
[157] United Nations, *High-Level Political Forum on Sustainable Development – Voluntary National Reviews Database* (2023), https://hlpf.un.org/vnrs/.
[158] Robert Bird & Kristen Davis-Nozemack, Tax Avoidance as a Sustainability Problem, 151 *J. Bus. Ethics* 1015 (2018).
[159] Dirk Matten & Jeremy Moon, "Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 *Acad. Mgmt. Rev.* 406, 406–08 (2008).

address these limitations by integrating empirical methodologies, including qualitative interviews with regulatory officials and corporate compliance personnel, and by analyzing anonymized CSR tax data across countries. Such an approach would provide a more grounded understanding of the efficacy and implementation barriers of CSR tax disclosure policies.[160]

Future Lines of Research

Further research on Corporate Social Responsibility (CSR) tax transparency should extend beyond theoretical and comparative frameworks to explore the practical realities of policy implementation in diverse economic contexts. One significant avenue is the examination of CSR tax reporting mechanisms in developing economies, where regulatory capacities may be weaker and where tax incentives could have disproportionate developmental impacts.[161] Empirical studies focusing on local enforcement challenges, administrative capacity gaps, and compliance culture would enrich the global understanding of CSR fiscal governance.

Another promising direction is the integration of digital tax administration tools into CSR reporting frameworks. As governments increasingly adopt e-filing, real-time tax analytics, and centralized databases, research should assess how these technologies can improve CSR compliance monitoring, flag discrepancies, and promote automatic disclosure alignment with national development goals.[162] Comparative evaluations of digitalized tax systems in jurisdictions like Estonia, Singapore, and Brazil could offer valuable insights for other countries considering similar reforms. A third-dimension worth exploring is the relationship between CSR tax incentives and Environmental, Social, and Governance (ESG) performance metrics. Research that links tax relief for CSR initiatives to demonstrable ESG impact could provide a performance-based accountability model for corporate tax benefits.[163] This would also support a shift from input-based reporting (i.e., amounts spent) to outcome-based assessments (i.e., measurable social and environmental returns).

Finally, the role of emerging technologies such as blockchain and artificial intelligence (AI) in automating CSR tax compliance and monitoring deserves in-depth scholarly attention. These tools could enhance transparency by ensuring traceability of funds, real-time verification of beneficiary impact, and reduction in compliance costs for both firms and tax authorities.[164] Interdisciplinary studies combining legal, technological, and public policy perspectives would be particularly valuable in designing next-generation CSR governance systems. From the author's standpoint, realizing the full potential of Corporate Social Responsibility (CSR) requires a paradigm shift in how transparency and accountability are embedded within corporate financial behaviour. Transparency must not be viewed as a regulatory burden but rather as a core ethical principle that defines modern corporate citizenship.[165] When CSR is approached merely as a financial strategy or reputational device—particularly through

[160] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* 112 (Pitman 1984).
[161] U.N. Dep't of Econ. & Soc. Affs., *Financing for Sustainable Development Report 2023* (2023), https://developmentfinance.un.org/fsdr2023.
[162] U.N. Dep't of Econ. & Soc. Affs., *Financing for Sustainable Development Report 2023* (2023), https://developmentfinance.un.org/fsdr2023.
[163] Michael E. Porter & Mark R. Kramer, Creating Shared Value, 89(1/2) *Harv. Bus. Rev.* 72, 72–73 (2011).
[164] OECD, *Blockchain Technologies as a Digital Enabler for Sustainable Infrastructure*, OECD Env't Pol'y Papers No. 28 (2021), https://doi.org/10.1787/a60a6c29-en.
[165] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* 102–06 (New Soc'y Publishers 1998).

opaque tax deduction schemes—its societal purpose is undermined and public trust eroded.[166] A recurring concern is the corporate reluctance to disclose CSR-related tax data, often justified through claims of commercial confidentiality or competitive advantage. However, where public funds in the form of tax deductions are involved, the public interest in disclosure should take precedence. Governments have a duty to ensure that such incentives yield measurable societal outcomes rather than facilitating tax base erosion under the guise of philanthropy.[167] Achieving this balance requires both regulatory courage and institutional innovation. Legal mandates must compel disclosure, and international cooperation must ensure standardization. Open-access databases, auditing frameworks, and cross-sectoral collaboration between tax authorities, civil society, and academia are necessary to reinforce a culture of ethical and accountable CSR practice.[168]

In the author's view, CSR should be repositioned from a discretionary or compliance-driven activity to a strategic social investment, intrinsically linked with national development goals and global sustainability frameworks. If properly regulated, CSR tax incentives can contribute to inclusive growth and social justice. However, if left unmonitored, they risk becoming tools of inequality, enabling corporations to dictate the terms of social development while undermining the tax systems that fund public welfare.[169] Thus, the future of CSR lies in regulatory clarity, public participation, and global coherence—anchored in the shared belief that transparency is indispensable to responsible capitalism.

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[166] Prem Sikka, Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance, 34(3–4) *Accts. Forum* 153, 161 (2010).
[167] OECD, *Corporate Tax Statistics: Second Edition* (OECD Publ'g 2021), https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-database.htm.
[168] G.A. Res. 70/1, ¶ 67, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015).
[169] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* 119 (Pitman Publ'g 1984).

UPHOLDING THE VULNERABLE: PROTECTING THE RIGHTS OF THE CHILD IN CRIMINAL JUSTICE SYSTEM

Shruti*[1]

Introduction

Child rights refer to the entitlements that come with being a child. Due to their vulnerability, immaturity, lack of experience, and dependence on caregivers, children are particularly susceptible to exploitation. This highlights the need for creating protective measures to ensure their well-being. Child rights encompass all the necessary programs that enable children to grow, develop, and achieve their full potential, while safeguarding their interests. Various plans, laws, regulations, and initiatives exist to protect children. Unfortunately, many children are deprived of the basic rights, such as care of family, safety, play, shelter, nutrition, healthcare, and the education. They face challenges like starvation, exploitation, abuse, marginalization, and trafficking. Thus, it is essential to advocate for children's rights and raise public awareness about their significance, the ways to protect them, and how to ensure their fulfilment.[2] The issue of children's rights has emerged as one of the most pressing concerns in the new millennium. Despite this, children still remain a marginalized issue in discussions on human rights and culture. A key reason for this is that children are not yet politically active and lack security, both physically and mentally, as well as financially. In this era of rapid change, the legal implementation of children's rights at all levels requires the support of dedicated resources. This impacts the entire system, including the allocation of budgets and addressing current needs. The future of society will ultimately depend on children, yet the approach to safeguarding them remains limited and disconnected from broader social and political planning.[3] This situation becomes even more perilous when a child is deprived of time, lives in conflict or poverty, is forced to work, performs menial or strenuous tasks, helps with household chores, lives on the streets, or faces physical or mental disabilities. In such circumstances, these children are often neglected and left vulnerable to violence. The violation of children's rights is a societal issue, stemming from harmful attitudes, ignorance, inadequate child development, lack of justice, misguided beliefs, and harmful behaviors. These factors contribute to the exploitation and mistreatment of children, perpetuating a cycle of weakness and cruelty.[4]

Meaning of Child

As defined in Article 1 of the 1989 "Convention on the Rights of the Child (CRC)", "A child is every human being under the age of eighteen years, unless a different age of majority is specified by the law applicable to the child."

