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CONTENT

Preventive Detention Related Provisions under Kerala Anti-Social Activities (Prevention) Act, 2007: An Analysis of Judicial Pronouncements of Kerala High Court

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Introduction

Organised criminal activities pose a serious threat to both the economic and physical security of the state and citizens. They are prejudicial to the maintenance of public order in particular and to the larger interests of the society and the state in general. With a view to prevent as well as to have effective control over such anti-social activities, the State of Kerala enacted the Kerala Anti-Social Activities (Prevention) Act in 2007 [hereinafter referred to as KAAPA]. KAAPA is an enactment providing for preventive detention as in the case of Conservation of Foreign Exchange and Prevention of Smuggling Act (COFEPOSA), National Security Act (NSA), Maintenance of Internal Security Act (MISA) etc. The prime focus of the legislation is to prevent or control anti-social activities by such persons who fall within the sweep of 'known goonda'[1] or 'known

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1 According to section 2 (j) of KAAPA, a 'goonda' is a person who indulges in any anti-social activity or promotes or abets any illegal activity which is harmful for the maintenance of the public order. Bootleggers, counterfeiters, depredators of environment, digital data and copy right pirates, drug offenders, hawala racketeers, hired ruffians, rowdies, immoral traffic offenders, loan sharks as well as property grabbers are also included within the scope of the definition of the term goonda. It may be noted that the terms anti-social activity, bootlegger, counterfeiter, depredator of environment, digital data and copy right pirate, drug offender, hawala racketeer, hired ruffian, rowdy, immoral traffic offender, loan shark as well as property grabber have been separately defined by the statute. A 'known goonda', according to section 2 (o) is a 'goonda' who has been found guilty by a competent court or authority atleast once for an offence within the meaning of the term goonda in respect of acts done

rowdy'[2]. Be that as it may, KAAPA vests ample power with the government or an officer authorised by the government in the matter of passing orders of preventive detention against a person upon satisfaction in mind and on the basis of relevant information and materials furnished that he has indulged in or about to indulge or abet unlawful activities likely to be detrimental to the societal interests, public peace and public tranquillity. Unlike the case of 'punitive detention' where the purpose is to punish the offender on proving guilt; 'preventive detention' is only a prudent action to prevent the possible damage which could be caused to the public order and the society at large.

Section 3 of KAPPA empowers the state government or an officer authorised by the government to issue an order of preventive detention against any person who falls within the ambit of the definition of 'known

within previous seven years as calculated from the date of the order of detention. A goonda who has been found to have committed any act within the meaning of the term goonda in any investigation or enquiry by a competent police officer, authority or competent court on complaints initiated by persons other than police competent police officer, authority or competent court, in two separate instances not forming part of the same transaction, and that too in respect of acts done within the previous seven years as calculated from the date of the order of detention is also considered as a 'known goonda' for the purposes of KAAPA. An offence in respect of which a report was filed by a police officer before a lawful authority consequent to the seizure, in the presence of witnesses, of alcohol, spirit, counterfeit notes, sand, forest produce, articles violating copyright, narcotic drugs, psychotropic substances or currency involved in hawala racketeering is also included within the zone of consideration while determining whether a person is a 'known goonda' for the purposes of KAAPA.

2 According to section 2 (t) of KAAPA, a 'rowdy' is a person who either by himself or as a member of a gang commits or attempts to commit or abets the commission of any offences under sections 153A and 153B of Chapter VIII and Chapter XV, XVI, XVII and XXII of the Indian Penal Code or any offences under the Arms Act, 1959 or the Explosive Substances Act, 1905. The offences must be punishable with five or more years of imprisonment or with less than five but not less than one year of imprisonment. Offences under any other law for the time being in force punishable with five or more years of imprisonment or with less than five but not less than one year of imprisonment and which are notified by the government can also be considered while determining whether a person falls within the ambit of the definition of the term

goonda' or 'known rowdy'. This order can be issued with a view to prevent such person from committing any anti-social activity within the state. The preventive detention order is to be issued on the basis of the satisfaction of the detaining authority derived from information provided by a police officer not below the rank of Superintendent of Police (who is also referred to as 'sponsoring authority'). KAAPA through its relevant provisions direct the government and any other authority as empowered by the government to be vigilant and reasonable in the matter of compliance of the mandatory requirements while issuing an order of detention. Necessary safeguards are provided under KAAPA to curb unlawful detentions.

During the last fifteen years, the Kerala High Court has pronounced several judgments interpreting the scope of the various provisions of KAAPA. These judgments have resolved many of the ambiguities

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rowdy. A 'known rowdy' as defined in section 2 (p) is a person who had been, by reason of acts done within the previous seven years as calculated from the date of the order of detention, found guilty by a competent court at least once for offences under sections 153A and 153B of Chapter VIII and Chapter XV, XVI, XVII and XXII of the Indian Penal Code or under the Arms Act, 1959 or the Explosive Substances Act, 1905 which are punishable with five or more years of imprisonment. A person who had been, by reason of acts done within the previous seven years as calculated from the date of the order of detention, found guilty by a competent court at least twice for an offences under sections 153A and 153B of Chapter VIII and Chapter XV, XVI, XVII and XXII of the Indian Penal Code or under the Arms Act, 1959 or the Explosive Substances Act, 1905 which are punishable with less than five but not less than one year of imprisonment also falls within the ambit of the definition of 'known rowdy'. A person who has been found to have committed offences under sections 153A and 153B of Chapter VIII and Chapter XV, XVI, XVII and XXII of the Indian Penal Code or under the Arms Act, 1959 or the Explosive Substances Act, 1905 or any other law for the time being in force as notified by the government and punishable with five or more years of imprisonment or with less than five but not less than one year of imprisonment in any investigation or enquiry by a competent police officer or authority on complaints initiated by persons other than police officers, in three separate instances not forming part of the same transaction, and that too in respect of acts done within the previous seven years as calculated from the date of the order of detention is also considered as a 'known rowdy' for the purposes of KAAPA

surrounding various provisions of KAAPA. The judgments have also brought clarity with respect to the scope of the powers and jurisdiction of sponsoring authority, detaining authority, and government as well as the KAAPA Advisory Board. The scope of the rights of KAAPA detenus have also been delineated by the Kerala High Court through its judicial pronouncements. This paper is a survey of the judicial pronouncements of the Kerala High Court which throw light on the scope of the powers and functions of the detaining authority, government as well as the Advisory Board within the framework of preventive detention related provisions of KAAPA.[3] It attempts to examine how the Kerala High Court has, while exercising the jurisdiction under Article 226 of the Constitution of India, ensured that the personal liberty of the detenus are adequately safeguarded while the state and its agencies invoke the powers available to them under the law.

Role of the Detaining Authority Under KAAPA

Section 3 of KAAPA envisages initiation of action by the detaining authority, based on the information received from a police officer not below the rank of a Superintendent of Police with regard to the activities of any 'known goonda' or 'known rowdy', with a view to prevent such person from committing any anti - social activities[4] in the State.Before a valid order of detention is passed under section 3 of KAAPA, the

3 An analysis of the judicial pronouncements of the Kerala High Court which throw light on the scope of the powers and functions of the various authorities within the framework of externment related provisions of KAAPA is beyond the scope of this paper. This paper also sidesteps a detailed discussion on the scope of terms such as 'known rowdy', 'known goonda' and 'anti-social activity'.

4 'Anti-social activity' has been defined in section 2 (a) of KAAPA. It reads: 'anti - social activity' means acting in such manner - as to cause or - is likely to cause, directly or indirectly, any feeling of insecurity, danger or fear among the general public or any section thereof, or any danger to the safety of individuals, safety of public, public health or the ecological system or any loss or damage to public exchequer or to any public or private property or indulges in any activities referred in Clauses (c), (e), (g), (h), (i), (l), (m), (n), (q), (qb) and (s) of this section".

detaining authority must first entertain twin satisfactions. Firstly, the initial objective satisfaction must be entertained that the detenu is a 'known goonda' or 'known rowdy'. Then the detaining authority must entertain the latter subjective satisfaction that detention of the detenu is necessary to prevent such detenu from indulging in anti-social activity. Only when both satisfactions are validly entertained on the basis of the materials available before him, can the detaining authority pass a valid order of detention under section 3 of KAAPA. While considering the entertainment of the latter subjective satisfaction, every detaining authority is bound to consider whether the acts complained of against the detenu do really pose a threat to maintenance of public order. When the acts alleged are such that they threaten only the law and order and not public order, they cannot be reckoned as sufficient to justify an order of preventive detention.[5]

Though it is the duty of the detaining authority to arrive at the objective as well as subjective satisfaction, it is not within the domain of the detaining authority to make an enquiry as to whether the person concerned has really committed the offence; whether there is sufficient evidence to arrive at a conclusion that he is guilty of the offence, or whether any plausible defence is available to the accused.[6] Materials to be considered and the approach to be made by the detaining authority and the trial court respectively, in respect of 'preventive detention' and 'punitive detention' are totally different; especially, in view of the difference in the purpose and objective to be achieved.

The particulars furnished by the sponsoring authority have to be subjected to scrutiny by the detaining authority, who has to arrive at a finding of his own as to the various requirements contemplated under the statute. Mere registration of FIR may not be enough for the detaining authority to invoke the jurisdiction under section 3 of KAAPA. At the same time, it is not at all necessary for the detaining authority to wait for

5 Shruthi P. v. State of Kerala and others, 2009 KHC 1207.

6 Anithakumari v. State of Kerala, 2015 KHC 963, ¶ 7.

finalization of the investigation of the case to pass an order to prevent antisocial social activities by such persons.[7] If the data collected during the course of investigation is adequate enough to meet the requirements under the statute so as to record the 'objective' well as 'subjective' satisfaction to the extent it is necessary, it is open for the detaining authority to act upon and he need not wait till completion of investigation and submission of charge sheet under section 173(2) of the Cr. P. C. In short, filing of charge sheet under section 173(2) of Cr. P. C. is not necessary to enable the detaining officer to invoke the power under section 3(1) of KAAPA.[8]

According to the Kerala High Court:[9]

> unlike the case of 'punitive detention' where the purpose is to punish the offender on proving guilt; in the case of 'preventive detention 'it is only a prudent action to prevent the possible damage which could be caused to the public order and the society at large. As such it has to be prevented at the earliest opportunity. The detaining authority, who is mulcted with the duty in this regard, cannot wait for completion of the investigation and submission of the final report under S.173(2) of Cr.PC to invoke the jurisdiction keeping as eyes shut till such time; which otherwise will only be an instance of dereliction of duty. The only requirement is that he should be in a position to record the 'satisfaction' with regard to the requirements under the statute, based on the information made available, whether it is final report or such other materials.

The detaining authority is not supposed to sign on the dotted lines, based on the final report submitted by the investigating officer or the information made available through the sponsoring authority. The final report, if any, could be one of the pieces of information being passed on by the officer at higher level to be acted upon by the detaining authority. If the charge sheets contain sufficient materials to connect the detenu to

7 Rajan Abubacker v. State of Kerala, 2017 (5) KHC 134.

8 Stenny Aleyamma Saju v. State of Kerala, 2017 (3) KHC 517.

9 *Id.* at ¶ 27.

the offence levelled against him, it is enough for the detaining authority to act upon the same and record satisfaction with proper and independent application of mind. If it is inadequate in any respect, it is very much open for the detaining authority to probe more. All materials made available to the detaining authority by the sponsoring authority could be looked into by the detaining authority, without confining such scrutiny to the final report submitted under section 173(2) Cr.P.C. alone. He can call for further materials, if necessary, or get clarification on the particulars, if at all any obscurity is there. The order to be passed by the detaining authority shall be pursuant to such independent analysis and not a dictated one.

While answering a reference made to it, the Kerala High Court in *Abdul Wahab* v. *State of Kerala*[10], clarified that the fact that a final report is available does not prevent the detaining authority who is exercising the jurisdiction under section 3 of KAAPA from considering any additional documents other than the final report. According to the Court, it is for the detaining authority to pass appropriate orders in terms of the relevant provisions of the statute, based on the materials made available to him by the police officer not below the rank of a Superintendent of Police and also by looking into other materials, if necessary, to satisfy the three different ingredients under section 3(1) of KAAPA.

It may be noted that a contrary view has been expressed by a two judge Bench of Kerala High Court in *Minimol* v. *State of Kerala*[11]. While advocating the need for reconsideration of the position taken by a Full Bench of Kerala High Court in *Stenny Aleyamma Saju* v. *State of Kerala*[12] that a final report under section 173(2) Cr.P.C. is not a pre - requisite to invoke the power under section 3 of KAAPA, the court in *Minimol*[13] observed:[14]

10 2017 (4) KHC 1.

11 2022 (7) KHC 563.

12 2017 (3) KHC 517.

13 Minimol v. State of Kerala, 2022 (7) KHC 563.

14 *Id.* at ¶ 18.

> "The setting in which sub-clause (iii) to section 2(p) occurs in the statute is important. Clauses (i) and (ii) to section 2(p) stipulates the requirement of a clear finding of guilt by a competent court. Needless to say that the parameter prescribed is strict in nature. However, in clause (iii), it is enough that a person had been found on investigation or enquiry by a competent police officer or other authority to have committed any offence mentioned in section 2(t). Obviously, the standards have been diluted. It may incidentally be pointed out that the investigation component is referable to a "competent police officer" and enquiry to "other authority" - the requirements in both cases being a finding to the extent permissible by the 'police officer' or 'authority' in law - to have committed an offence of the nature prescribed by the proposed detenue. The requirements of clause (iii), when juxtaposed with the rigour of standard prescribed in clauses (i) and (ii), appears to be a conclusive finding upon completion of investigation / enquiry that the proposed detenue had committed an offence of the nature referred to; and not an interim satisfaction, lesser to that of a final conclusion. In practice, inferences which occur to an Investigating Officer may vary and oscillate by and between the guilt and innocence at various stages. Certain material in the nature of evidence would tend to incriminate the accused, whereas, certain others not. He forms an opinion as between section 169 and section 170 of the Code only upon completion of the investigation, after considering the weight of the evidence, he had collected in the process of investigation. With all respect in our command to the judgment of the Full Bench, we are of the opinion that the proposition of law laid down in paragraph no.23 - that a final report under section 173(2) is not a pre - requisite to invoke the power under section 3 of the KAAPA - requires reconsideration".