In India, this definition of a child is upheld by the following legislation:

- "Protection of Children from sexual Offences Act (2012)"

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[2] Vaishnavi Parate, "Child Protection Laws in India," 6 Issue 6 *International Journal of Law Management & Humanities* 1273–8 (2023).

[3] Syed Sameer Hasan Zahidi, "Crime against Children in India," 7 Issue 1 *International Journal of Law Management & Humanities* 1542–4 (2024).

[4] *Ibid.*

- "National Policy for Children, 2013"
- "The Juvenile Justice (Care and Protection of Children) Act, 2015"[5]

Issues Affecting Children in India

A. *Child Poverty:* In an ideal world, the needs of children would be fully addressed in all areas of child welfare. However, in India, children are often overlooked despite various developmental rights being outlined for them from adulthood. A primary contributor to poverty is an unplanned population, and while education, behavioral encouragement, and a peaceful environment help, they don't fully resolve the issue. It is no longer solely the state's responsibility to help workers escape poverty; the state must also take proactive steps to safeguard the welfare of children and youth, a responsibility that impacts the "Directive Principles of State Policy (DPSP)."[6]

B. *Child Labor:* Child labour has long been a significant issue in India. As the nation strives to become a global economic powerhouse, it is essential to prioritize the future of its children. Child labour remains a blight on the nation, with India having the highest population of child labour under the age group of fourteen years in the world-an estimated 100-150 million, out of which at least a population of 44 million are engaged in hazardous work. Despite laws prohibiting children under 14 from working in dangerous environments, child labour persists.[7]

C. *Child Abuse:* Child abuse remains one of the most alarming issues facing society. Children may suffer from physical, verbal, or emotional abuse, which includes neglect, sexual violence, and exploitation. Such abuse significantly impacts children's lives, hindering their development and affecting their social interactions. According to the "National Crime Records Bureau", incidence of torture as well as murder is on the rise. The harsh realities of life and economic shifts expose children to various forms of abuse, which can have long-lasting effects on their well-being and on future generations. To protect children from these dangers, comprehensive prevention plans and robust legal systems must be developed and maintained.[8]

Need for Protection of Child Rights

Children embody innocence, trust, and boundless hope. Their childhood should be a time of joy, love, and gradual growth as they explore and gain new experiences. However, for many, childhood is far from this ideal. Throughout history, children have faced abuse and exploitation, enduring hunger, homelessness, hazardous labour conditions, high infant mortality, inadequate healthcare, and limited access to basic education. Such hardships should not define a child's life. Childhood must be cherished and safeguarded. Every child has the right of survival, thrive, right of protection, and have a voice in decisions which affect their livelihood.[9]

Children are the future of our nation, destined to become our future lawyers, doctors, engineers, teachers, and more. Protecting their rights is essential, especially as many children, including orphans,

[5] Priyanka A., "Legal Mechanism for Protection of Child Rights in India," 2 Part 1 *Indian Journal of Integrated Research in Law* 1–9 (2022).
[6] Syed Sameer Hasan Zahidi, "Crime against Children in India," 7 Issue 1 *International Journal of Law Management & Humanities* 1542–4 (2024).
[7] *Ibid.*
[8] *Ibid.*
[9] Namita Chandwani, "Protection of Child Rights in India," 5 *Supremo Amicus* 160–71 (2018).

face significant challenges in life. They are often subjected to hardships such as sexual abuse, child trafficking, and forced begging, highlighting the urgent need for their protection and care. The need for distinct rights of children emerged after "the Second World War", as many children got orphaned or were not able due to the conflict hence required protection. Those working with children recognized that the existing systems were inadequate to address their comprehensive needs. This led to the creation of the "UN Convention on the Rights of the Child", which, for the very first time in history, consolidated all child's rights into a single document. The cornerstone of these rights is the "best interest principle," which ensures that any action concerning a child prioritizes their well-being. The Convention defines the fundamental rights of children, addressing a wide range of needs and issues, and was officially endorsed by India on December 11, 1992.[10]

The UNCRC lists the four main categories of fundamental human rights that children should be entitled to. Each child's "civil, political, social, economic, and cultural rights" are fully covered under these groups:

1. *Right of Survival:*
   - This includes the "right to birth."
   - The right to health and medical care, which includes access to clean and safe water, wholesome food, a clean and safe environment, and knowledge necessary for sustaining good health;
   - The right to live life with dignity;
   - The right to basic standards of food, clothes, as well as well as housing.
2. *Right to Protection:*
   - This includes the right to be shielded from abuse in all its manifestations as well as the right to be shielded from neglect.
   - The right to be shielded from dangerous substances, such as narcotics;
   - The right of protection of sexual as well as physical abuse.
3. *Right to take part:* Both the "freedom of expression" and the "freedom of speech" are guaranteed.
   - "The freedom to associate";
   - Right to obtain knowledge;
   - The right to take part in choices that have an impact on their lives, either directly or indirectly.
4. *The right to progress*
   - The entitlement to an education.
   - The freedom to learn new things and develop new abilities.[11]

Legal Framework

"*Constitutional Provisions"*

1. Right to Equality: As per Article 14 of the Indian Constitution, every person, including minors, has the right to equal legal protection and treatment, free from discrimination. Furthermore, the

[10] *Ibid.*
[11] *Ibid.*

State is required by Article 15(3) to establish "special provisions for the welfare of women and children."

2. *Right to Education:* One of humanity's greatest blessings is education, which is necessary for personal autonomy and empowerment. Everyone is entitled to high-quality information. India has stated time and time again that all children up to the age of fourteen years will receive universal elementary education. The significance of free and mandatory high-quality education has been underlined by a number of commissions, including the "Kothari Commission", "the Acharya Ramamurthy Committee", "the Prof. Yashpal Committee", and "the Saikia Committee". According to Article 21 of the Constitution, the Supreme Court of India ruled in the historic case of "*Unni Krishnan v. State of Andhra Pradesh*" that the right to education till the age group of fourteen years is a fundamental right.

All children aged 6 to 14 must receive free and compulsory education, according to Article 21(A), which was added by the "Constitution (Eighty-Sixth Amendment) Act, 2002." Furthermore, the State is required by Article 45 of the Constitution to offer all children early childhood care and education until they turn six. Article 51A(k) was also included by the 86th "Constitutional Amendment Act, 2002," which mandates that all Indian parents and guardians provide their children between the ages of six and fourteen with access to education.[12]

3. *Prohibition of Child Labour:* "Human trafficking", begging, and other types of "forced work" are all prohibited under Article 23. Any breach of this clause will be regarded as illegal and subject to legal penalties. The State may nonetheless enforce mandatory service for public objectives in spite of this clause. However, the state cannot discriminate on the basis of caste, class, religion, colour, or any other comparable criteria where such service is required.[13]

Article 24: Children under the age group of fourteen years are not allowed to engage in "hazardous jobs or activities", such as mines, factories, and other hazardous industries, according to Article 24.

Other Legal Legislations

1. "The Employment of Children Act, 1938": It forbids hiring minors under the age of 15 for certain jobs involving the shipping, shipping, or passenger transportation of products by railroads or port authorities.
2. "The Factories Act, 1948": It forbids the employment of minors in workplaces who are younger than 14.
3. No one under the age of eighteen is allowed to work in a mine or be in any area of an underground mine where mining activities are occurring, according to "The Mines Act, 1952."
4. "The Merchant Shipping Act, 1958" forbids hiring or transporting anyone younger than 16 to work on a ship in any capacity.
5. **"***The Apprenticeship Act, 1961*, says an individual must be at least 14 years old and fulfil the necessary scholastic and physical fitness requirements in order to be hired as an apprentice for training in any approved trade.

[12] Priyanka A., "Legal Mechanism for Protection of Child Rights in India," 2 Part 1 *Indian Journal of Integrated Research in Law* 1–9 (2022).
[13] Priya Rao, "Human Rights and Rights of Children in India," 2 *GNLU Journal of Law Development and Politics* 100–21 (2010).

6. Children under the age of 15 are prohibited from working in any motor transport enterprise by "The Motor Transport Workers Act, 1961."
7. Children under 14 are not allowed to work in any industrial setting, according to the Beedi and Cigar Workers (Conditions of Employment) Act, 1966.
8. A comprehensive regulation known as "The Child Labour (Regulation and Prohibition) Act, 1986" clearly divides activities into "hazardous" and "non-hazardous" categories in order to control and outlaw child labour. The hiring of minors under the age of 14 in particular jobs and procedures is expressly forbidden under the Act.
9. To stop the abuse of prenatal diagnostic methods to identify genetic, metabolic, or chromosomal anomalies that can result in female feticide, "The Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994" was created.
10. "The 2006 Prohibition of Child Marriage Act" This Act forbids marriages in which the girl is under the age of eighteen or the boy is under the age of twenty-one. Additionally, it states that child marriage is a crime that can be prosecuted and is not subject to bail, and that parents who let such marriages to take place will be held responsible and punished.
11. In order to make the juvenile justice system more adaptable to changing conditions, the Juvenile Justice Act of 2000 was repealed and replaced by the Juvenile Justice (Care and Protection of Children) Act of 2015. Protecting the rights of children who are in legal trouble is its main goal.
12. A gender-neutral law known as the "Protection of Children from Sexual Offences (POSCO) Act, 2012" forbids sexual assault against any kid younger than 18. It has extensive provisions for establishing child-friendly courts, recording the victim's statement, and performing medical examinations.
13. The main goal of "The Immoral Traffic (Prevention) Act, 1956" was to outlaw the trafficking of women and girls for prostitution purposes.
14. *"The Bharatiya Nyaya Sanhita,2023***"** includes provisions to prohibit child trafficking, such as penalties for kidnapping, as well as for the selling or buying of a child for prostitution.[14]

International Legislations

"The United Nations Convention on the Rights of the Child 1990"

"The United Nations Convention on the Rights of the Child (UNCRC)", adopted in 1989 and enacted in 1990, has been so ratified by nearly all countries, including India, with the notable exceptions of the United States and the Somalia. This convention comprehensively outlines the rights of children and emphasizes the protection of vulnerable children. States that are party to the UNCRC are legally obligated to uphold and comply with its provisions. Among the various rights enshrined in the convention, Article 31 specifically emphasizes that: "state parties shall promote physical and psychological recovery and social integration of child victim of armed conflicts and that such recovery shall take place in an environment which fosters the health, self-respect and dignity of the child."[15]

"The International Convention on Civil and Political Rights"

Individual rights are protected for member states that have accepted the 1954-drafted and 1976-enacted

[14] Priyanka A., "Legal Mechanism for Protection of Child Rights in India," 2 Part 1 *Indian Journal of Integrated Research in Law* 1–9 (2022).

[15] Kiiza Smith and Renu Ral Sood, "The Enforcement and Protection of the Rights of Vulnerable Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–15 (2023).

"International Covenant on Civil and Political Rights (ICCPR)". The covenant covers children's rights, especially those that affect children who are at risk. According to Article 24(1), every child has the right to the protective measures that are appropriate for their status as a minor and that are supplied by their family, society, and the state, regardless of their race, colour, sex, language, religion, national or social origin, property, or place of birth.[16]

"Universal Declaration of Human Rights 1948"

There are two articles of the "Universal Declaration of Human Rights (UDHR)" that particularly deal with children. "Motherhood and childhood are entitled to special care and assistance," according to Article 25(2), which also guarantees that all children, whether born within or outside of marriage, have an equal right to social protection. The right to education for all is emphasized in Article 26, which covers both the goals of education and its accessibility. It requires elementary and fundamental education to be free, with elementary school being required. Additionally, the goal of education should be "the strengthening of respect for human rights and fundamental freedoms and the full development of the human personality." Additionally, parents retain the prior right to determine the type of education their children receive. While the UDHR does not explicitly mention vulnerable children, it remains highly relevant in establishing and upholding protections for them.[17]

Judicial Approach for the Protection of Child's Rights

Child Adoption: In "*Laxmi Kant Pandey v. Union of India"*[18], The Hon'ble Supreme Court held that the primary objective of child adoption must be the utmost welfare of the child. It also issued several guidelines to the central government concerning the adoption of "Indian children" by foreign parents.[19]

Children in Jails/Juvenile Homes/Care Homes: In "*Hiralal Mallick v. The State of Bihar"*[20], a criminal appeal case, Justice V.R. Krishna Iyer, while delivering the judgment, emphasized the very role of the legal system in juvenile justice and strongly criticized the State of Bihar for lacking a legislation on Children's rights. He stated, "As humanity approaches the International Year of the Child (1979), the Indian legal system must be sensitized to juvenile justice. It is a mark of our humanist culture that we uphold a national youth policy in criminology." In "*Hussainara Khatoon and others v. Home Secretary, State of Bihar"*[21], *Patna* the Hon'ble Supreme Court ruled that the speedy trial is the essential component of the fundamental right to life and liberty guaranteed under Article 21. The Court further emphasized that in a social welfare state, the government must establish rescue and welfare homes to care for women and children who have nowhere else to go and are neglected by society.[22]

Child Labour: In "*People's Union for Democratic Rights and Others v. Union of India and Others"*[23] (commonly known as the Asiad Workers Case), the Supreme Court provided a broad interpretation of

[16] *Ibid.*
[17] *Ibid.*
[18] *Laxmi Kant Pandey v. Union of India AIR 1984 SC 469*.
[19] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[20] *Hiralal Mallick v. The State of Bihar AIR 1977 SC 2236*.
[21] *Hussainara Khatoon and Others v. Home Secretary, State of Bihar AIR 1979 SC 1369*.
[22] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[23] *People's Union for Democratic Rights and Others v. Union of India and Others AIR 1982 SC 1473*.