Application of mind by detaining authority

In a catena of judicial pronouncements, the courts have stressed the need for application of mind on the part of detaining authorities while

passing detention orders In *Shajitha Suneer* v. *State of Kerala and Others*[15] the Kerala High Court set aside the detention order on the ground of non-application of mind of the detaining authority. In that case it was found that in spite of the fact that the accused was enlarged on bail with conditions the detaining authority did not consider whether bail conditions were sufficient to prevent the detenu from continuing to indulge in anti - social activities. The court highlighted the importance of application of mind in the following terms:[16]

> Preventive detention laws are intended to maintain public order without which the right to personal liberty of the general public would lose all its meaning. When the right to personal liberty of large number of citizens is at stake, the State will be forced to curtail liberty of individuals who are seen disturbing public order. Such curtailment by its very nature, cannot be based on trial and conviction. It has to be based on presumptive propensity of the individuals, drawn by authorities on subjective satisfaction. It is an executive imperative. The most important protective measure against deprivation of personal liberty extended to detenus, is application of mind by the detaining authorities before arriving at their subjective satisfaction. This protective measure being a substantial right, cannot be permitted to be watered down even eventually.

In *Mary Selma* v. *State of Kerala*[17], a detenu challenged the detention order, *inter alia*, on the ground that there was non-application of mind by the detaining authority. The detenu was classified as a 'known rowdy' on the basis of eight cases registered against him. One of the crimes which found mention in the detention order was the one registered as Crime No. 1052/2019. While the detenu was in judicial custody in respect of that crime he had filed a bail application before the Sessions Court which in turn was rejected by the court. The detention order of the detenu also

15 2019 (3) KHC 453.

16 *Id.* at ¶ 23.

17 2021 KHC 127.

referred to two other crimes i.e., Crime No. 622/2020 and Crime No. 869/2020 which were registered after the rejection of bail in Crime No. 1052/2029. In other words, the two crimes were registered at a time when the detenu was in judicial custody. While considering a challenge to the detention order, the High Court of Kerala found that the detaining authority had failed to apply mind at the time of passing of the impugned detention order. According to the High Court, had the detaining authority applied his mind and perused the bail order in Crime No. 1052/2019 he could have very well found that the detenu was not released on bail at any time after the dismissal of the bail petition in respect of Crime No. 1052/2019 so as to commit the crimes registered as Crime No. 622/2020 and Crime No. 869/2020. Emphasizing the significance of proper application of mind by detaining authorities, the court observed:[18]

> Law of preventive detention is very harsh and its provisions are very stringent which affect the personal liberty of a citizen, guaranteed under Article 21 of the Constitution of India. Whenever such an intervention is made by a statutory body affecting the personal liberties, it should be in strict compliance of the procedure established by law. Whenever there seems to be a violation, the court should not be reluctant to interfere in order to uphold the fundamental rights of the citizen guaranteed under the Constitution of India.

In *Ponnappan N. N.* v. *State of Kerala*[19], the Kerala High Court has held that lack of reasons in a detention order cannot be supplemented by or supplanted with averments in a counter affidavit. Previous opinion of the Advisory Board which led to the revocation of the previous detention order and even the revocation of the previous detention order are highly relevant and crucial materials which must be considered by the detaining authority when it decides the question whether a detention order should be issued against a person on a subsequent occasion.[20]

18 Mary Selma v. State of Kerala, 2021 KHC 127, ¶ 10.

19 2018 (5) KHC 210.

20 Devika K. D. v. State of Kerala, 2022 KHC 871.

Fixation of period of detention arises only after the confirmation of the order of detention. Confirmation of the order of detention would take place only after the report containing the opinion of KAAPA Advisory Board is received by the government. In *Krishnan* v. *District Collector and District Magistrate, Kasaragod*[21], the Kerala High Court had to deal with a situation where the District Magistrate in a Jail Admission Authorisation issued to the Superintendent of Central Jail specified the period of detention of the detenu as six months. While finding fault with the action of the District Magistrate the Court directed the Additional Chief Secretary (Home and Vigilance) to instruct District Magistrates to avoid unintentional, but serious, mistakes in the documents like Jail Admission Authorisation.

Delay in passing detention orders

It is now a settled position that if the delay, as between the last prejudicial activity and the issuance of the detention order, has not been explained and the same is inordinate and unreasonable, the impugned detention order can be interdicted on the ground that the live link, as between the last prejudicial activity and the purpose of detention, has been snapped.[22] Over the years the Kerala High Court had occasion to uphold as well as set aside the impugned detention orders when they were challenged on the ground of delay between the last prejudicial activity and the issuance of the detention order.

In *Joseph Sebastian* v. *State of Kerala*[23], the last prejudicial anti-social activity was alleged to have occurred on 3-09-2017. The proposal for proceeding under KAAPA was forwarded by the sponsoring authority on 31-10-2017. The detention order was passed by the District Magistrate, Allapuzha on 26-01-2018 and was executed on 6-02-2018. Before the

21 2016 (4) KHC 54.

22 Shahul Hameed v. State of Kerala, 2023 (1) KHC 301.

23 2018 (3) KHC 889.

Kerala High Court, the detenu raised the plea that there was an unreasonable delay of 5 months between the last prejudicial activity and the detention order. The delay on the part of the District Magistrate to pass the detention order was also raised by the detenu. Convinced by the clear explanation offered by the detaining authority regarding the reasons for the delay the Kerala High Court refused to set aside the detention order on the ground of delay.

On the other hand, in *Ponnappan N. N.* v. *State of Kerala*[24], the Kerala High Court set aside a detention order and ordered immediate release of a detenu since the detaining authority failed to satisfactorily explain the reason for a time gap of more than 5 months between the date of last prejudicial activity and date on which the detention order was passed. According to the court the detaining authority has to enter into proper satisfaction with respect to the delay in passing the detention order. Further, whenever there is a delay in passing the detention order, the delay has to be considered in juxtaposition with the period of six months which is the maximum period for which a detenu can be detained.

The detention orders issued under section 3 of KAAPA have been quashed by the Kerala High court on a number of occasions on the ground that the live link between the last prejudicial activity and the order of detention has been snapped on account of inordinate delay.[25]

In *Joicy* v. *State of Kerala*[26] it was held that non-application of mind by the detaining authority can be attributed only if there is long unexplained interval between the offending acts committed by the detenu and the detention orders. In *Rahila Nazeer v. State of Kerala and Others*[27], the Court held that the factual situation in each case is relevant to decide whether delay is inordinate so as to vitiate the order of detention and that if delay is satisfactorily explained, it cannot be held that the live link is snapped.

24 2018 (5) KHC 210.

25 *See* Jasid A. S. v. State of Kerala, 2022 (7) KHC 453.

26 2018 (1) KHC 37.

27 2016 (3) KHC 189.

In *Radhika B. v. State of Kerala and Others*[28], a Full Bench of Kerala High Court held that the prejudicial activities which were reckoned for the purpose of an earlier detention order can nevertheless be counted, providing the live link to issue another order of detention against the same person.[29]

Detention order in respect of a person who is already in custody

There is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of a criminal case.[30] However, if the detention order is challenged, the detaining authority has to satisfy the court that he was fully aware of the fact that the detenu was actually in custody and there are materials before the authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.[31] Thus, in *Swati S.* v. *State of Kerala*[32], the Kerala High Court set aside a detention order since it was evident that the detaining authority failed to consider the crucial aspect as to whether the detenu, who was already in judicial custody, was likely to have been released from judicial custody in the near future and that therefore he was likely to engage in further prejudicial activities.

Number of detention orders

The KAAPA does not impose any limitation on the number of detention orders which can be passed against any person. If the situation warrants any number of detention orders can be passed against a particular detenu. Otherwise, there will be no purpose for the enactment.[33]

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28 2015 (2) KHC 183.

29 *See also*Devika K. D. v. State of Kerala, 2022 KHC 871.

30 Rishada Haris K. P. v. State of Kerala, 2022 KHC 898. *See also*Rajan Abubacker v. State of Kerala, 2017 (5) KHC 134.

31 Rajan Abubacker v. State of Kerala, 2017 (5) KHC 134.

32 2022 (7) KHC 306.

33 Rajan Abubacker v. State of Kerala, 2017 (5) KHC 134.

Duty of detaining authority to report to government

The detaining authority who issues a detention order under section 3 of KAAPA has a duty to forthwith report the fact to the government and the Director General of Police together with a copy of the order and supporting records. In *Rafiya* v. *State of Kerala*[34], the detaining authority issued a detention order on 15-04-2018. Soon thereafter, the authority reported that fact to the government. Copy of the detention order as well as the grounds of detention were also forwarded to the government on that day. The other records relevant to the detention were forwarded to the government only on 24-04-2018 consequent to the arrest of the detenue on 21-04-2018. The detention order was held to be unsustainable, *inter alia*, on the ground that the mandate of 'forthwith despatch' was not complied with by the detaining authority.

Responsibility of the Officer Arresting the Detainee

S.7 of KAAPA provides that the officer arresting a person pursuant to a detention order shall read over the order and shall also furnish a copy of the order to the detenu. The grounds of detention, specifying the offences for which the detenu was charge-sheeted, with copies of relevant documents based on which he was enlisted as 'known goonda' or 'known rowdy' and the circumstances based on which the issuance of an order of detention was necessitated shall be furnished to him as far as practicable and as soon as possible, within 5 days of his detention. The right of the detenu to be informed with regard to the grounds of detention has been emphasised in several judgments.[35] Only if the detenu is informed about the grounds of detention will he be able to make an effective representation before the government and the KAAPA Advisory Board.

The officer arresting the detainee shall also inform the detainee in writing and under acknowledgment, his right to make representations to the government and the Advisory Board against the order of detention.

34 2019 (1) KHC 63.

35 Dr. Rekha Gopakumar v. State of Kerala, 2012 (4) KHC 896.

The officer is not bound to disclose information liable to reveal identity of the confidential source or that is liable to affect the internal or national security. The Superintendent of Jail where the detenu is confined shall afford all reasonable opportunity to him to consult with a lawyer and to avail assistance from him in the matter of making representation to the government or to the Advisory Board. Merely because one or more grounds stated as reasons for the issuance of an order of detention has become vague, non-existent, irrelevant or invalid, will not invalidate a detention order, if the authority issuing it is convinced and justified from the minimum valid grounds available that the detenu is liable to be classified as a known goonda or known rowdy.

A detenu under the preventive detention laws would be arrested and detained abruptly. Unlike in the trial of a criminal case, the person concerned who has been detained under the KAAPA would not get much opportunity to mould his defence and to put forward his arguments. A detenu's right is confined to make a representation to the government as well as to the Advisory Board. The rights of the detenu would be protected by providing a meaningful opportunity to him to make representations as provided under section 7(2) of the KAAPA. The law therefore insists that the detenu must be informed of his right in writing and under acknowledgment. The detenu should not be given an information which is capable of having different interpretations. The information supplied to the detenu should be correct, specific and beyond any suspicion.

Role of Government Under KAAPA

The government has a very important role in the operationalisation of the provisions of KAAPA. The government is the competent agency to authorise an officer to issue detention orders under section 3 (2) of KAAPA. An order of detention made under section 3 of KAAPA is to be immediately reported to the government and the Director General of Police, Kerala.[36] A copy of the order and supporting records which have a

36 Kerala Anti-social Activities (Prevention) Act, 2007, No. 34, Acts of Kerala Legislature, 2007, S. 3(3).

bearing on the matter is to be immediately sent to the Government as well as the Director General of Police, Kerala.[37] The order of detention has to be approved by the Government or by the Secretary, Home Department within a period of 12 days from the date of detention.[38] If the order of detention is not so approved it shall cease to remain force.[39]

Apart from the KAAPA Advisory Board, the government is the competent entity to consider the representations made by the detenu in respect of the detention order.[40] The government has an obligation under section 9 of KAAPA to place before the Advisory Board the grounds on which a detention order has been issued and the representation, if any, made by the detenu. On receipt of the opinion of KAAPA Advisory Board, the government has to act in accordance with the mandate of the statute.[41] If the the opinion of the Advisory Board is to the effect that there is sufficient cause for the detention of the person the government can confirm the order of detention and continue the detention of the person for such period as it thinks fit.[42] Subject to the upper limit as prescribed in section 12 of KAAPA, the duration of the detention is a matter falling with the discretion of the government. The government is also conferred with the power to revoke the detention order and this power can be exercised under various scenarios as spelt out in the statute.[43]

The Kerala High Court has on several occasions reminded the detaining authorities to forward the copy of the detention order as well as the supporting records to the government without unnecessary delay.[44]

37 *Id.*

38 *Id.*

39 *Id*.

40 KAAPA Act, S. 7(2).

41 KAAPA Act, S. 10(4).

42 *Id.*

43 KAAPA Act, S.13.

44 Rafiya v. State of Kerala, 2019 (1) KHC 63.

Division Benches of Kerala High Court have also categorically held in several judgments that if the timeline of 12 days is not complied with in the matter of issuance of approval order by the government, then the detention order issued by the detaining authority shall no longer remain in force.[45] It is to be noted that, unlike other statutes such as the National Security Act, the timeline of 12 days for approval is to be reckoned from the date of actual detention of the detenu and not from the date of issuance of the detention order.[46]

Nature and quality of consideration of representation

Article 22(5) of the Constitution of India and section 7(2) of the KAAPA confers on a detenu the right to make a representation against an order of detention. The representation can be made to the government as well as the KAAPA Advisory Board. This right to make a representation inheres in it a corresponding right to proper and expeditious consideration of such representation. As observed by the Kerala High Court in *Ramseena Anas* v. *State of Kerala*[47], the nature of consideration of a representation by the government and by the Advisory Board is different and distinct as the government considers the representation for ascertaining, essentially, whether the detention order is in conformity with the power under the law whereas the Advisory Board considers the representation and the case of the detenu for examining whether there is sufficient cause for detention.

In several cases, the courts have discussed the nature and quality of consideration which a representation made by a detenu under Article 22(5) of the Constitution of India and section 7(2) of the KAAPA must receive at the hands of the government. According to the courts, though there is no right of hearing or an obligation to pass a speaking order there

45 *See* Swathi S. v. State of Kerala, 2022 (7) KHC 306; Susha v. State of Kerala, 2017 (1) KHC 423.