the term 'hazardous employment'. The Court stated, "A large number of men, women, and children, who form the majority of our population, are living in sub-human conditions marked by extreme poverty. This grinding poverty has weakened their spirit and shattered their faith in the existing social and economic system. Construction work is clearly a hazardous occupation, and it is imperative that the employment of children under the age of 14 be prohibited in all types of construction work." In "*Bandhua Mukti Morcha v. Union of India and others"*[24], The Supreme Court ruled that the health care of workers and their families, as well as the education of children as well as adults in areas where workers reside, should be the responsibility of the employer. The Court further stated that requiring the state to fund the construction of a school in such areas, where there may not be enough children to justify it, might not be appropriate. Instead, the employer should bear the responsibility of providing schooling for the children of workers.[25]

Children's Right to Shelter: In "*M/s. Shantistar Builders v. Narayan Khimalal Totame and Others"*[26], the Supreme Court stated: "The right to life is fundamental in any civilized society. This includes the right to food, clothing, a decent environment, and adequate accommodation. The distinction between the shelter needs of animals and humans must be recognized. While an animal requires only basic protection for its body, a human being requires suitable accommodation that enables growth in physical, mental, and intellectual aspects. The Constitution seeks to ensure the full development of every child, which can only be achieved if the child is in a proper home." Thus, the Supreme Court, acknowledged the child's right to have shelter as essential for the overall development.[27]

Rights of Children Expelled from School: In the case of "*Bijoe Emmanuel and Others v. State of Kerala and Others"*[28], Three children who were removed from school for refusing to sing the National Anthem had their fundamental rights affirmed by the Supreme Court. The children's refusal to sing the National Anthem during the school's morning prayer was deemed by the Court to be an act of no disrespect. According to Articles 19(1)(a) and 25(1) of the Constitution, the deportation was considered a violation of their fundamental rights. The Supreme Court ordered the authorities to give the children with the facilities they needed for their schooling and to restore them so they may continue their studies without any obstacles.[29]

Child Marriage: In "*Sushila Gothala v. State of Rajasthan and others"*[30], Sadly, no social organisation has stepped up to inform the public about the detrimental impacts of child weddings, despite the fact that the social evil in Indian society is more deserving of criticism than the dowry system. However, the Court recommended that the government form committees at the district, block, and village levels, made up of social workers and government representatives, to hold frequent seminars in villages to increase awareness of the detrimental effects and repercussions of child marriage. Additionally, the

[24] *Bandhua Mukti Morcha v. Union of India and Others AIR 1984 SC 802*.
[25] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[26] *M/s. Shantistar Builders v. Narayan Khimalal Totame and Others AIR1990SC630*.
[27] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[28] *Bijoe Emmanuel and Others v. State of Kerala and Others AIR 1987 SC 748*.
[29] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[30] *Sushila Gothala v. State of Rajasthan and Others AIR1995RAJ90.*

government should use print and broadcast media to condemn this social ill and designate Child Marriage Prevention Officers, if the state hasn't already done so in accordance with Section 13 of the Act.[31]

Children and Right to Education: In the landmark case "*Mohini Jain v. State of Karnataka and Others"*[32], the Supreme Court highlighted the "constitutional mandate" of child education as an essential part of the fundamental right to life under Article 21 of the Indian Constitution. The Court stated: "The Directive Principles, which are fundamental in the governance of the country, cannot be separated from the fundamental rights guaranteed under Part III. These principles must be interpreted alongside the fundamental rights, as they complement each other. The State has a constitutional obligation to create conditions where individuals can fully enjoy their fundamental rights. Without realizing the 'right to education' under Article 41 of the Constitution, the fundamental rights outlined in Chapter III will remain out of reach for the large majority, who are illiterate."[33]

Children and Corporal Punishment: In the landmark judgment of "*Parents Forum for Meaningful education and Another v. Union of India and Another"*[34], the Delhi High Court struck down the very Rules 37(1)(a)(ii) and (4) of the Delhi School Education Rules, 1973, which allowed the infliction of corporal punishment on children. The Court ruled that such provisions were in violation of Articles 14 and 21 of the Constitution.[35]

Rights of Children in Mother's Womb: In "*Municipal Corporation of Delhi v. Female Workers" (Muster Roll) and another*[36] The Court further emphasized that motherhood is a natural and fundamental experience in a woman's life. It asserted that employers must show consideration and sympathy towards a woman in service, recognizing the physical challenges she faces while carrying a child or caring for one after birth. Employers are obligated to provide necessary support to facilitate childbirth for working women.[37]

Child/Female Feticide: In "*Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India and others"*[38] Despite the passage of the PNDT Act in 1994, the Supreme Court recognised that female infanticide and foeticide still occur in India. In response, the Court issued a number of directives as specified in the Act to the Central Government, State Governments/Union Territory Administrations, the Central Supervisory Board (CSB), and other pertinent authorities.[39]

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[31] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[32] *Mohini Jain v. State of Karnataka and Others AIR 1992 SC 1858*.
[33] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[34] *Parents Forum for Meaningful Education and Another v. Union of India and Another AIR2001DELHI212*.
[35] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[36] *Municipal Corporation of Delhi v. Female Workers (Muster Roll) and Another AIR 2000 SC 1274*.
[37] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).
[38] *Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India and Others AIR 2003 SC 3309*.
[39] Anita Verma, "Judicial Approach towards Protection of Children in India," 5 Issue 2 *Indian Journal of Law and Legal Research* 1–25 (2023).

Right to Information: The Protection of Child Rights

"The Right to Information Act, 2005" is a legislation aimed at establishing a practical framework for citizens to have access of information held by public authorities, fostering the transparency as well as the accountability in the operations of these authorities. According to Section 2(h) of the RTI Act, public authorities are under obligation to provide information in response to Right to Information applications. This Act plays a crucial role in empowering civil society organizations to engage in governance and social transformation, using the Act as a tool to monitor, assess, and evaluate government policies, programs, and schemes. Hence "Right to Information Act, 2005" provides protection to the children.

Initiatives

Numerous official documents highlight the state's commitment to children and emphasize the importance of child welfare programs. For instance, "Article 24 of the Indian Constitution" strictly prohibits the "employment of children under the age group of 14 years" in hazardous occupations, while Article 21A ensures free and compulsory education for children up to 14 years. Additionally, Article 45 underscores the state's responsibility to provide the early "childhood care and education". "The Directive Principles of State Policy" further affirm the government's dedication to safeguarding children's rights.