46 Rajula v. District Magistrate, Palakkad, 2022 (7) KHC 123.

47 2020 KHC 77.

should be a real and proper consideration of the representation made by the detenu. Impartial consideration of the representation must be evident from the order passed by the government while disposing the representation. When an order rejecting representation suffers from non-consideration of patently erroneous factual details which has crept into the order of detention the courts have set aside the said order and thereby held the continued detention of the detenu to be vitiated.[48]

In *Shruthi* v. *State of Kerala*[49], the detention of a detenu was found to be invalid and unjustified on the ground that the representation of the detenu with regard to the facts and circumstances was not given real and proper consideration by the government before it gave its approval to the order of detention.

In *Joseph Sebastian* v. *State of Kerala,*[50] the detenu did not make a representation to the government initially. Be that as it may, the government forwarded the detention order issued by the District Magistrate, Allapuzha to the KAAPA Advisory Board within a period of three weeks from the date of detention as required by KAAPA. The detenu subsequently made a representation before the KAAPA Advisory Board. The KAPPA Advisory Board on completion of its proceedings made a report in which it expressed the opinion that there is sufficient cause for the detention of the accused. Thereafter the KAAPA Advisory Board forwarded its report, its proceedings as well as the representation made by the detenu to the Additional Chief Secretary (Home and Vigilance) for further action. After considering the report as well as the proceedings of the KAAPA Advisory Board the government confirmed the order of detention for a period of six months from the date of detention. The government failed to consider the representation of the detenu while confirming the report of the KAAPA Advisory Board. The failure of the government to independently consider

48 Shruthi P. v. State of Kerala and other, 2009 KHC 1207.

49 2009 KHC 1207.

50 2018 (3) KHC 889.

the representation submitted by the detenu before the Advisory Board while confirming the order of detention was considered as fatal by a two judge Bench of Kerala High Court which set aside the detention order and directed the release of the detenu forthwith. A similar position was taken by the Kerala High Court in 2017 when it held that non consideration of representation by the government would vitiate the continued detention of a detenu when he submits a representation to the Advisory Board with a request to forward it to the government for its independently and expeditiously consideration.[51] In many other decisions also the Kerala High Court has held the detention of a detenu to be illegal on the ground of failure of the government to consider the representation made by the detenu.[52]

In *Thankam* v. *State of Kerala*[53], while setting aside a detention order on the ground of non-consideration of representation by the government, the Kerala High Court observed:[54]

> When an order is passed to restrict a person's Constitutionally guaranteed right of freedom or movement by a procedure established by law, like the Act dealt with herein, the authorities ought to have ensure strict compliance thereof without deviating therefrom, even in minute aspects. The case on hand is a clear one of violation of the mandatory requirements for the second time by the authorities despite elaborating the procedure to be followed by them by a Court of law. Legal action if any, proposed to be taken under the Act, must be taken strictly in conformity to the procedures prescribed therein and with a view to enforce the same. Otherwise, it would remain as a paper right and would be a mockery from the point of view of the public who repose much confidence in the institution that exists to maintain justice. Undoubtedly it would defeat the reliability of

51 *See* Susha v. State of Kerala, 2017 (1) KHC 474.

52 Saraswathy v. State of Kerala, 2012 (1) KHC 432.

53 2018 KHC 818.

54 Thankam v. State of Kerala, 2018 KHC 818, ¶ 44.

> the citizens on the institution. It would tend to view the authorities with a suspicious eye. If the procedures prescribed are complied with in its true spirit, it would safeguard the authorities as well as the detenu and balance the power of the authority and the protection of the detenu against the illegal detention. Such action would be free from criticism from any corner. The authorities must see that action taken by them would be in strict conformity to the procedural mandates and is meant for enforcement.

According to the Kerala High Court, the government could, while considering a representation made by the detenu, exercise the power under section 13 of KAAPA[55] before transmitting the representation to the Advisory Board.[56] A representation made by the detenu cannot be rejected when the case of the detenu is pending before the Advisory Board.[57] It has also been held that the representation made by the detenu can be rejected only after the opinion of the Advisory Board is received. Otherwise, if the Advisory Board interferes with the detention, the government despite having rejected the representation would be obliged to release the detenu. [58]

Revocation of the order of detention

The KAPPA confers on the government the power to revoke an order of detention issued by a detaining authority. This can be either as a measure of obligatory revocation under section 10 (4) or by recourse to revocation under section 13 (1) of KAAPA. The power of the government, it has been held, even extends to the withdrawal of the detention order even before the actual execution and arrest of the detenu.[59]

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55 S.13 of KAAPA confers on the government the power to revoke a detention order made under § 3 of KAAPA.

56 Thankam v. State of Kerala, 2018 KHC 818.

57 Aboobackar alias Rajan v. State of Kerala, 2020 KHC 5352.

58 *Id.*

59 Rishada Haris K. P. v. State of Kerala, 2022 KHC 898.

Role of Advisory Board under KAAPA

The Advisory Board constituted under section 8 of KAAPA comprises of a Chairman[60] and two other members[61]. The KAAPA Advisory Board has a significant role to play when it comes to the implementation of the statute. The government is required by section 9 of KAPPA to place before the KAAPA Advisory Board the grounds on which the detention has been made and the representation, if any, made by the detenu. This is to be done within three weeks from the date of detention. While exercising its jurisdiction, the Advisory Board has to consider the detention order, the grounds of detention, and the various materials placed before it for its consideration. The Advisory Board can call for further information from the government, or from any person called through the government and also from the detenu. If the detenu shall be granted a personal hearing if he makes a request to that effect. Detenus do not have a right to represented by a legal practitioner before the Advisory Board. However, the Board has the discretionary power to permit legal practitioners in cases it deems fit. The Advisory Board is required to render its opinion to the government, as to whether or not there is sufficient cause for the detention of the person concerned. This opinion has to be given within nine weeks from the detention of the person.[62] Where the opinion of the Advisory Board is to the effect that there is sufficient cause for the detention of the person the government may confirm the order and continue the detention of the person for such period as it thinks fit.[63] Where the Advisory Board gives its opinion that there is no sufficient cause for the detention of the person concerned, then the Government is obliged to accept the same and shall revoke the detention order and cause

60 A person who is or had been a Judge of a High Court is to be appointed as the Chairman of KAAPA Advisory Board.

61 Persons who are qualified under the Constitution of India to be appointed as a Judge of a High Court are to be appointed as members of KAAPA Advisory Board.

62 KAAPA Act, S.10 (1).

63 KAAPA Act, S.10 (4).

the person to be released forthwith.[64] No particular time frame is fixed for the government to act under section 10 (4) and confirm the detention order.[65] If the government confirms the order of detention, the detenu may be detained for a period which may extend up to six months if it is a case of first detention.[66] In the case of subsequent detentions, the detenue may be detained for a period which may extend up to one year.[67]

On certain occasions the Kerala High Court has found that the Advisory Board acted in excess of the jurisdiction available to it under the law. For instance, in *Jasheela T. M.* v. *State of Kerala*[68] the Kerala High Court had the occasion to deal with a situation where Advisory Board while expressing the opinion that there is sufficient cause for the detention of the detenu, additionally directed the government 'to pass an order confirming the order of the detaining authority subject to the modification that for the remaining period of detention he shall appear before the Station House Officer, Peroorkada on all Sundays, Tuesdays and Fridays between 5 P.M. and 6 P.M subject to the rider that any failure to do so on three occasions without the permission of the Station House Officer will result in cancelling the order by the Government after giving the detenue an opportunity to show cause and in which case the detenu will have to undergo the remaining period of detention as ordered by the detaining authority'. The Court observed that this part of the recommendation was beyond the jurisdiction of the Advisory Board and that the government was not bound by the same.[69]

64 *Id.*

65 Vilasini Ramachandran v. State of Kerala, 2018 KHC 174.

66 KAAPA Act, S.12.

67 KAAPA Act, S.12.

68 2022 (7) KHC 613.

69 Jasheela T. M. v. State of Kerala, 2022 (7) KHC 613, ¶ 16.

Personal hearing during COVID-19 pandemic

Opportunity for personal hearing before KAAPA Advisory Board was not available to many detenus during COVID-19 pandemic. In that scenario a question came up whether the denial of personal hearing can affect the sustainability of the detention order. In *Ramseena* v. *State of Kerala*[70], a detenu while challenging his detention raised this plea of denial of opportunity of personal hearing. When the detenu prayed for a personal hearing the KAAPA Advisory Board communicated to him that on account of the restrictions due to COVID-19 pandemic personal hearing in a sitting of the Board was not possible. The Board however gave him an opportunity to furnish written statements which however was not availed by the detenu. Taking into account the special circumstances which prevailed in the state owing to COVID-19 pandemic the Kerala High Court concluded that the denial of opportunity of personal hearing in such circumstance cannot be considered as something which affected the sustainability of the detention order. The court also based its decision on the fact that the denial of opportunity of personal hearing did not cause any prejudice to the detenu.

In *Ramseena* v. *State of Kerala*[71] though the denial of opportunity of personal hearing was held to not cause prejudice to the accused, the Kerala High Court advised the authorities to take advantage of the technological developments and implement virtual hearings without further delay. The Court said:

> Before concluding, we wish to make some observations to ensure facilitation of personal hearing through Video Conferencing. In this case, we have found that, not providing the opportunity to the detenu for personal hearing has not resulted in any prejudice to the detenu. However, we notice that, granting opportunity for hearing, if asked for by the detenu, is a statutory requirement under S.10 of the Act and hence adherence to the same is necessary for completeness of the

70 2021 KHC 580.

71 *Id.*

> procedure. Even in cases where, the Advisory Board, is prevented by reasonable cause, from providing a physical hearing, it is desirable to provide a virtual hearing. Advancement of technology enables us to conduct hassle free virtual hearings, through the means accessible to all. We are unable to see any reason in not adopting such technological advances by the authorities concerned, for effective compliance of procedures contemplated in the Statute. In such circumstances, we direct the 1st respondent, to provide necessary infrastructure to the Advisory Board under KAA(P)A, to enable them to conduct personal hearings through virtual mode, as expeditiously as possible. We are told that the prisons are provided with such facilities and the infrastructure provided to the Advisory Board would ensure that the statutory requirement is complied with in its letter and spirit.

Need for Training of Officials

The Kerala High Court has on several occasions pointed out the necessity of imparting necessary training to government officials who deal with preventive detention matters. In *Shruthi P.* v. *State of Kerala and others*[72], the Court observed:[73]

> Before parting with the case, we must impress upon the government the need to ensure that orders of preventive detention do not suffer from technical or procedural inadequacies. The legislative anxiety to arm the executive with such draconian power to order preventive detention in the interest of societal safety and protection can be frustrated by such inadequate compliance with procedural safeguards. The Government must ensure that such inadequacies do not creep in at any stage to vitiate the order. The officials may be inexperienced and ill equipped to live upto the challenges in the new jurisdiction to order preventive detention available under

72 2009 KHC 1207.

73 *Id.* at ¶ 53.

the KAAPA. Adequate training for and strict insistence of procedural mandates from those wielding such power have to be insisted by the Government if legislative goals are to be fully achieved. The Government must ensure that every representation by the detenu under Art.22(5) of the Constitution and S.7(2) of the KAAPA is disposed of after real and proper consideration as insisted by the precedents referred above.

Conclusion

Application of preventive detention comes at the cost of life and liberty. The various authorities involved in the implementation of KAAPA have an onerous role to play in striking a balance between the need to maintain public order and the fundamental rights of individuals. The detaining authority has a crucial responsibility of preventing individuals from engaging in any activity that could potentially undermine public order. At the same time, they need to act in strict compliance of the procedure established by law. Through its various judicial pronouncements, the Kerala High Court has succeeded in ensuring that the power of preventive detention is used used judiciously and with great care by the detaining authorities.

Detaining an individual without trial, irrespective of the duration, is fundamentally inconsistent with the basic principles of our government and judicial system. Be that as it may, the court has, while exercising its jurisdiction under Article 226 of the Constitution of India stood up to the executive in the interests of the constitutional guarantee of personal liberty. The court has consistently taken the position that the government must ensure that inadequacies do not creep in at any stage to vitiate the detention orders. Lapses and lack of co - ordination on the part of the authorities in dealing with preventive detention cases have engaged the attention of the court and it has risen to the occasion when inadequate compliance with procedural safeguards have come to its notice. The court has also stressed the need for government officials dealing with such matters are properly informed of the legal requirements.

A survey of the judicial pronouncements also leads us to the irresistible conclusion that the Kerala High Court has been vigilant enough to ensure transparency and accountability on the part of the various authorities engaged in the implementation of KAAPA. By insisting on the need for proper application of mind by detaining authorities, by highlighting the significance of timelines provided in KAAPA, by safeguarding the rights of detenus as provided in the statute, by underlining the need for effective consideration of representations filed by the detenus, by advocating the need for proper co-ordination among the authorities and finally by recommending the need for capacity building of the entities involved in the implementation of KAAPA, the court has upheld the fundamental rights of the detenus.

Public Attitudes towards the Use of Automatic Facial Recognition Technology in the Indian Criminal Justice System

Bhumika*

Introduction

Facial Recognition Technology (FRT) is the technology which is used to analyse images of human faces for the purpose of identifying (or verifying) them.[1] This technology uses algorithms to extract data points from a person's face to create a digital signature of the face.[2] The process involves measuring the specific characteristics a person's face such as "the distance between the eyes, the width of the nose, and the length of the jaw line"[3] to create a mathematical representation that determines their

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1 'Face Recognition Technology' (*American Civil Liberties Union*) (June 5,2023,10.30 AM)<https://www.aclu.org/issues/privacy-technology/surveillance-technologies/face-recognition-technology> .

2 'Panoptic' (*Panoptic*) (June 5,2022,10.30 AM),https://panoptic.in>.

3 Kevin Bonsor & Ryan Johnson, *How Facial Recognition Systems Work*, *How Stuff Works,* https:// electronics.howstuffworks.com/ gadgets/high-tech-gadgets/facialrecognition.htm as cited in Kristine Hamann and Rachel Smith, *Facial Recognition Technology: Where will it take us?* CRIMINAL JUSTICE (2019), (June 5,2022,12.30 PM),https://pceinc.org/wp-content/uploads/2019/11/20190528-Facial-Recognition-Article-3.pdf.

similarity.[4] This signature is then compared with an existing database to find possible matches.