India's 1974 National Policy for Children acknowledges the critical role of the state in ensuring children's welfare. As one of the few nations with a comprehensive child welfare strategy, the policy aims to promote the holistic physical, mental, and social development of children, both before and after birth. These constitutional provisions and policies collectively reflect the state's proactive approach to protecting and nurturing its youngest citizens.[40]

a) *"Ministry for Women and Child Development":* To advance the welfare of women and children, the "Ministry of Human Resource Development" later renamed the "Ministry of Social Justice and Empowerment" established a special section in 1985. The goal of this service is to help every child and woman reach their greatest potential. It enacts or adjusts laws, creates plans, policies, and programs, and organizes the work of governmental and non-governmental organizations that are concerned with child development. Additionally, the ministry oversees several innovative programs specifically designed to benefit young women and children.[41]

b) **"***National Human Rights Commission":* "The United Nations General Assembly and the United Nations Commission on Human Rights" have accepted the principles upon which the National Human Rights Commission bases its policies and actions.

c) **"***National Commission for Protection of the Child Rights (NCPCR)":* "The National Commission for the Protection of Child Rights Act of 2005" established a "National Commission at the Central level and State Commissions at the state level" to protect children's rights. In 2007, the government created a dedicated body to safeguard these rights, with the primary objective of ensuring the

[40] "Initiatives on protection of child rights in india pdf - Google Search,"*available at*: https://www.google.com/search?q=initiatives+on+protection+of+child+rights+in+india+pdf&oq=initiatives+on+protection+of+child+rights+in+india+pdf&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIJCAEQIRgKGKABMgkIAhAhGAoYoAEyCQgDECEYChigAdIBCDIxNzBqMGo3qAIAsAIA&sourceid=chrome&ie=UTF-8#vhid=zephyr:0&vssid=atritem-https://www.lawjournal.info/article/49/2-2-13-622.pdf (last visited January 14, 2025).

[41] *Ibid.*

"effective enforcement" of the child's rights and the "proper implementation" of the laws and programs designed for their welfare.

d) *"Central Advisory Board on Child Labour":* "The Central Advisory Board on Child Labour" was established on March 4, 1981. Its responsibilities include:

- Reviewing the implementation and enforcement of existing child labour laws by the national government.
- Providing recommendations on legislative measures and social welfare initiatives for the well-being of working children.
- Evaluating the effectiveness of welfare programs aimed at assisting child labourers.
- Identifying industries and regions where child labour needs to be systematically eliminated.[42]

Role of Voluntary Organizations

Voluntary organizations have played a pivotal role in developing children's services and initiating innovative projects. These agencies have collaborated with the government to address the challenges faced by children effectively. "The National Policy for Children and the National Plan of Action" provide support and reinforcement to these organizations, fostering synergy between governmental and non-governmental efforts. Representatives from national and state-level voluntary organizations frequently participate in advisory bodies, consultative committees, expert groups, and task forces established by the government. These bodies are tasked with designing specific projects and programs, evaluating "government schemes", and addressing needs of "particular groups of children".

Voluntary organizations have significantly influenced the formulation of national child policies and contributed to building family as well as "community-based child services". They look for children's needs and the establishment of important services while shaping public opinion to support new approaches to children's rights programs. Many non-profit organizations have been pioneers in child advocacy and empowerment, playing a transformative role in ensuring the welfare and rights of children.[43]

Challenges

1. National and local monitoring and coordinating bodies should receive increased support, including financial resources, to enhance their institutional capacity and enable them to effectively fulfil their mandates.
2. Strong measures must be implemented to address persistent discriminatory attitudes and practices against specific groups of children, particularly girls, children from minority communities, those with disabilities, and children born outside of marriage.
3. Efforts should be intensified to bring awareness and the knowledge of the objective and the very provisions of the "Convention on the Rights of Child" among both adults and children. This includes the widespread dissemination of child-friendly versions of the treaty in local languages.

[42] *Ibid.*
[43] *Ibid.*

4. Legal measures are essential to prevent and address the "economic exploitation of children", particularly "domestic workers" and those belonging to informal sector. Measures are also needed to combat mistreatment, including "sexual abuse", and to halt the "sale and trafficking of children."
5. "Systematic collection of quantitative and qualitative data" is required across all areas as per the Convention, including for children in both urban and rural settings, to better inform policy and intervention.
6. In regions affected by armed conflict, adherence to humanitarian laws protecting children, particularly regarding the involvement of child soldiers, is critical. Additionally, measures should be taken to ensure "the physical and psychological recovery and social reintegration of child victims of war and violence."
7. Greater attention must be given to ensuring meaningful child participation and consultation. Current practices that overlook or inadequately recognize children's voices need to be rectified.[44]

Conclusion

Children, due to their developing minds, are highly influenced by their environment. Therefore, it is crucial to ensure that their surroundings are conducive to their growth and development. This necessity applies universally, irrespective of whether a child is in conflict with the law or not, and they must be afforded adequate care and legal protection. The well-being of children is fundamental to the prosperity of any nation. Recognizing this, India strives to safeguard rights of the children through various international, national, and state legal framework, as outlined above.

Despite the presence of various legal frameworks, there remain significant gaps and challenges that must be addressed both in the short and long term. Numerous cases have highlighted that children have not received the justice they deserve, and social issues such as child labour and child marriage continue to persist. The suggestion would be that the awareness campaign should be held on the rights of child and the very importance of education for that purpose. The empowerment of institution and the involvement of community people are very important in eradicating such problem and implementation should be strengthened.

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[44] Rebeca Rios-Kohn, "The Convention on the Rights of the Child: Progress and Challenges Features," 5 *Georgetown Journal on Fighting Poverty* 139–60 (1997).

BALANCING TECHNOLOGICAL GOVERNANCE AND FUNDAMENTAL RIGHTS IN THE DIGITAL ERA: A CASE COMMENT ON *ANURADHA BHASIN V. UNION OF INDIA (2020)*

Bhaskarjit Roy*

Introduction

The Historic case of Anuradha Bhasin v. Union of India exemplifies the significant junction between technological breakthroughs and fundamental rights in the digital era. This lawsuit emerged in the wake of the Indian government's decision to impose a comprehensive internet shutdown in the Union Territory of Jammu and Kashmir on 4th August 2019, preceding the abrogation of Article 370. These exceptional measures, which included the suspension of internet services, was justified on grounds of national security and public order. However, it raises serious concern about the constitutionality of such measures, particularly in relation to the fundamental rights guaranteed in the Indian Constitution.[1] The major argument of this court case was that the government's actions violated the Indian Constitution's Article 19 which guarantees the freedom of speech and expression as well as the freedom to engage in any trade or profession. The petitioners, led by Anuradha Bhasin, the Editor of the Kashmir Times, argued that the internet shutdown severely restricted journalistic freedom and the dissemination of information, thereby undermining the very essence of democratic principles. The judgement of the Supreme Court of India on this matter is noteworthy as it affects the citizens of Jammu and Kashmir – but that's not all – it also seeks more broad implications for the rights of citizens with respect to modern technology. The internet shutdowns are now being put under scrutiny, which is a positive sign, but we need to make sure it is permanent.[2] This is a much-required exercise since the move or decision to suspend the internet needs to be proportionate to the problem at hand. Here, the question to be asked is whether the severing of these communications is the most appropriate response to the challenge of national security or does it need to be balanced with the need to protect the rights of the citizens, which in this case enablement of accessing the cyberspace. In this case comment, we analyze the factual matrix of the case, the legal arguments put forth, the reasoning of the Court, and the lasting implications this judgment has on the interface between technology and human rights. From the above analysis, we try to bring out the fundamental role of judicial review in the protection of democratic liberties in the information age.[3]

Facts

The Indian government on 4th August 2019, made a decision to implement a total internet shutdown in Jammu and Kashmir gave rise to the case of Anuradha Bhasin v. Union of India. This action coincided with the abrogation of Article 370, which had previously granted special status to the region. The shutdown was carried out by the government as part of security measurement for upholding law and

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[1] Constitutional Liberties and Cyberspace: Analysing the Anuradha Bhasin v Union of India Case and Its Impact on Fundamental Rights' (2020) 20 Legal Information Management 345, DOI:10.1017/S1472669620000384.