Facial recognition technology has shown potential to increase public safety by helping law enforcement agencies in finding and identifying victims, witnesses, and suspects quickly.[5] It can find missing children, locate wanted fugitives in a crowd, or spotting terrorists as they enter the country.[6]

FRT is being deployed increasingly by law enforcement agencies in Telangana[7], Delhi,[8] and other States across the country for wider security, surveillance, and identity authentication and investigation purposes in public spaces. Telangana is considered to be using the highest number FRT in India[9]. Internet Freedom Foundation's Project Panoptic which aims to bring transparency and accountability in matters of deployment and implementation of FRT reveals that there are 124 FRT systems deployed at Central and State levels.[10] The Central government has further approved

4 '*ITIF Technology Explainer: What Is Facial Recognition?*' (Information Technology and Innovation Foundation 2020) (June 5, 2022,10.30 AM), <https://itif.org/publications/2020/04/08/itif-technology-explainer-what-facial-recognition.

5 *Id*.

6 *Supra* note 3

7 Venkat Ananth, *In Telangana, the eyes have it: How the State is redefining data driven governance*, THE ECONOMIC TIMES, (March 16, 2020) (Jan.2,2023,10.30 AM), https://economictimes.indiatimes.com/news/politics-and-nation/in-telangana-the-eyes-have-it-how-the-state-is-redefining-data-driven-governance/articleshow/74644762.cms

8 Jay Mazoomdar, *Delhi Police films protests, runs its images through facial recognition software to screen crowd*, INDIAN EXPRESS, (December 28, 2019) (Jan. 2,2023,10.30 AM), https://indianexpress.com/article/india/police-film-protests-run-its-images-through-face-recognition-software-to-screen-crowd-6188246/.

9 U Sudhakar Reddy, *Telangana tops in the use of facial recognition technology*, TIMES OF INDIA, (Nov 28, 2020) (Jan.2,2023,10.30 AM), https://timesofindia.indiatimes.com/city/hyderabad/t-tops-in-use-of-facial-recognition-technology/articleshow/79454173.cms

10 *See* (Jan.2 2023,10.30 AM), https://panoptic.in/

deployment of Automated FRT in 2022 which will allow facial biometrics to be extracted from CCTV cameras and match them with the NCRB's database.[11]

Though this evolving technology has enormous potential for law enforcement, it is not fool proof and comes with its own set of problems and (technological) limitations. It is not fully accurate and comes with the harms of misidentification (false positive) and failure to identify (false negative). If it fails to find a face that is present, it is called a false negative. If it identifies a non-face structure as a real face, it is called a false positive.[12] This technology is also prone to bias as it is now a well known fact that human bias creeps into algorithms.[13] Since most of the algorithms have been trained using pictures of white males/ light skinned males, it is most accurate in identifying white males/ light skinned males. The accuracy of identification in case of light skinned females decreases, further lowers in case of dark skinned males and is the lowest in case of dark skinned females.[14] This inaccuracy can lead to misidentifications.

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11 Anthony Kimery, *India set to stand up world's largest government facial recognition database for police*, BIOMETRIC UPDATE, (March 11, 2020) (Jan.2,2023, 10.30 AM), https://www.biometricupdate.com/202003/india-set-to-stand-up-worlds-largest-government-facial-recognition-database-for-police-use

12 Joy Buolamwini et al, Facial Recognition Technologies: A Primer (Mar.31,2022, 10 AM), https://www.semanticscholar.org/paper/.

13 'Bias in the Machine: Internet Algorithms Reinforce Harmful Stereotypes (June 10,2022,10.30 AM), https://www.cs.princeton.edu/news/bias-machine-internet-algorithms-reinforce-harmful-stereotypes. .

14 Sidney Perkowitz, The Bias in the Machine: Facial Recognition Technology and Racial Disparities, MIT CASE STUD. SOC. ETHICAL RESPONSIB. COMPUT. (2021) (June 10,2022,10.30 AM), https://mit-serc.pubpub.org/pub/bias-in-machine/release/1; Clare Garvie & Jonathan Frankle, Facial-Recognition Software Might Have a Racial Bias Problem (June 5,2022,11 AM), https://apexart.org/images/breiner/articles/FacialRecognitionSoftwareMight.pdf; Joanna J. Bryson Rankin Susan Etlinger, Os Keyes, Joy Lisi, Gender Bias in Technology: How Far Have We Come and What Comes Next?, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (June 5,2023,10.30 AM), https://www.cigionline.org/articles/gender-bias-technology-how-far-have-we-come-and-what-comes-next/;Susan Leavy, 'Gender Bias in Artificial Intelligence: The Need for Diversity and Gender Theory in Machine Learning', Proceedings of the 1st International Workshop on Gender Equality in

Unlike other biometric systems such as fingerprints, iris scan, etc. facial recognition can be used for general surveillance passively without requiring "the knowledge, consent, or participation of the subject."[15]

It is feared that the unfettered deployment and use of facial recognition technology in public spaces is creating a panoptic society,[16] and that its irresponsible and unregulated use entails violation of the constitutional guarantees and safeguards.[17]

In India, the deployment and use of FRT is taking place in the absence of any regulatory legislation.[18]Such unregulated use of this technology infringes right to privacy as it involves collecting and processing of personally identifiable sensitive information/ biometric i.e. the face of a person. It is also argued that it does not fulfil the proportionality test as laid down in *Justice K.S. Puttaswamy v. Union of India.*[19] There are no procedural guarantees to prevent arbitrariness in State action. It also impinges upon the fundamental rights to freedom of speech and expression, and freedom to assemble peacefully as people would be afraid of being targeted if they raise their voices or take part in peaceful demonstrations

Software Engineering (2018)(June 5,2023,10.30AM)<https://doi.org/10.1145/3195570.3195580>.

15 *Supra* note 1.

16 Mitchell Gray, *Urban Surveillance and Panopticism: will we recognize the facial recognition society?*, 1 Surveill. Soc. 314–330 (2002); Stéphane Leman-Langlois, *The Myopic Panopticon: The Social Consequences of Policing Through the Lens*, 13 Polic. Soc. 43–58 (2002); Ivan Manokha, *Surveillance, Panopticism, and Self-Discipline in the Digital Age* 16 SURVEILLANCE & SOCIETY 219. (2018).

17 Faizan Mustafa & Utkarsh Leo, *On Facial Recognition and Fundamental Rights in India: A Law and Technology Perspective*, (2021), (June 5,2022,10.30AM), http://dx.doi.org/10.2139/ssrn.3995958.

18 Soibam Rocky Singh, *Facial Recognition Technology: Law yet to Catch Up*, THE HINDU (December 30,2020), (June 6,2022,10.30 AM), <https://www.thehindu.com/news/cities/Delhi/facial-recognition-technology-law-yet-to-catch-up/article33458380.ece.

19 (2017) 10 SCC 1.

and protests as they would be always under the "eye". There is a lurking fear of surveillance, exclusion and profiling.[20]

So it becomes imperative to study what the public thinks and what is its attitudes toward the use of FRT in India, particularly in the context of criminal justice system. Hence, I have conducted an empirical study to investigate this.

Panopticism

In his book 'Discipline and Punish,[21] French philosopher Michel Foucault argues that there is a rise of a disciplinary society, where the State's political power is trying to manage the population through various mechanisms. Surveillance is one of them. The State constantly monitors our behaviour through a tight gaze, in order to make the society 'disciplined'. Disciplinary power has three elements:

i. hierarchical observation- referring to the fact that someone above us is constantly watching our movements and behaviour;

ii. normalising judgment- referring to the fact that such constant observation is for our own good;

iii. examination- referring to the fact that since all of us are conscious that we are being observed, we keep ourselves in check, behaving in a certain way, a way the political power wants us to behave, and in this way, the State exerts control and manages us. With surveillance, the law is everywhere and applies everywhere. There are no outlaws.

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20 Vrinda Bhandari, *Facial Recognition: Why We Should Worry About the Use of Big Tech for Law Enforcement*, (2020), (Mar 24, 2022,13.30 PM), http://dx.doi.org/10.2139/ssrn.3824118 ; Smriti Parsheera, *Adoption and Regulation of Facial Recognition Technologies in India: Why and Why Not?*, (Jan 6,2022,13.30 PM), http://dx.doi.org/10.2139/ssrn.3525324.; Faizan Mustafa & Utkarsh Leo, *On Facial Recognition and Fundamental Rights in India: A Law and Technology Perspective*, (2021), http://dx.doi.org/10.2139/ssrn.3995958.

21 Michel Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (2nd ed. 1995).

Punishment has always been very political.[22] Earlier it was about torture and terror where punishment was inflicted on the body displaying the strength of the ruler. Now the punishment is more incorporeal. It focuses on the mind instead of the body. Through surveillance and discipline, the State is managing us without inflicting violence. Even though we do not see the punishment, we each experience it intensely. Punishment plays out discreetly in our minds where it effectively alters our behaviour.

Foucault says that the penal system- the laws, policing and surveillance is not supposed to prevent crime or reform criminals or do justice. It simply exists to defend the power of the ruling class. It is supposed to make people useful to the ruling class.[23] He says, "prison, and no doubt punishment in general, is not intended to eliminate offences, but rather to distinguish them, to distribute them, to use them; that it is not so much that they render docile those who are liable to transgress the law, but that they tend to assimilate the transgression of the laws in a general tactics of subjection."[24]

English philosopher Jeremy Bentham designed a hypothetical prison called the 'Panopticon'. The Panopticon is a circular prison with cells built into a circular wall and a central observation tower. From the tower one can see into each cell and from each cell one can see the tower. The tower is designed with shutters and blinds so that they cannot see into it, but only that it is there. So at any moment, the prisoners cannot be sure whether they are being watched but they know that there is always a real possibility that they are being watched. The panopticon induces in the inmate a state of conscious and permanent visibility that ensures the automatic functioning of power.[25]The power is visible yet unverifiable.

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22 *Id*

23 Michel Foucault*: Crime, Police, & Power*| PHILOSOPHY TUBE (Mar.2,2022,10.30 AM) https://m.imdb.com/title/tt17220454/mediaviewer/rm2077942017/?ref_=tt_ov_i

24 *Supra* note 21

25 Michel Foucault, *Panopticism* in THE INFORMATION SOCIETY READER(2004).

For Foucault, the panopticon embodies four principles:[26]

i. Pervasive power- the tower sees into every cell and sees everything that is happening therein and can regulate it

ii. Obscure power- the tower sees into the cells but the prisoners cannot see into the power, and cannot know when they are being observed

iii. Direct violence made structural- the prisoners would behave themselves without being coerced

iv. Structural violence made profitable- making the prisoners do what the power finds 'profitable' or making them behave in a way which it finds useful.

The panopticon represents the way in which discipline and punishment work in modern society. Foucault asserts that invisible surveillance would reinforce compliant behaviour from individuals. He insists that "this invisibility is a guarantee of order". As the individuals are constantly uncertain as to whether they are being watched at any given moment, they must act accordingly to the rules set by the power or suffer punishment. "The more numerous these anonymous and temporary observers are, the greater the risk for the inmate of being surprised and the greater his anxious awareness of being observed".[27] Surveillance then also serves the ulterior purpose of expanding power.

A shift from sovereign power to bio-political power can also be seen.[28] The basic biological features of human beings become the object of a political strategy, of a general strategy of power. The human becomes the object. It is quantified. This objectification then becomes subjectification.

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26 Foucault: *Government Surveillance & Prison* | PHILOSOPHY TUBE (Directed by Philosophy Tube, 2017) (Mar.1,2022,10.30 AM)<https://www.youtube.com/watch?v=AHRPzp09Kqc.

27 Manokha ,*supra* note 16

28 Sovereignty is exercised over a particular territory whereas discipline is exercised over the bodies of individuals.

It strips individuals of their anonymity and their group identity and renders them subject to control. Surveillance then becomes antithetical to the rights of individuals. "Classical panopticism breaks down what differentiates people from those around them to make them more easily moulded and made to fit a specific image that is most beneficial to the reigning hierarchic power."[29] For example, people would fear to exercise their right to assemble peacefully for demonstrations or protests for reasons unsupported by political power. It also has a 'chilling effect' upon the speech and expressions of individuals, as when aware of being under surveillance, they make changes in their behaviour to be in conformity with the perceived norms or expectations of the surveyors/ political power.[30]

Modern information panopticon has taken Foucault's idea of panoptic architecture and made it into an omnipresent and insidious institution.[31] Observation and gaze thus become the key instruments of the political power helping it in exercising control in modern society. The 'power of the gaze' in panoptic settings is expected to produce—self-censorship and self-discipline.[32]The transformation of panoptic disciplinary power has changed to a more decentralized apparatus that takes the strengths of panoptic power and distributes those checks on behaviour throughout society.[33]

The panopticon through modern means of surveillance has moved beyond prisons and in fact makes the prison system the model for all institutions, thereby generalizing for the whole society a subtle, calculated technology of subjection. It now encapsulates society as a whole. So it is

29 Connor Sheridan, Foucault, Power and the Modern Panopticon(Jan.6,2022,10.30 AM) https://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1564&context=theses

30 Manokha ,*supra* note 16.

31 Sheridan ,*supra* note 29

32 Manokha ,*supra* note 16

33 Sheridan, *supra* note 29.

important to view society through the panoptic lens because "the eye of the Inspector is now on all of us."[34]

The Question of Proportionality and Constitutionality

"We must recognize that while technology is a useful tool for improving the lives of the people, at the same time, it can also be used to breach that sacred private space of an individual."[35]

The law enforcement agencies are deploying facial recognition technology in public spaces for policing as well as investigative purposes. Deploying such technology in public spaces puts all citizens under the "eye of the inspector" and acts as a mode of surveillance.

Members of a civilized democratic society have a reasonable expectation of privacy and ought to be protected against its violation. The right to privacy is directly infringed when the State does surveillance on an individual. Further, "surveillance and the knowledge that one is under the threat of being spied on can affect the way an individual decides to exercise his or her rights. Such a scenario might result in self-censorship."[36]

While there is no legislation in place to give legal validity to the executive practice of deployment and use of this technology, such practice nevertheless is subject to the proportionality test. A conjoint reading of *KS Puttaswamy* v. *Union of India*[37] (the privacy judgment) and *KS Puttaswamy* v. *Union of India* (the Aadhar judgment)[38] provides the proportionality test. It entails that any restriction on the fundamental rights must fulfil the following requirements:

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34 *Id*

35 Manohar Lal Sharma v. Union of India (2021 SCC OnLine SC 985).(India)

36 *Id*.

37 (2017) 10 SCC 1.(India)

38 (2019) 1 SCC 1.(India)

i. The legality aspect i.e., there must be a clear law in place imposing such restrictions;

ii. The legitimate aim aspect i.e., there must be a rational connection with the legitimate object the State is proposing to attain;

iii. The necessity aspect i.e., the measure adopted by the state must be proportional to the legitimate purpose and that it is the least restrictive alternative available to attain the legitimate objective;

iv. The procedural safeguards aspect i.e., there must be sufficient procedural safeguards to ensure that there is no misuse or abuse of the power held by the State.

When the practice of deployment and use of this technology is tested at the anvil of this proportionality aspect, it fails. There is no legislation in place with respect to deployment and use of facial recognition technology so the legality aspect is not fulfilled.[39] Currently this technology is being used for tracking "suspicious" people/ habitual protestors, for identifying persons not obeying the mandatory governmental directive of wearing masks during the pandemic, etc.[40] These purposes are often vague and over-broad.[41] Further the accuracy of such technology is also in question. So the legitimate aim aspect that there must be a rational connection with the legitimate object the State is proposing to attain is not fulfilled. Subjecting everyone to this technology treats everyone as a potential criminal and is against the established principle of criminal law that a person is presumed innocent until proven guilty. There is nothing to say that this is

39 Vrinda Bhandari, *Facial Recognition: Why We Should Worry About the Use of Big Tech for Law Enforcement*, (2020),(June 5,2022,11 AM) http://dx.doi.org/10.2139/ssrn.3824118 ;Faizan Mustafa & Utkarsh Leo, *On Facial Recognition and Fundamental Rights in India: A Law and Technology Perspective* 2021, (June 5,2022,10.30 AM),http://dx.doi.org/10.2139/ssrn.3995958.

40 Vrinda Bhandari, *Facial Recognition: Why We Should Worry About the Use of Big Tech for Law Enforcement*, (2020)(Jan.5,2022,10.30 AM), http://dx.doi.org/10.2139/ssrn.3824118.

41 *Id*.

the least restrictive alternative available to attain the legitimate objective. The necessity aspect is also not fulfilled. Lastly there are no procedural safeguards in place to hold the State accountable and keep the process transparent. The test of proportionality is not met, violating the fundamental right to privacy recognised under Article 21 of the Constitution of India.

There is a lot of opaqueness with respect to who is subject to technology, how is the database collected for identification and verification purposes, is everyone in the database and how the collected sensitive personal information/ biometric is stored. The practice becomes more questionable especially in the absence of any law to govern sensitive personal data or information. It is also important to remember that "the body in the digital archive exists as a site of constant surveillance and as something always potentially criminal".[42]

This technology captures the faces of persons without their consent. A face is an important part of one's identity and subject to reasonable aspect of privacy. It has been reported that the police in Delhi had been trying to identify "habitual protestors" using an automated facial recognition system.[43] This can "connect an otherwise anonymous face in a protest to a name, and to all the information available on the public database associated with them."[44] This can have a "chilling effect" on the fundamental right to free speech and expression, and the fundamental freedom to assembly peacefully

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42 Jonathan Finn, *Capturing the Criminal Image: From Mug Shot to Surveillance Society* (2009)(Jan. 5,2023,11 AM), https://www.jstor.org/stable/10.5749/j.ctttv09q.

43 *Delhi Police Film Protests, Run Its Images through Face Recognition Software to Screen Crowd* ,THE INDIAN EXPRESS,(June 7,2022,11 AM) <https://indianexpress.com/article/india/police-film-protests-run-its-images-through-face-recognition-software-to-screen-crowd-6188246/> .

44 Alessandro Acquisti, et al., Face Recognition and Privacy in the Age of Augumented Reality (2014) 6(2) JOURNAL OF PRIVACY AND CONFIDENTIALITY as cited in Vrinda Bhandari, *Facial Recognition: Why We Should Worry About the Use of Big Tech for Law Enforcement*,2020(Mar.24,.2022,10.30 AM), http://dx.doi.org/10.2139/ssrn.3824118 .

without arms guaranteed under Article 19(1)(a) and 19(1)(b) of the Constitution of India. There is also a fear that it may be used to target minorities.[45]

It is essential "to strike a balance between the liberty and security concerns so that the right to life is secured and enjoyed in the best possible manner."[46] Hence deployment and use of facial recognition technology should strictly adhere to the proportionality test. Irresponsible and unregulated use entails violation of the constitutional guarantees and safeguards and should be disregarded.[47]

Statement of Research Problem

Kay L. Ritchie, et al.,[48] in a recently published paper had attempted to conduct an international survey of public attitudes towards the increasing use of automatic facial recognition technology in criminal justice systems around the world. They conducted two studies. In Study 1 they ran focus groups in in the UK, Australia and China. In Study 2 they collected data from participants in the UK, Australia, and the USA using a questionnaire investigating attitudes towards the use of this technology in criminal justice systems.

In India this technology is gradually being deployed by the law enforcement agencies. However not much work has been done to study

45 Aishwarya Jagani, *In India, fears grow that facial recognition systems may be used to target minorities*, SCROLL.IN,(June 7,2022,13.30 PM) https://scroll.in/article/1006615/in-india-fears-grow-that-facial-recognition-systems-may-used-to-target-minorities;*Alibaba facial recognition tech specifically picks out Uighur minority - report,* REUTERS, December 17, 2020, (June 7,2022,13.30 PM), https://www.reuters.com/article/us-alibaba-surveillance-idUSKBN28R0IR.

46 Anuradha Bhasin v. Union of India ,(2020) 3 SCC 637.(India)

47 Faizan Mustafa & Utkarsh Leo, *On Facial Recognition and Fundamental Rights in India: A Law and Technology Perspective*, (2021), (June 7,2022,13.30 PM) http://dx.doi.org/10.2139/ssrn.3995958 .

48 Kay L. Ritchie et al., *Public attitudes towards the use of automatic facial recognition technology in criminal justice systems around the world*, 16 PLOS ONE (2021).(June 5,2022,10.40 AM) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8513835/

the attitudes of the general public towards the use of this technology , in the Indian context. Here, I attempt to conduct an empirical study to collect data from Indian participants using a questionnaire investigating their attitudes towards its use in the Indian criminal justice system adopting the methodology of above mentioned Study 2.

In this, I will examine, firstly, whether participants are aware that facial recognition can be used as a method for verifying identity. Secondly, what is the participants' perception regarding the use of this technology by various law enforcement agencies, governmental authorities and private entities. Thirdly, how much are they comfortable with its use by the police, and how much they do they trust them in using this technology responsibly. Fourthly, whether they are aware of the different use cases of this technology in court as the government is using this technology surveillance, identification and investigations purposes. Fifthly, what is the public perception of the accuracy of this technology.

Research Question

Central research question

What is the public attitude towards the use of automatic facial recognition technology in the Indian criminal justice system?

Incidental questions

i. Whether participants are aware that facial recognition can be used as a method for verifying identity?

ii. What do participants think about the use of this technology by the police, the government and private companies?

iii. How comfortable participants feel with the use of this technology by the police, and what is the extent of trust in this technology being used responsibly by the police, the government, and the private companies?

iv. Whether they are aware of the different use cases of this technology in court as the government is using this technology surveillance, identification and investigations purposes?

v. What is the public perception of the accuracy of this technology?

Research Objectives

To understand the public attitudes towards the use of facial recognition technology in the Indian criminal justice system and to find out how similar or dissimilar it is from the public attitudes in other criminal justice systems around the world.

Limitations

The very first limitation is the fact that data has been collected from a very small number of participants, and may not generalise the opinion of the whole population of India. The second limitation was that the questionnaire was in English language so only those people who could comprehend it were able to attempt it.

Methodology

The methodology adopted is similar to the one adopted in Kay L. Ritchie et al.[49] paper, where a study[50] was conducted using a questionnaire to investigate public attitudes towards the use of automated facial recognition in criminal justice systems.

I have used the same questionnaire as was used in this research study. It exhaustively dealt with the problem at hand and was also independently verified to ensure that the wordings of the questions were unbiased and not leading.

Participants: The data was collected voluntarily from 138 participants through the snowballing method using a google form. The form was circulated

49 *Supra* note 48.

50 Study 2.

through a link to the participants. (In the Kay L. Ritchie study,[51] the data was collected through data collection websites such as MTurk and Prolific.co, but since these websites required the participants to be financially compensated for their time, I could not use them.) Out of these, seven did not identify themselves as citizens of India. So their responses were not considered. Hence the final sample consisted of responses from 131 participants.

This final sample consisted of responses from 66 male participants and 65 female participants. No one identified themselves as "other." The mean age was 28 years. The age range was 18 to 61 years.

***Procedure*:** The questionnaire had total twenty three questions divided among the following five sections-

1) Background knowledge
2) Use of facial recognition technology
3) Trust in the use of facial recognition technology
4) Use of facial recognition technology in Court
5) Accuracy of facial recognition technology

Each of these sections contained multiple questions to address and understand the different aspects of people's attitudes towards the use of this technology. The participants had to answer each question mandatorily. A six point scale was used provided for answering questions where the participants had to rate their agreement with a statement.

The data was collected from 9 April 2022 to 24 May 2022.

Review of Literature

Mitchell Gray in *Urban Surveillance and Panopticism: will we recognize the facial recognition society,* explores the implementation of facial recognition surveillance mechanisms as a reaction to perceptions of insecurity in urban spaces. However, instead of reducing insecurity, it paradoxically may add to insecurity by transforming society in

51 *Supra* note 48.

unanticipated directions- altering societal conceptions of privacy as well as the dynamics of individual and group interactions in public space.[52]

Vrinda Bhandari in *Facial Recognition: Why We Should Worry About the Use of Big Tech for Law Enforcement*, argues that the terrain of the privacy battle in India is changing and that rather than improving transparency or efficiency, FRTs end up threatening democracy. She points out that the use of FRT raises privacy and fundamental rights concerns, including free speech and free assembly concerns, thus necessitating the application of the proportionality test as laid down in the *KS Puttaswamy* v. *Union of India*.[53]

Smriti Parsheera in *Adoption and regulation of facial recognition technologies in India: Why and why not?,* writes that the unchecked use of FRT, particularly by government agencies, poses serious questions of privacy, transparency, accuracy, bias and lack of adequate accountability mechanisms. Furthermore, the deployment of FRTs though, on one hand, poses threat to individual and community rights, which might be impossible to rectify in future, while on the other hand, it has some potential benefits and some may come to light only as the technology evolves further.[54]

Tim McSorley in *The Case for a Ban on Facial Recognition Surveillance in Canada* argues that facial recognition has emerged as a particularly troubling and controversial tool for surveillance by law enforcement and that in the absence of meaningful policy or regulation governing its use, facial recognition surveillance cannot be considered safe for use in Canada.[55] Such an argument can be juxtaposed in the Indian context as there is no law at present to govern or regulate the use of FRT.

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52 Gray ,*supra* note 16.

53 Vrinda Bhandari,*Facial Recognition: Why We Should Worry About the Use of Big Tech for Law Enforcement*, (2020), (Mar.24,2022,14.20 PM),https://deliverypdf.ssrn.com/delivery.php?ID=022074007112126070113066016071076096.

54 Smriti Parsheera, *Adoption and Regulation of Facial Recognition Technologies in India: Why and Why Not?* (Jan.6,2022,13.20 PM) ,https://papers.ssrn.com/sol3/papers.cfm?.

55 Tim McSorley, *The Case for a Ban on Facial Recognition Surveillance in Canada*, 19 SURVEILL. SOC. 250-254 (2021) (Mar.21,2022,13.20 PM) ,https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/14777.

Lucas D. Introna and David Wood in *Picturing Algorithmic Surveillance: The Politics of Facial Recognition Systems* talk about how algorithmic surveillance design decisions may have important political consequences and ought to be subject to scrutiny. "We can not remain naïve about such a powerful technology."[56]

David Lyon in *Surveillance as Social Sorting* proposes that "surveillance is not simply a contemporary threat to individual freedoms, but that, more insidiously, it is a powerful means of creating and reinforcing long-term social differences. As practised today, it is actually a form of social sorting – a means of verifying identities but also of assessing risks and assigning worth. Questions of how categories are constructed therefore become significant ethical and political questions."[57]

Marcus Smith and Seumas Miller in *The ethical application of biometric facial recognition technology* argue that the problems arising from the use of FRT cannot be framed in terms of "a simple weighing of, let alone trade-off between, individual privacy rights versus the community's interest in security". It also has the potential to create a power imbalance between governments and citizens. So it is important that their use be subject to accountability mechanisms to guard against misuse. Further, citizens should be well informed about the use of such facial recognition systems and their consent should be taken to the use of these systems for specific and justified purposes.[58]

Public Attitudes towards the Use of Automatic Facial Recognition

56 Lucas Introna and David Wood, *Picturing Algorithmic Surveillance: The Politics of Facial Recognition Systems* 2 SURVEILL.SOC (2002),(Mar.31,2022,13.30 PM) <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/3373>. "plainCitation": "Lucas Introna and David Wood, 'Picturing Algorithmic Surveillance: The Politics of Facial Recognition Systems'.

57 David Lyon, *Surveillance as Social Sorting: Privacy, Risk and Digital Discrimination* (Mar.31,2022,13.20 PM)),https://silo.pub/qdownload/surveillance-as-social-sorting-privacy-risk-and-digital-discrimination.html.

58 Marcus Smith and Seumas Miller, *The Ethical Application of Biometric Facial Recognition Technology*, 37 AI & SOCIETY 167(2022).

Technology in the Indian Criminal Justice System: Questionnaire Results and Discussion

Section 1: Background knowledge

The first part of the questionnaire aimed to understand whether the participants have any background knowledge about facial recognition technology as an identification method.

Firstly, the data revealed fingerprints, iris/eye scanning, password, voice recognition, and face recognition as methods the participants were most aware of. 82.4% of the participants were aware that facial recognition can be used for verifying identity. A similar trend can be seen amongst the participants from the UK, Australia and the USA, where 90.3% were aware that it can be used for verifying identity.[59]

Secondly, the data revealed that fingerprints (80.2%) and passwords (74.8%) were mainly used for identity verification, followed by facial recognition (43.5%). The percentage of participants currently using facial recognition in India seems more than the participants from Australia, the UK, and the USA (28.3%)[60].