[2] Anuradha Bhasin v Union of India (2020) SC 172, full judgment available at https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/02/AB-v.-Union-of-India-Full-Judgment.pdf accessed 20 January 2025.

[3] Anuradha Bhasin v Union of India: An Examination of the Supreme Court's Application of the Doctrine' (Centre for Advanced Legal Studies and Research Blog, 2020) https://www.calj.in/post/anuradha-bhasin-v-union-of-india-an-examination-of-the-supreme-court-s-application-of-the-doctrine accessed 20 January 2025.

order and put off violence during a delicate political time. Alongside the internet shutdown, restrictions under Section 144 of the Criminal Procedure Code were imposed, prohibiting public gatherings. The petitioner, Anuradha Bhasin, Executive Editor of The Kashmir Times, herein challenges the measures as framed, which were said to be disproportionate on the activities of the press-in violation of the right to freedom of speech and expression guaranteed under Article 19(1)(a) and the right to practice any profession or trade guaranteed under Article 19(1)(g). Bhasin argued that blackout had silenced mainstream media and blocked information access and democratic freedoms. For the opposing side, the government justified the measures as temporary and necessary for national security and public safety on the basis of Temporary Suspension of Telecom Services Rules, 2017, under the Telegraph Act of 1885. So, the government protected the measures as temporary and necessary for national security and public safety, citing the Telegraph Act of 1885 and the Temporary Suspension of Telecom Services Rules, 2017. The case raised serious concerns regarding the validity of such broad restrictions, notably whether they followed standards of proportionality, necessity, and procedural safeguards. This legal dispute highlighted the exquisite balance between security concerns and the protection of fundamental rights.

Issues

1. Is the suspension of the internet envisaged as infringing the fundamental right to freedom of speech and expression?
2. In what measure is the access to the above understood with regard to this right in the current modern democratic society?
3. Does the indefinite suspension of the internet infringe the right to practice any profession, trade, or business which depends on the internet for individuals or entities?
4. Whether frequent and prolonged application of Section 144 Cr.P.C to impose restriction of freedom of movement and assembly was legally justified.
5. Whether or not the orders of suspension of internet complied with the procedural safeguards as mandated under the Telecom Suspension Rules, 2017.
6. Will the Right to access the internet be recognized as a part of the fundamental right to freedom of speech and expression under Article 19(1)(a) hereof, and as the right to life and personal liberty under Article 21?
7. What has to be looked into is how the non-publication of such orders affects the ability of individuals to challenge them in courts of law.

Judgement

The verdicts in Anuradha Bhasin v. Union of India (2020) captures the essence of constitutional principles at their best: those that hold the balance between the cardinal demands of national security and the sanctity of fundamental rights. In a democracy, the Constitution is the early light of justice for the governed and the government. The definitive battle in the Supreme Court of India was settled with all the complexities related to the duty of the state to ensure public order on one level and the citizens' inviolable rights to freedom of speech, expression, and trade with the digital age on another. The Court forcefully inducted the internet as a predominant enabling constituent of fundamental rights stressing its role in free speech, economic activity, and access to information. It declared that it made a part of

speech.[4]

Final judgement

The final judgment in the case of Anuradha Bhasin v. Union of India (2020) was delivered by the Supreme Court of India on January 10, 2020. The judgment addresses the issues concerning restrictions on communication and movement in Jammu & Kashmir in the aftermath of the abrogation of Article 370 in August 2019. Key aspects of the judgment are as follows: The Court ruled that both freedom of speech and expression as well as the right to carry on trade or business under Article 19(1)(a) and Article 19(1)(g) include the right to access the internet but subject to reasonable restrictions under Article 19(2) and Article 19(6). The Court mentioned that the principle of proportionality is one of the main standards relevant to judging the validity of the restrictions on fundamental rights and any restriction must be:

1) Necessary for the attainment of a legitimate purpose;
2) The least restrictive means;
3) In balance extended with the interests of the state.

The Court required the government to publish all orders for imposing restrictions including those for internet shutdowns to create transparency and allow the same for judicial review. The orders which are issued under Section 144 of CrPC (which is being used to impose curfew and restriction) must also be proportional and could not be used to masquer dissent arbitrarily. The Court noted that repetitive Section 144 cannot be a tool to tie forever. The Court ruled that indefinite suspension of internet services is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. All suspension must be temporary, justifiable and, reviewed periodically. The Court emphasized that an individual affected by restrictions can seek relief in the courts and this was mandated in the annual judicial reviews.

Significance and critical analysis of the judgment

The Court considered access to the internet as part of the very fundamental rights, namely freedom of speech and expression (Article 19(1)(a)) and the right to practice any professions or trade (Article 19(1)(g)). It described how the internet is today-used in democratic discourse and business transactions. The Court emphasized that procedural safeguards have to be followed under Section 144 of the CrPC and the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. It made every order restricting internet access subject to publication for purposes of ensuring transparency and accountability. Thus, the judgment reiterated the principle of proportionality as a benchmark for judging the validity of restrictions on fundamental rights. Restrictions are to be capable of serving a legitimate aim and shall be the least restrictive means necessary to serve that aim. The Court has also emphasized the importance of a judicial oversight over the executive actions restricting fundamental rights. The judgment was in the internet shutdown in Jammu & Kashmir that followed the abrogation of Article 370 in August 2019. The decision did try to weigh national security issues against the rights of individuals residing within that region. So, while some important principles have been laid

[4] Anuradha Bhasin v Union of India (2020) MANU/SC/0022/2020, full judgment available at http://student.manupatra.com/Academic/Studentmodules/Judgments/Nov/MANU_SC_0022_2020.pdf accessed 20 January 2025.

down, it avoided creating any remedy or timeline for the lifting of those restrictions applied over Jammu and Kashmir. The Court put emphasis on proportionality but did not subject it to the rigour of an examination as in the case of the restrictions imposed in Jammu and Kashmir. The criticism lies that the Court has at certain points surrendered to the discretion of the executive. Its access to the internet was identified as an integral part of other fundamental rights.[5]

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[5] Global Freedom of Expression, 'Bhasin v Union of India' (Columbia University) https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/ accessed 20 January 2025.