Thirdly, the data revealed that in an ideal world, fingerprints (58.8%), iris/ eye scanning (54.2%), and passwords (48.9%) would be the most popular methods of identity verification. Fingerprints and passwords were also considered the most popular identity verification methods in an ideal world in the UK, Australia, and the USA.[61]32.1% of the participants stated that they would depend upon face recognition as a method to verify identity in an ideal world. This is lower than the mean of participants from the UK, Australia, and the USA (42.59%).[62]

59 *Supra* note 48,at 13.

60 *Id*

61 *Id*

62 *Id*

Fourthly,57.3% of the participants responded saying that they were aware and knew a little about the use and adoption of such technology in India. This indicates that they do not consider themselves experts. This finding is similar to the finding obtained from the participants in the Kay L. Ritchie et al. study.[63]

Section 2: Use of facial recognition technology

In this section, participants were asked about the various uses of automatic facial recognition by firstly, the police, secondly, the government, and thirdly, the private companies in India.

Use of facial recognition technology by the police

The participants were asked in which ways they thought facial recognition technology was currently being used by the police in India. The data revealed that about 65.6% of participants stated that this technology is currently being used by the police in criminal investigations, 58% indicated that it is currently being used by the police to search for those who have been alleged of committing some crime, and 48.1% stated that it is presently being used to search for missing persons.

In contrast, the participants stated that the use of this technology by the police to track citizens (24.4%), to search for people irrespective of whether or not they have committed a crime (25.2%), in everyday policing (19.1%) was lower. A similar conclusion was found in the case from participants in the Kay L. Ritchie et al. study.[64]

The participants were then presented with follow-up questions. The first follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India in their everyday policing. The results showed a mixed response, with participants slightly disinclining (52.7%) towards the use this technology by the police in their everyday policing.

63 *Id* at 13.

64 *Id* at 15.

The second follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India in criminal investigations.The results reveal that about 71% of the participants agreed with the use of this technology by the police in criminal investigations.

The third follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India to search individuals who have committed a crime .The results reveal that about 68.7% of the participants agreed with use of this technology by the police to search individuals who have committed a crime.

The fourth follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India to search individuals whether or not they have committed a crime. The results reveal that about 61% of the participants did not agree with the use of this recognition technology by the police to search for individuals irrespective of whether they have or not they have committed a crime.

The fifth follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India to search for missing persons. The results reveal, that about 71.8% of the participants agreed with the use of this technology by the police to search for missing persons.

The sixth follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India to track citizens. The results reveal that about 60.3% of the participants did not agree with the use of this technology by the police to track citizens.

The seventh follow-up question asked the participants the extent of their agreement with the use of this technology by the police in India to automate police work.T he results reveal a mixed response from the participants. About 51.9 % did not agree with the use of this technology by the police to automate police work. About 48% of the participants agreed with the use of this technology by the police to automate police work.

Use of facial recognition technology by the government

The participants were asked in which ways did they think facial recognition technology was currently being used by the government in India. The data revealed that the participants were in agreement with the use of this technology by the government was high as evidence for identifying individuals from CCTV images in criminal trials (68.7%) as evidence identifying individuals from other digital images in criminal trials (58%) and to prevent fraud when applying for identity documents, e.g., passports (55%). The agreement was low to search for people irrespective of whether they have or they have not committed a crime (36.6%) and track citizens (40.5%). This trend was also noticed amongst the participants in the Kay L. Ritchie et al. study.[65]

The participants were then presented with follow-up questions. The first follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India to search for people who have committed a crime. The results show that 69.4% of the participants agree with the use of this technology by the government to search for those individuals who have committed a crime.

The second follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India to search for individuals irrespective of whether or not they have committed a crime. The results show that 55% of the participants do not agree with the use of this technology by the government to search individuals whether or not they have committed a crime.

The third follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India to search for missing persons. The results show that 71.8% of the participants agree with the use of this technology being used by the government to search for missing persons.

65 *Id* at 15.

The fourth follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India to track citizens. The results show that 51.2% of the participants do not agree with the use of this technology by the government to track citizens.

The fifth follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India to verify identity when accessing government websites.T he results show that 55.7% of the participants agree with the use of this technology by the government to verify identity when accessing government websites.

The sixth follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India to prevent fraud when applying for identity documents, e.g., passports. The results show that 71.8% of the participants agree with the use of this technology by the government to prevent fraud when applying for identity documents, e.g., passports.

The seventh follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India as evidence identifying individuals from CCTV images in criminal trials.The results show that 73.3% of the participants agree with the use of this technology by the government as evidence identifying individuals from CCTV images in criminal trials.

The eighth follow-up question asked the participants the extent of their agreement with the use of this technology by the government in India as evidence to identifying individuals in other digital images such as social media images, etc. in criminal trials.The results show that 65.7% of the participants agree with the use of this technology by the government as evidence identifying individuals in other digital images in criminal trials.

Use of facial recognition technology by private companies

The participants were asked in which ways they thought facial recognition technology was currently being used by the government in India. The data revealed that the participants' agreement with the use of facial recognition technology by private companies was high in the case of sharing data between businesses, e.g. bars and shops, in order to blacklist people (50.4%) and in case of blacklisting people who have previously behaved antisocially (41.2%). This is in contrast with the trend seen in the case of participants from Australia, the UK, and the USA.[66] Interestingly, in the "other" option, participants stated "marketing strategies," "for business analytic to know footfall," "to provide various services based on AI," "own benefits for their business to grow." A graphic representation of the responses can be seen below.

The participants were then presented with follow-up questions. The first follow-up question asked the participants the extent of their agreement with the use of this technology by private companies in India to track citizens. The results show that 61% of the participants do not agree with the use of this technology by private companies in India to track citizens.

The second follow-up question asked the participants the extent of their agreement with the use of this technology by private companies in India to track people behaving antisocially. The results show that 54.2% of the participants do not agree with the use of this technology by private entities to track people who behave antisocially.

The third follow-up question asked the participants the extent of their agreement with the use of this technology by private companies in India to blacklist people who have previously behaved antisocially. The results show that 63.3% of the participants do not agree with the use of this technology by private companies to blacklist people who have previously behaved antisocially.

66 *Id* at 15.

The fourth follow-up question asked the participants the extent of their agreement with the use of this technology by private companies in India to share data between businesses, e.g. bars and shops, in order to blacklist people. The results show that 51.2% of the participants do not agree with the use of this technology by private companies to share data between businesses, e.g. bars and shops, in order to blacklist people.

Section 3 Trust in the use of facial recognition technology

This section sought to understand how comfortable the participants are with the use of automatic facial recognition by the police, and how much they trust the police, the government, and private companies in using this technology responsibly.

With respect to the use by the police

The first question in this regard asked the participants how comfortable did they feel with police in India using facial recognition technology to search for individuals who are on a watch list. The data revealed that about 39.8% of the participants were not comfortable with the police's use of this technology to search individuals who are on a watch list. About 60.3% of the participants were comfortable with the police's use of this technology to search individuals who are on a watch list. This trend is also somewhat seen amongst the participants from the UK, Australia, and the USA in the Kay L. Ritchie et al. study.[67]

The second question the participants were asked was as to how comfortable they felt with the police in India using facial recognition technology to search for individuals who were not on a watch list. The results revealed that about 63.4% of participants were uncomfortable with police's use of this technology to search those individuals who are not on a watch list. However, about 36.6% of participants were comfortable with police's use of this technology to search individuals who are not on

67 *Supra* note 48, at 16

a watch list. This trend is also somewhat seen amongst the participants from the UK, Australia, and the USA the Kay L. Ritchie et al. study.[68]

The third question asked the participants the extent of their trust in police's use of this technology responsibly. The results revealed that about 57.2% of the participants did not trust the police's use of this technology responsibly. Strikingly, 24.4% of the participants did not trust the police at all. On the other hand, 43.8% of the participants trust the police's use of this technology responsibly. Only 10.7% of the participants trusted the police very much.

This question was followed by two sub-questions to understand the extent of trust of the participants. The data revealed that 35.9% of the participants stated that it is beneficial for the security of society, 22.1% of the participants stated that they generally trust the police, and 17.6% of the participants stated that they trust the police to use the technology in an ethical manner.40.5% of the participants stated that they are concerned about their data being misused, 35.1% of the participants stated they do not trust that their data will be stored securely, 32.8% of the participants stated that it infringes on the privacy of all people in society, 32.1% of the participants stated that the loss of privacy they might experience outweighs any benefit to society, and 32.1% of the participants stated that they do not trust the police's use of this technology ethically.

With respect to the use by the government

The fourth question was as to what extent they trusted the government in India to use facial recognition technology responsibly.

The results revealed that about 57.2% of the participants did not trust the government in using this technology responsibly, and about 42.7% of the participants trusted the government in using this technology responsibly.

68 *Id*

On comparing this data with the data obtained for the above question three, i.e., trust in police using facial recognition technology responsibly it seems the percentage of participants is almost the same. However, the participants from the UK, Australia, and the USA trusted the police more than the government.[69]

This question was again followed by two sub- question to understand the extent of trust of the participants. The data revealed that 28.2% of the participants stated that it is beneficial for the security of society, 24.4% of the participants stated that they generally trust the government, and 19.1% of the participants stated that the benefits to society outweigh any loss of privacy that they might experience.40.5% of the participants were concerned about their data being misused, 35.1% of the participants stated that they do not trust that their data will be stored securely, 29% of the participants stated that the loss of privacy they might experience outweighs any benefit to society and 29% of the participants also stated they do not trust the government in using this technology ethically.

With respect to the use by private companies

The fifth question asked the participants to what extent they trusted the private companies in India to use facial recognition technology responsibly.

The data revealed that about 73.3% of the participants did not trust private companies to use this technology responsibly and only about 26.7% of the participants trusted private companies to use this technology responsibly. On comparing this data with the data showing participants' trust in the use of this technology responsibly by the police and the government, it seems that the participants' trust in use of this technology responsibly by private companies is strikingly low. Participants trust the police and the government comparatively more than private companies.

69 *Id*

This question was again followed by two sub- questions to understand the extent of trust of the participants. 12.2% of the participants stated that it is beneficial for the security of society, 8.4% of the participants stated that it is beneficial for their own personal security, 10.7% of the participants stated that they trust that their data will be stored securely.42% of the participants stated that they did not generally trust private companies, 38.2% of the participants stated that they did not trust that their data will be stored securely, 37.4% of the participants stated that they are concerned about their data being misused and 37.4% of the participants also stated that they do not trust private companies in ethical use of this technology ethically.

Section 4 Use of facial recognition technology in Court

This section inquired with the participants about the different uses of automatic facial recognition technology if it were to be used as evidence in India. The participants were then asked three questions in this regard.

The first question in this section asked the participants the extent of their agreement with the use of this technology in securing convictions, in absence of other evidence. The results revealed that about 52.7% of the participants did not agree with the use of this technology to secure convictions without other evidence, and about 47.3% of the participants agree with the use of this technology to secure convictions without other evidence.

The second question asked the participants the extent of their agreement with the use of this technology to secure convictions in conjunction with other evidence. The results revealed that about 67.9% of the participants agree with use of this technology to secure convictions in conjunction with other evidence, whereas, about 32.1% of the participants did not agree with its use for securing convictions in addition to other evidence. This trend is also seen amongst the participants in the Kay L. Ritchie et al. study.[70]

70 *Supra* note 48, at 17.

The third question asked the participants the extent of their agreement with the use of this technology- only as a tool to aid investigation and not at all in court.[71]The data shows that people are more inclined towards agreeing with the statement that this technology should only be used as a tool to aid investigation and not in court.

Section 5. Accuracy of facial recognition technology

This section asked the participants about their perceptions as to the accuracy of automatic facial recognition technology where it is used to search for a target person through databases of images containing multiple different people.

The first question in this section asked the participants how accurate they think this technology is at correctly identifying an individual from a database.The results reveal that the majority of the participants (about 67.9%) are of the opinion that this technology can accurately identify the person from the database. This trend is also true for the participants in the Kay L. Ritchie et al. study.[72]

The second question asked the participants how accurate they think this technology is at recognizing the same person across changes in their appearance. The results reveal that the majority of the participants (about 53.4%) are of the opinion that this technology can accurately identify the correct person from a database. This trend is also true for the participants from the UK, Australia and the USA.[73]

Accuracy of this type of facial recognition technology *vis a vis* other forms of identification:

The first sub- question in this respect asked the participants how accurate they think this type of technology is compared to DNA as a form of identification.

71 While I was supposed to provide a scale from 1 to 6, I mistakenly provided the scale up to 5 only.

72 *Supra* note 48, at 18.

73 *Id.*

The results reveal that 70.2% of the participants think that when this technology is compared to DNA as a form of identification, it is less accurate. This trend can also be seen amongst the participants from the UK, Australia, and the USA.[74]

The second sub-question asked the participants how accurate they think this type of technology is compared to fingerprints as a form of identification.The results reveal that 55% of the participants think that when this technology is compared to fingerprints as form of identification, it is less accurate. This trend can also be seen amongst the participants in the Kay L. Ritchie et al. study.[75]

The third sub- question asked the participants how accurate they think this type of technology is compared to eye witness testimony as a form of identification. The results reveal that 30.5% of the participants think that when this technology is compared to eye witness testimony as a form of identification, it is less accurate, whereas, 39.7% of the participants think that facial recognition is more accurate.

However this trend deviates from the data from participants from Australia, the UK and the USA which revealed that majority (63.71%) of the participants thought automatic facial recognition to be more accurate than eye witness testimony.[76] Kay L. Ritchie, et al. have also made a remark in this regard that generally, the public seems to be cautious of the accuracy eyewitness testimony. May be this cautious note resonates more with the Indian participants.

The fourth sub- question asked the participants how accurate they think this type of technology is compared to iris/ eye scanning as a form of identification. The results reveal that 65.6% of the participants think that when this technology is compared to iris/ eye scanning as a form of

74 *Supra* note 48, at 18.

75 *Supra* note 48, at 18.

76 *Id*.

identification, it is less accurate. This trend can also be seen amongst the participants in the Kay L. Ritchie et al. study.[77]

The fifth sub- question asked the participants how accurate they think this type of technology is compared to voice recognition as a form of identification. The results reveal that 45.8% of the participants think that when this technology is compared to voice recognition as a form of identification, it is more accurate, whereas, 40.5% of the participants thought that facial recognition technology and voice recognition are both equally accurate. This trend can also be seen amongst the participants from Australia, the UK, and the USA where 48.12% thought that facial recognition technology and voice recognition are both equally accurate.[78]

The next question asked the participants how accurate they think this technology needs to be in order for them to agree to it being used to identify anyone in society .The results reveal that 19.1% of the participants think that this technology needs to be 80% accurate, 22.1% of the participants think that this technology needs to be 90% accurate, and 14.5% of the participants think that technology needs to be 100% accurate to be able to identify any person in the society.

Surprisingly this trend in percentage is less when compared with the data from the participants from the UK, Australia, and the USA where 77% responded that it needs to be 90 or 100% accurate.[79]

The next question asked the participants whether they think that this technology is equally accurate with people of different genders. The results reveal that 41.2% of the participants think that this technology is equally accurate with all genders, whereas, 35.9% of the participants did not know. Amongst the participants in the Kay L. Ritchie et al. study, the most common response was that they did not know.[80]

77 *Id*

78 *Id* at 19.

79 *Id*

80 *Id.*

It was also revealed that the participants, who thought that facial recognition is not equally accurate with people of different genders, mostly were of the opinion that this technology is most accurate with males.

The next question asked the participants whether they think this technology is equally accurate with people of different ethnicities. The results reveal that 42% of the participants think that this technology is equally accurate with different ethnicities, whereas, 32.8% of the participants did not know. Amongst the participants in the Kay L. Ritchie et al. study, the most common response was that they did not know.[81]

It was also revealed that out of the participants who thought that facial recognition is not equally accurate with people of different ethnicities 16% were of the opinion that this technology is most accurate with Asian- Indian, 16% again were of the opinion that this technology is most accurate with mixed/ multiple ethnic groups, and 15.5% were of the opinion that this technology is most accurate with whites.

The next question asked the participants that if this technology was more accurate with, for example, white than non-white people, then to what extent would they agree with its use. The results show that majority of the participants did not agree with the use of this technology if it were more accurate with white than non- white people, with 26.7% responding that they do not agree at all. This trend can also be seen amongst the participants from the UK, Australia, and the USA.[82]

The final question asked the participants that if this technology was more accurate with, for example, white than non-white people, then to what extent would they agree, that accuracy with white people should be reduced in order to make it more equal. The results show that majority of the participants did not agree with the statement that if this technology

81 *Id* at 19.

82 *Id* at 20.

was more accurate with, for example, white than non-white people, that accuracy with white people should be reduced in order to make it more equal, 31.3 % responding that they do not agree at all. This trend can also be seen amongst the participants from the UK, Australia, and the USA.[83]

Conclusion

The data collected from the participants revealed that though most of them were aware about facial recognition technology for verifying identity, majority of them (57.3%) knew little about its use and adoption in the country. 9.9% of them knew nothing about it. They were not experts in the matter and had little awareness about facial recognition technology. This highlights the need to publicise the use of the facial recognition technology and its concerned aspects such as data privacy, accuracy, and justification of its use. Clear and cogent legal framework should also be in place which allows proportional use of this technology for legitimate aims.

The majority of the participants agreed with the use of this technology by the police, the government and private companies. The consent was high for use in criminal investigation, investigating people who have committed a crime, as evidence for identifying individuals in criminal trials, and low for searching individuals as to whether they have committed a crime or to track citizens. The extent of agreement was high for use by the police, slightly low for use by the government and lowest for use by private companies.

The majority of the participants were comfortable with the police's use of this technology such as to search individuals on watch list. However, about 57.2% of them did not trust the police in using this technology responsibly. This percentage was same for those who did not trust the government in using it responsibly. There are fears of misuse, infringement of privacy, etc. Trust towards private companies to use this technology responsibly was lowest.

83 *Id.*

With respect to the different use of this technology in Courts, as the government is using this technology for surveillance, identification and investigation purposes, the majority of the participants did not agree with its use to secure convictions in absence of other evidences. 67.9% of them agreed for its use to secure convictions in conjunction with other evidences. Most of them were in favour of it being used for the purposes of investigation only.

With respect to the public perception of accuracy of facial recognition technology, the majority of them (67.9%) considered it to be accurate. The majority responses considered it less accurate than DNA, fingerprints and iris scanning. There was no clarity in responses as to whether it is more accurate than eye witnesses. There were mixed responses as to whether it was more accurate than voice recognition or equally accurate.

It is however interesting to note that despite the fact that data for the present research was from a small subset of participants, the broad trends revealed by this data were similar to the one seen in the data collected by Kay L. Ritchie, et al.[84] from the participants from Australia, the UK and the USA.

Lastly, I would conclude stating that there is a dire need to have a legislative framework governing the deployment and use of facial recognition technology in India. It should strictly comply with the proportionality test. The legislation should specify a legitimate aim and purpose for the use of this technology by the law enforcement agencies. It should be the least restrictive alternative on the fundamental rights of the citizens. This would ensure that a balance is struck between the security objectives of the State and the liberty of the citizens. There must be procedural guarantees to prevent any unnecessary/ excessive use or misuse of this technology. There must be clarity as to the storage and use of sensitive personal data, especially since there is no data protection

84 *Id*.

legislation currently in place in India. The legislation should also regulate the use of this technology by private companies.

Supporting Information

The questionnaire used can be found at: https://docs.google.com/document/d/16yT2qTSXGG-eUpRz7-eDmnTAKgheHJNEz5JCCW2WoYE/edit?usp=sharing

The responses collected from the participants can be found at: https://docs.google.com/spreadsheets/d/12WHWIiXHW8kumBmOWy0MTfJxLyzo6uveeXhSm8wJpBw/edit?usp=sharing

Is Judiciary Setting the Tone for the Religious Fabric of India: Fiddling with the Liberal Space of an Individual

Jasper Vikas*

Introduction

The Constitution of India clearly suggests the separation of both (i) a secular domain and (ii) a religious domain. The State regulates and monitors the secular domain whereas the religious sphere is free from the State's interference. But, due to the adjustments associated with the community, based on the premise of living together, the Judiciary is being regularly called upon to resolve issues pertaining to religion. This is crucial from two aspects.*Firstly,* the decisions taken by the judiciary have long-term social, religious and political consequences and *secondly*, the Judiciary sets the tone of the religious, social and cultural fabric of the society. In the liberal democratic setup, the judiciary has its roots in doing legal analysis of religious practices and there is also a vital overlap in the Judiciary's decisions and interpretation of the religious practices and the ontology of the religion. In the past years, the judiciary in India has set the tone of society's political, social and religious fabric, contrary to the American Courts, which generally avoid deciding core issues on religion

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and its rituals and practices.[1] The Indian judiciary has taken a reformist approach by trying to reform religion and its practices, thereby setting the trend for modern religious practices and rituals, which will decide as to how the pluralist society will co-exist in the near future. The Supreme Court had termed secularism as a part of the basic structure of the Indian Constitution[2] and made it an invincible force against the majoritarianism of the pluralist society, which aims at homogenisation of the culture.[3] But, soon thereafter, various election cases[4] not only completely changed the political temperament of the Indian political milieu but also influenced the religious and social set up of the society. And this trend continued in a forward direction. Therefore, after the election cases, the Courts continued to receive petitions to decide issues arising due to different religious and social ideologies prevailing in the country more particularly because India is an amalgamation of different cultures and social backgrounds,. The Courts, in the past many years, thus started passing orders and judgments affecting either the core religion *per se*[5] or its interaction with the society's social and religious fabric. However, this approach is more sporadic than regular. The Courts do not adopt any exact methodology other than in the doctrine of essential practices, whose applicability is not based on objectivity because of a lack of appropriate guidelines[6], resulting in uncertainty in the Court's decisions regarding any particular religion or

1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 1155 (2nd ed. 1998)

2 S.R. Bommai v. Union Of India, (1994)3 SCC 1 (India).

3 S P Sathe, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 194 (2nd ed2002).

4 Dr Ramesh Prabhu v. Prabhakar Kashinath Kunte, (1996) 1 SCC 130, Manohar Joshi v. Nitin Bhaurao Patil, (1996) 1 SCC 169, and Ramchandra G Kapse v. Haribansh Ramakbal Singh, (1996) 1 SCC 206, the candidates contesting elections were in one way or the other, using the term 'Hindutva'. The Supreme Court held that this term simply means a way of life and it is not a religious term.

5 The matter of wearing hijab in educational institutions is related to the core religious practices, whereas the judgement on *Jallikattu race* is related to the religious rituals.

6 The test of 'Essential Practices' was at the beginning designed for the enhancement of those aspects of the religious faith, which urgently require scrutiny.

its rituals or practices. Recently, the Madras High Court bench consisting of Justice R Subramanian and Justice L Victoria Gowri refused to ban the offering of Namaz in a Nellithopu (pathway) which leads towards the Kasi Viswanathan Temple, which is located in Thirupparankundram in the Madurai District.[7]In this case, the Petitioner had argued that *firstly*, when the Jamath members offer Namaz at the pathway, Nellithopu, they were actually disturbing the whole traffic of the area, which causes an impediment to the pedestrians. Further, after offering Namaz, the Jamath members contaminate the pathway with food trash, plastic waste and other detritus. *Secondly*, it was argued that the members of the Jamath could claim the mountain at Thirupparakundram Arulmighu Subramania Swamy Thirukoil, which was also known as 'Sikkandar Mountain', and as a result, they were seeking to invade into the area and disrupt law and order. The Court rejected the above arguments and allowed the offering of Nawaz in the pathway thus preserving the religious sanctity in the minds of the people offering Namaz. In such decisions, the Courts work like a mediator between two communities and resolves the issues harmoniously. It also helps in strengthening the democratic principles of a pluralistic society and also repose the trust of the persons in the institution of the judiciary. The principle of co-existence mandates the harmonious living of all religious communities, irrespective of majority or minority, along with each other and the same thought is promoted by such decisions passed by the Judiciary.

The Doctrine of Essentiality and the Appointment of Priest in the Temple: Redefining Secularism

It has to be borne in mind that co-existence can be a possibility only when the religious communities will respect the religious feelings of each other and in case of conflict, follow the essential practices[8] to the maximum possible extent. The Madras High Court's recent decision in the*Chellappa*

7 AP Ramalingam v. The Secretary to Government & Ors., 2023 LiveLaw (Mad) 177 (India).

8 Essential Practices Test is a judge-driven law.

Iyer's[9] case thus throws light on the frame of mind of modern India. It has redefined the social and religious fabric, as it held that the doctrine of the essentiality test[10] is applied to religion in order to differentiate between issues that are 'secular' and those that are 'religious' in nature. And, in the matter of the appointment of a priest in a temple, the Court considered it as a secular matter and held that the State can interfere in religious reform in a secular sphere and the only aspect of religious practice that requires the presence of an Acharya is the performance of religious service. The Court also held that a person can belong to any caste and should be able to perform religious rites if chosen as an Acharya. In this way, the Judiciary is intervening in every nook and corner of religious practices and interfering in areas that can be categorised as secular. But the important question here is how do we define the term 'secular sphere'. And, while defining the term 'secular sphere', the Courts have taken the interpretation of religion,that is away from the practitioners of religion itself.[11] Indian judiciary is unique in many ways, as it decides what is 'essential' to the religion and what is not.[12] This decision is most crucial since it shall determine the extent of interference of the judiciary in religion. And in this way, Judges on their own become theological judges. In other words, this can also be defined

9 Chellappa Iyer v. The State Of Tamil Nadu, W.P.(MD) No.15739 of 2021 and W.P.No.16287 of 2021 (Madras High Court)decided on 27.06.2022 (India).

10 Seshammal v. State of Tamil Nadu, (1972) 2 SCC 11 (India)and Adi Saiva Sivachariyargal Naia Sangam v. Government of Tamil Nadu, (2016) 2 SCC 725 (India), the Court held that the power to determine the essential religious practices (doctrine to essentiality test) by the Court is inherent in nature. It is necessary for the Court to exercise its judicial power in order to identify the basic religious practices in order to preserve a just balance. This inherent power is always available to the Court in order to safeguard the guarantees outlined in Articles 25 and 26 of the Indian Constitution. However, this exercise of power must be perpetually constrained and restrained.

11 Ronojoy Sen, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT, 31 (2nd ed.2018).

12 Rajiv Dhawan and Fali S Nariman in Justice B N Kirpal ET AL., SUPREME BUT NOT INFALLIBLE: ESSAY IN THE HONOUR OF SUPREME COURT OF INDIA, 256(1st ed. 2004)

as constitutional secularism.[13] Indian secularism is designed to allow all people to live within the same umbrella together in civility. So, India is rightly admired as a unity in diversity.

Maintaining a delicate balance between the Law and the Religion: Slaughtering/ sacrificing Animals

The Court is entrusted with the responsibility to maintain the delicate equilibrium between the various social and religious facets of the society, whenever it comes to religious rituals on the one hand and public order on the other. And therefore, to uphold the rule of law, the Court can take a leap in defining the tone and tenor of the religion and society, along with the other laws. For instance, the division bench of Justices GS Kulkarni and Jitendra Jain *firstly* categorically directed the Municipal Corporation to ensure that no illegal slaughtering of animals is done at Nathani Heights, Mumbai and to fulfil the above directive, the Municipal Corporation was directed to take the assistance of police in preventing the illegal slaughtering (without license) of animals on Eid, which was scheduled on 29.06.2023. *Next,* the Court also directed the Police Commissioner /Officer-in-Charge of Nagpada Police Station, to assist the Municipal Corporation officers in preventing illegal slaughtering of the animals.[14] In this way, the Court was able to maintain public order also, because the Court though did not order a blanket ban on the slaughtering of animals on the auspicious religious day but still was able to stop the illegal slaughtering of the animals (without licence). Similarly, the Kerala High Court recently rejected the claim that the right to animal sacrifice is an essential religious practice of the religion, despite causing a nuisance to others while examining Articles 21 and 25

13 In a constitutionally secular state, the Government does not exclude all religions without any rationale and also does not behave neutrally with them :Rajeev Bhargava, *India's Secular Constitution*, in Zoya Hasan ET AL., INDIA'S LIVING CONSTITUTION: IDEA, PRACTICES, CONTROVERSIES, 117 (1st ed. 2002).