CONSTITUTIONAL SAFEGUARDS FOR SCHEDULE TRIBES UNDER UNIFORM CIVIL CODE

Ashish Nath Tiwari*

Introduction

In India, specific communities belonging to marginalized backgrounds have been officially designated as Scheduled Castes (SCs) and Scheduled Tribes (STs). According to the United Nations, identifying minority groups can be a nuanced process, involving both objective and subjective measures. These measures have been crafted by UN experts using universal standards. Objectively, the focus is on common traits among the group, such as nationality, ethnicity, customs, language, or faith. The STs, once proud owners of their ancestral lands, are now facing the gradual loss of their holdings and increasing marginalization within their own homelands. This long-standing issue has been exacerbated in recent years, despite the promises of independence. The territories still under ST control are underdeveloped and lacking in basic irrigation, rendering them vulnerable to exploitation by outsiders who act as middlemen. Historically, governments in tribal territories have implemented irrigation projects that have disrupted ST villages and displaced their people, ultimately benefiting non-tribals instead. Renowned Indian law scholar and human rights advocate Upendra Baxi has significantly improved knowledge and support for tribal rights in India. He has criticized the current human rights framework, contending that it frequently falls short in addressing the unique vulnerabilities and needs of tribal populations. Baxi highlights how crucial it is to acknowledge and defend tribal peoples' distinct cultural identities, land rights, and right to self-determination. He supports a more sophisticated strategy that takes into account native communities' histories, social structures, and pluralism in law.

The Scheduled Tribes

Tribal individuals who reside in forested areas or have a nomadic lifestyle are often classified as scheduled tribes. Generally excluded from organized religions, they are often considered social outcasts. These tribes have unique customs, attire, eating habits, and a distinct culture that sets them apart. However, many of these tribal community’s struggle with backward social, educational, and economic standards, often due to their geographic isolation, timid nature, and primitive beliefs. Considering their history can provide insight into their current situation. Under Article 342(1) of the Indian Constitution, the President has the power to designate certain tribes or tribal groups in States or Union Territories as scheduled tribes.

Constitutional Rights for the Scheduled Tribes

The legal landscape surrounding religion in India is a complex and dynamic one that encompasses a wide range of issues such as modernity, secularism, unity, group identity, religious freedom, and parity. India's legal framework, also known as the personal law system, operates under the principle of legal pluralism. As a result, various religious communities, including Muslims, Christians, Jews, Hindus, and Parsis, have their own distinct legal systems. This can be seen particularly in family law, where women's rights are often subject to a paternalistic interpretation. This can be observed in cases such as the one discussed in this article (249601), where the interpretation of women's rights is heavily influenced by

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societal norms and expectations.

Since India gained independence, the Uniform Civil Code (UCC) has sparked ongoing discussions. The decision to implement it was left to the government's discretion due to its significant impact, the current state of affairs, and the recognition of the importance of preserving religious diversity and avoiding tensions between communities during the constitution-making process. The Indian Constitution's directive principles of state policy, specifically Article 44, enshrines the concept of a UCC, stating that the state's responsibility is to ensure that all citizens are safeguarded by a uniform civil code. This is particularly crucial in a country like India, where numerous religious communities exist, each with their own unique laws and customs regarding matters like inheritance, marriage, divorce, and other civil matters.

Constitutional safeguards for STs

The visionaries who laid the foundations of our constitution and shaped the Indian Republic were staunch believers in the need for special safeguards for the Scheduled Castes (SC) and Scheduled Tribes (ST) communities in India. Deeply ingrained in the Preamble of the Indian Constitution is the promise of ensuring social, economic, and political justice; preserving freedom of speech, thought, belief, faith, and worship; promoting equality of status and opportunity; and most importantly, fostering brotherhood which celebrates the inherent worth of every individual and upholds the unity and integrity of the nation. With careful consideration, the Indian Constitution incorporates specific provisions and measures to protect the Backward Classes, with a primary focus on the wellbeing of SCs and STs. These safeguards encompass various aspects such as social, economic, political, educational, cultural, and access to state-provided services, all of which ultimately contribute to the betterment of the wider public.[7]

Educational & Cultural Safeguards

Art. 15(4): - Special provisions for advancement of other backward classes *(which includes STs);*

Art. 29: - Protection of Interests of Minorities *(which includes STs);*

Art. 46: - The State shall promote, with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes, and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation,

Art. 350: - Right to conserve distinct Language, Script or Culture;

Art. 350: - Instruction in Mother Tongue.

Social Safeguard

Art. 23: - Prohibition of traffic in human beings and beggar and other similar form of forced labour;

Art. 24: - Forbidding Child Labour.

Economic Safeguards

Art.244: - Clause (1) Provisions of Fifth Schedule shall apply to the administration & control of the Scheduled Areas and Scheduled Tribes in any State other than the states of Assam, Meghalaya, Mizoram and Tripura which are covered under Sixth Schedule, under Clause (2) of this Article.

Art. 275: - Grants in-Aid to specified States (STs & SAs) covered under Fifth and Sixth Schedules of the Constitution.

[7] https://ncst.nic.in/content/constitutional-safeguards-sts.

Political Safeguards
Art.164(1): - Provides for Tribal Affairs Ministers in Bihar, MP and Orissa;
Art. 330: - Reservation of seats for STs in Lok Sabha;
Art. 337- Reservation of seats for STs in State Legislatures;
Art. 334: - 10 years period for reservation *(Amended several times to extend the period.);*
Art. 243: - Reservation of seats in Panchayats.
Art. 371: - Special provisions in respect of NE States and Sikkim
Service Safeguards-: Under Art.16(4),16(4A),164(B) Art.335, and Art. 320(40)

In the case of ***Bhauri Lal Jain and Anr. Vs Sub-Divisional Officer and Ors***[8], Mr. Sinha has urged "*that Section 42 of the Santal Parganas Tenancy (Supplementary Provisions) Act, 1949*[9] *is discriminatory, inasmuch as if action for election is taken before a Civil Court, there will be a defense that the suit is barred, if brought after twelve years, in case of non-Scheduled Tribe, or 30 years, in case of Scheduled Tribes, as under amended Article 65 of the Limitation Act, by Regulation I of 1969, but, there will be no defense, if action is taken before the Deputy Commissioner, under Section 42 of the Act, for eviction. The position, therefore, comes to this that whereas the suit will fail before the Civil Court, if such a defense is sustained, but if the plaintiff will go before the Revenue Court, i.e., the Deputy Commissioner, he will get the desired relief. Therefore, this was a harsher remedy and Section 42 was hit by Article 14 of the Constitution, as it was a denial of equality before law or equal protection of laws*."

He also urged that under Section 42 of the Act, the Deputy Commissioner may choose to interfere in one case and may not choose to interfere in another. This is discriminatory between a citizen and citizen. He has also urged that the true scope of the power of the Deputy Commissioner under Section 42 is administrative as laid down in the case of 1957 BLJR 820. That is to say, he can exercise those powers where eviction is sought for within twelve years of wrongful possession and the question of title does not fall for consideration, which question can only be decided, in a suit, by a Civil Court**.**

Indira Vs State of Kerala[10]
According to the Indian Constitution, all citizens are entitled to equality in their status and opportunities. However, the State has the power to implement specific measures for the advancement of socially and educationally underprivileged groups, as well as the Scheduled Castes and Scheduled Tribes, as stated in Article 15(4). Furthermore, under Article 16(4), the State can reserve job positions
or appointments for any underrepresented groups that they deem to be lacking representation in government services. The Parliament also has the authority to modify the list of Scheduled Castes listed in a notification under Article 341(2). In a recent court ruling, Justice Pratibha M. Singh of Delhi High Court spoke about the vital importance of a Uniform Civil Code (UCC) in the case of ***Satyaprakash Meena v. Alka Meena***[11]. The need for a code that applies equally to everyone and upholds universal principles in matters such as marriage, divorce, and succession was emphasized. Justice Singh stressed

[8] AIR 1973 PATNA 1.
[9] Bihar Act XIV of 1949.
[10] AIR2006KER1.
[11] AIRONLINE 2021 DEL 925.

that Article 44, a Directive Principle of State Policy, should not be seen as a mere aspiration. In light of the ***Ms. Jordan Diengdeh v. S.S. Chopra***[12] judgment, the Ministry of Law was directed to take necessary action. However, little progress has been made thus far.

Background to Uniform Civil Code

The origins of the Uniform Civil Code (UCC) can be traced back to Article 44 of the Indian Constitution. Through landmark cases such as ***Jordan Diengdeh v. S.S. Chopra***[13], ***Sarla Mudgal v. Union of India***[14]***, and Mohd. Ahmed Khan v. Shah Bano Begum***[15], the legal landscape surrounding the UCC has evolved. As a means of promoting gender equality and accessibility for marginalized groups, the UCC builds upon the ideals of Dr. Ambedkar. Its primary aim is to simplify the complexity of personal laws by creating a universally applicable and accepted standard law. By doing so, it strives to uphold consistency and fairness for all individuals. In the Indian cultural context, secularism is viewed as a positive force. In the landmark case of ***S.R. Bommai v. Union of India***[16], it was emphasized that the State's main concern is the human relationship, rather than the relationship between humans and gods. Since the debate over a Uniform Civil Code (UCC), progressive changes have been made, such as the 1954 implementation of the Special Marriage Act. This allows individuals of different genders to marry regardless of their respective religions or faiths, facilitating marriage outside of traditional and private religious regulations. This law eliminates the need for parties to change or convert their religious identities in order to legally marry, breaking down barriers and promoting unity.

An implementation of a UCC with a straightforward and homogeneous structure, solely motivated by simplifying administrative procedures, would be detrimental to the principles of Indian secularism. These principles uphold the freedom of individuals to practice, preach, and profess their religious beliefs as well as the right to choose whether or not to accept them. In light of this, B.R. Ambedkar of the Constituent Assembly took a sensible approach to resolving this issue by proposing a voluntary implementation of the UCC for the general public. The recently published Law Commission's Consultation Paper on Reform of Family Law, released on August 31, 2018, outlines a consultative process for achieving consensus among all religious groups and stakeholders, leading to the enactment of a UCC.

UCC and Scheduled tribes

Given the uncertainty and volatility of the current landscape, it is unfeasible to assume that majority-driven politics will cater to minority lifestyles. Furthermore, the notion that a Uniform Civil Code (UCC) will encompass the rights of minorities is far from realistic. While it may appear that implementing a UCC would streamline governance and establish uniformity in laws, the ramifications extend far beyond face value. In November of 2016, the Law Commission eagerly welcomed suggestions from tribal members on the potential creation of a Uniform Civil Code (UCC). It was heartening to see indigenous communities, many of whom are currently fighting for their right to reservations and the protection of Adivasi interests, being given a platform to voice their opinions. Even

[12] 1985 AIR 935.
[13] ibid
[14] 1995 AIR 1531.
[15] 1985 AIR 945.
[16] 1994 AIR 1918.

the Rastriya Adivasi Ekta Parishad took the initiative to petition the supreme court to protect their beliefs and practices, which may include polygamy and polyandry. While some common customs may be challenged and abolished in favour of a UCC that reflects the values of the larger society, a careful implementation of this code would ensure that the legislative goal of uniformity and consistency is not compromised.

The tribal groups in Jharkhand have united in opposition to the implementation of the Uniform Civil Code (UCC), asserting that it would undermine their long-standing customs and norms. Taking a proactive stance, they plan to stage both in-person demonstrations and email campaigns to express their objection to the Law Commission. Furthermore, they are convening gatherings to highlight their strategies. Ratan Tirkey, a former member of the Jharkhand Tribes Advisory Council, maintains that the UCC poses a threat to the Fifth and Sixth Schedules of the Constitution.

The Fifth Schedule encompasses the management of Scheduled Areas and Scheduled Tribes in specific regions of tribal states, such as Jharkhand, while the Sixth Schedule outlines provisions for the administration of tribal areas in Assam, Meghalaya, Tripura, and Mizoram. On June 14, the 22nd Law Commission of India requested further input on the Uniform Civil Code (UCC) from concerned parties. Numerous religious minorities have already expressed their disapproval. An email was sent to the Law Commission last month by a representative from a non-governmental organization advocating for the rights and education of minorities in Jharkhand, urging them to prioritize the national interest over the implementation of the UCC. Many people believe that the introduction of the Uniform Civil Code (UCC) would lead to the replacement of personal laws, which govern crucial aspects such as marriage, divorce, inheritance, and family matters for each community. These personal laws hold significant influence over both religion and society. Changing them would greatly disrupt the established lifestyle of those who have followed them for many generations. Tanweer Ahmed, the president of the Friends of Weaker Society in Ranchi, emphasizes that as a secular nation, India must not risk damaging people's religious and cultural beliefs.

Conclusion

In a country like India, where the Constitution upholds the values of democracy, secularism, and the protection of minority cultural institutions, it is necessary to carefully consider the potential consequences of imposing a UCC consistently. It is the duty of both academics and activists to draw attention to this issue and take proactive measures to prevent further exploitation, particularly in light of the ongoing identity crisis faced by many tribal and Adivasi communities in the realms of politics, society, morality, religion, and ethics. It is crucial to distinguish between genuine concerns and political propaganda. Fears have risen regarding the Modi government's intentions to use the Uniform Civil Code (UCC) as a tool to target a particular community. This concern has escalated since the 22nd Law Commission solicited recommendations for the UCC from all communities, faiths, castes, and classes. However, the truth is that the Uniform Civil Code already exists in Part 4, Article 44 of the Indian Constitution. The only difference is that this article has yet to be implemented. Furthermore, the implementation of a Uniform Civil Code will have an impact not only on members of a specific religious community, but also Hindus and Hindu tribal communities. This means that if the Uniform Civil Code is enforced, not only will it affect individuals from a certain community, but it will also have an impact on those from the Hindu community, including tribal groups. Over thirty tribal organizations in the state of Jharkhand have come together to urge the Law Commission to withdraw the proposed Uniform Civil Code. According to these organizations, the implementation of the UCC

could potentially threaten the unique identities of tribal members. These concerns are further compounded by the question of what will happen to existing laws that protect the rights of these tribes, such as the Santhal Pargana Tenancy Act and the Chota Nagpur Tenancy Act, if the UCC is introduced. These laws play a crucial role in safeguarding tribal lands, which are often considered the ancestral home of these tribes. Additionally, Hindu tribal communities have their own set of customs surrounding marriage and divorce, which are not officially documented. The implementation of the UCC raises questions about how these customs will be affected and what will happen to the lands and properties owned by tribal members after it comes into effect. This is particularly concerning for those who have shared ownership of property within their tribal communities.

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