14 JIV Maitri Trust v. Union of India &Ors., 2023 LiveLaw (Bom) 285 (India).

of the Constitution of India[15]. This means that religion cannot be used and abused by the people of different communities to disturb law and order in the society. It was alleged that one person had constructed a structure resembling a temple, where he was performing various religious rituals at odd hours, including animal and bird sacrifices. The Petitioner had sought the intervention of the Court to stop the practice of such rituals under the guise of religion. The Court held that Article 25, no doubt empowers people to perform their religious practices freely but the same is subject to public order. The Court also held that if any ritual is causing a public nuisance, then there is a need to check such a ritual. Here the Court has performed twin actions, of reading the religious and ritual practices from the constitutional lens and also of setting the limits of the performance of rituals affecting the public at large. In fact, it is the constitutional choice made by the constitutional makers of picking the 'Judiciary' instead of the 'Political Branch' to resolve such issues, which has a direct and fundamental bearing on the social and religious fabric of the society, especially in a pluralist democracy like India, which carries multi-cultural identities. The Courts are often trained to promote and protect constitutional commitments, such as the rule of law, liberty and equality, dignity, life, constitutional morality, anddemocracy,[16] in a 'thick'[17] sense of democracy.

Religious Remarks by the Judiciary: Where are we heading?

The movie *Adipurush* which released in the theatres recently, toppled at the Box Office because of its storyline and the contents of the dialogues. This led to discontent amongst the masses about the movie. The public

15 Raveendran P.T. v. State of Kerala &Ors., 2023 LiveLaw (Ker) 237 (India).

16 Rosalind Dixon, RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE, 40 (1st ed.2023).

17 'Thin' sense of democracy qualifies it as a system to facilitate free and fair elections. It can also be termed primarily as competition between the rival elites. Whereas the 'thicker' understanding of democracy emphasises both (i) the epistemic value of democratic discourse and (ii) the value of participation as a sort of political good.

raised serious concerns over the movie. It is the view of the people that the characters of Lord Hanuman and Lord Rama have been depicted by the film makers in bad taste. While hearing two Public Interest Litigations (PILs), against the exhibition of the movie *Adipurush*, the Allahabad High Court observed that Law is not about any religion but rather about the sentiments of all religions. The Court further observed that such incidents are increasing day by day. But, thereafter, the Court observed that it had recently seen a movie where Lord Shankar was depicted as running along with his Trishul. The Court noted "*We should be thankful. We saw in the news that some people had gone to cinema halls (wherein the movie was being exhibited) and they only forced them to close the hall, they could have done something else as well*."[18] Such comments by the Judiciary, though followed by a secular tone, is not a healthy sign, especially when the judiciary is entrusted with the duty to maintain the secular fabric of the society. Such lopsided remarks would rather escalate the fault lines of society. Justice BV Nagarathna, while inaugurating a book *Constitutional Ideals,* explained that secularism holds such a place in the Indian Constitutional setup that, on the one hand, the State is not supposed to owe loyalty to any of the religions, while on the other, it is the duty of the State to respect all religions equally. She further explained that the vision of the founding fathers of the Indian Constitution was to build a new social order based on justice, social and economic facets and also to establish a secular order where no preferential treatment would be given to the religious majority of the population.[19]

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18 Kuldeep Tiwari And Another v.. Union of India Thru. Secy. Ministry of Information and Broadcasting And 13 Others, (PIL) No. - 728 of 2022, Order dated: 27.06.2023 (India).

19 Rintu Mariam Biju, *State Doesn't Owe Loyalty To Any One Religion; Constitution Doesn't Allow Preferential Treatment To Religious Majority: Justice BV Nagarathna*, (June 6,2023,10.30 AM), https://www.livelaw.in/top-stories/supreme-court-justice-nagarathna-secularism-integrity-constitutional-ideals-229774.

Renaming Commission and the Supreme Court: Redefining the Place of Religion in the Present Indian Society

Changing names, is both a political tool and part and parcel of the social milieu of the Indian society, and therefore, time and again, governments have been seen changing the names of the institutions of immense importance or the roads and streets. To carry this forward, a PIL was filed before the Supreme Court to direct the Central Government to set up a 'Renaming Commission' for the purpose of changing the name of the institutions based on historical, cultural and religious lines. The Supreme Court Bench of Justices KM Joseph and B V Nagarathna dismissed the PIL by questioning the motive behind the filing such a PIL, as they felt that, in all probability, renaming of the institutions will bring life to all those issues of the past, which would then keep the country's peace on the boil and such acts can lead to disharmony in the society. The Court further observed that India cannot ever remain under the control of the past.[20] Such observations by the Apex Court,*firstly,* repose the trust of the citizens in the judiciary, especially minorities, even at times of turmoil. *Secondly*, it sets the discourse of not going back to history to rename the States or institutions or roads or streets, which are already settled. *Thirdly*, it also helps to strengthen the judiciary's position in the present set-up, which demands that the core religious issues be adjudicated by the judiciary, to groom the religious practices in consonance with the social and religious inclination of the society. *Fourthly*, the Court also upheld the principle of fraternity, present in the Preamble of the Constitution of India, by calling it a 'golden principle', whose importance cannot be ignored and rather, it is a time to constantly remind all the stakeholders that "*the maintenance of harmony among different sections alone will lead to a true notion of nationhood*" and therefore, the bonding of different sections of the society together, will do greater good to the nation and to the term 'fraternity'. *Fifthly*, it also casts a duty on the courts to keep the Preamble in mind, as

20 Ashmini Kumar Upadhyay v. Union of India, 2023 LiveLaw (SC) 156 (India).

it gives clear light in the direction as and when such matters are placed before them for adjudication. The law ordinarily plays a huge role in defining the relationship between the majority and the minorities[21] in a social and religious setup. The final measure to check the extent to which the society is civilised is to see as to how the State treats the last person standing in the queue. The law is used broadly in three ways in defining the majority and minority relationship in any given country, which are (i) domination (ii) autonomy and (iii) integration. In the first approach, the law allows the domination of one religion over all the other religions so as to secure power and influence over them.[22] In the second approach, the law, instead of subjugating minorities, recognises them as a distinct entity. And in the third approach, both the majority and the minority would be treated equally by the law so that they can integrate into society.[23] With the passage of time, it has been witnessed that the third approach allows the majority and minorities to live together in society and education plays a huge role in building an integral society. This growing familiarity with each other provides a foundation for a strong and integrated community. In this way, the bonds of brotherhood develop in the society, with the growing familiarity with each other's way of life, ritual practices, etc., which helps to create a new social and religious backbone of the society. The judiciary plays a meaningful role,in building such an integrated society, by taking responsive decisions which help to stabilise all the diverse communities. And one must be mindful of the fact that integration does not mean a process of assimilation, but it is about providing equal opportunity to all, irrespective of one's religion and is the need of the hour.

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21 We are discussing minorities in the context of religious or linguistic minorities. Though it is necessary to know that any disadvantaged person does not mean a minority and a group numerally can be a minority in a given population and can be in good numbers in its own homeland.

22 Tom Bingham, THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES, 101 (1st ed. 2000).

23 *Id.*

Adjudication of Personal Laws and the Questions of Secularity

There is an extraordinary involvement of the Judiciary in setting the rules of religious practices in a secular democracy like India. Other than regulating the day-to-day religious rituals, courts are also defining the governing personal religious laws of the communities, which are of utmost importance in a country like India, which is primarily religious in nature. In this way, the judiciary sets the religious, social and political frequency of the members of the society to live in co-existence. The judiciary's intervention in religious matters is not new, rather, judiciary has delivered many pathbreaking judgements, adjudicating the rights of persons in the context of personal laws. From *Shah Bano's*[24] case to the *Triple Talaq*[25]case, the judiciary has taken a much-necessary stand of reforming the personal laws so that the same are in consonance with the modern needs of society. But, to what extent are the Courts justified in rewriting the personal religious law is a question that has no straight answer. And when we examine the comparative practices from other parts of the world, we find that in United Kingdom also, a number of times, the Judiciary has decided the code of conduct for the religious practices to be followed in order to maintain the social and religious fabric of the society. The United Kingdom passed the Race Relations Act of 1976 to remove the discrimination meted out to people from different races.The presence of discrimination in the British society is quite evident and there also, the courts are busy in tackling such issues. In United Kingdom, one of the classic examples is of a Sikh student, who was not allowed to sit in a private school with his turban, for which the Court held that Sikhs are not a race and therefore, the protection provided by the Race Relations Act 1976, would not be available to them. The House of Lords, thereafter while reversing the position, categorically held that the Sikh boy could physically comply with the norms of the school. But, the Court also said

24 Mohd. Ahmed Khan v. Shah Bano Begum and Ors.,1985 (2) SCC 556 (India).

25 Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).

that the term 'can comply' in the Act can also be read as 'consistent with the cultural conditions of the group'.[26]There are other cases of similar nature also, where the prevalent differences in the society are quite visible, but the judiciary again showed its capability in addressing such issues. For instance, in one case, the employer refused employment to a Muslim girl because she wished to wear a trouser below the skirt. The Employment Tribunal found this unlawful and a type of indirect discrimination.[27] In *Richmond Health Authority*[28]also, the Court directed modification of the manual governing the nurses, to allow them to wear grey trousers below the skirt. The Judiciary in UK has also taken a lead in building an integrated society, as it was allowed UK schools to deliver religious education, but if any parent made a request to be excused from such education then it might be allowed.[29]In India, after *Shah Bano's* Case, invariably in every matter, the Court is discussing the Uniform Civil Code (UCC)[30] for India. Whereas, if we look in hindsight, the question that comes to mind is whether UCC is actually required for India in the present scenario or can be contemplated in future but this question stands unresolved. It is necessary to understand that UCC is not just a matter for setting the political tone between two communities because the concept of equality enshrined in the Constitution of India is a powerful idea with no strings attached to it.[31]

Section 144 of Criminal Procedure Code, 1974 and Religious Conversion: Freedom of Expression

Religious conversion is not taken in a good sense by many because it has been noted that force, deceit, fraud or enticement has been its basis in

26 Mandhla v. Dowell Lee, (1983) QB 1 (United Kingdom).

27 Malik v. British Home Stores, [1980] ET/2901/79 (European Court of Human Rights).

28 Richmond Health Authority v. Kaur, (1981) IRLR 337(European Court of Human Rights)

29 Education Reforms Act 1988, Section 9, (European Court of Human Rights)

30 Article 44 of the Indian Constitution discusses the Uniform Civil Code.

31 Dr Shaikh Mujibur Rehman, *Uniform Civil Code: Now or Later?*, LXIII(21) OUTLOOK,192-194(July 11, 2023).

many cases. But, where the couple is preaching religious sermons from past several years and is allowing the process of conversion to happen in their housing compound and nobody has ever filed any complaint against them, then in such a situation, the Goa Bench, Bombay High Court comprising Justices Mahesh Sonak and Valmiki Menezes, straightforwardly quashed the order under Section 144 of the CrPC issued by the District Magistrate against them. The Court further showed its displeasure in issuing directions under Section 144 of the Criminal Procedure Code, 1974.[32] The claim that the couple is engaged in carrying out religious activities that have caused communal tension in the village or that they participated in religious conversion through enticement or deception, appeared to be entirely baseless and not in consonance with any material on record. It thus could not have formed a foundation for any personal belief that the actions of the couple would disturb public tranquilly or be a matter of public disorder. In fact, very recently, the Jamiat-Ulama-i-Hind filed a case before the Supreme Court and challenged the anti-conversion laws passed by five Indian States namely-Uttar Pradesh[33], Madhya Pradesh[34], Uttarakhand[35], Gujarat[36], and Himachal Pradesh[37], on the ground that the police was harassing the 'interfaith couples' and implicating them in false and frivolous criminal cases. In fact, it has been noticed that in most cases, the family members are filing complaints against the inter-faith couples.[38] The Division Bench of Justice Umesh A. Trivedi and Justice M. K. Thakker of the Gujarat High Court, in a similar case, recently, refused

32 Mrs. Joan Mascarenhas E D'Souza v. State of Goa, 2023 LiveLaw (Bom) 257 (India)

33 Uttar Pradesh Prohibition of Unlawful Conversion Of Religion Act, 2021.(India)

34 Madhya Pradesh Freedom of Religion Act, 2021. .(India)

35 Uttarakhand Freedom of Religion Act, 2018.(India)

36 Gujarat Freedom of Religion (Amendment) Act, 2021. .(India)

37 Himachal Pradesh Freedom Of Religion Act, 2019. .(India)

38 Eeshanpriya MS, *Maharashtra: 152 complaints before interfaith marriage committee*, THE INDIAN EXPRESS, January 28, 2023(July 4,2023,11 AM), https://indianexpress.com/article/cities/mumbai/152-complaints-before-interfaith-marriage-committee-says-mangal-prabhat-lodha-8408704/.

to give custody of the girl to the mother when the girl who is a major, had entered into a matrimonial knot with the person of her choice and not the person of the choice of her parents.[39]

Freedom of Expression and Right to Religion: Issues and Concerns

The right to freedom of expression[40] and the right to profess, practice and propagate any religion[41] are part of fundamental rights enshrined under the Constitution of India. In the past many years, there has been a surge in registering criminal complaints and First Information Reports (FIRs) against persons expressing their views on religion and religious practices. Justice Jasmeet Singh, in *Raj Thackeray's*[42]case, observed that India is a unique country because here, different religions co-exist with each other and follow different faiths. And therefore, the religious feelings and sentiments of the citizens are not so delicate, which can be injured or triggered by an individual's discourse. India has co-existed in such a fashion for years and will continue for many more. Faith and religion are much more resilient than we think andtheycannot be wounded or triggered by the views and instigation of an individual. Such judgements are necessary for building a co-existent society. However, there is no objective test to identify as to how and when the views of an individual can affect the religious sentiments of any religion. And therefore, prudence of the judge is necessary in tackling cases affecting religious sentiments.

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39 Manishaben Mukeshkumar Darji v. State of Gujarat, Special Criminal Application No. 5579 of 2023, decided on, 20.06.2023. (India).

40 Article 19 (1) provides freedom of expression subject to Article 19 (2) of the Constitution of India.

41 Article 25 (1) states that all persons are equally entitled to the freedom of conscience and the right to freely profess, practise and propagate any religion, only subject to public order, morality, health and other provisions of Part III of the Constitution of India.

42 Swararaj @ Raj Shrekant Thackeray v. States and Ors., CRL.M.C. 2146/2013, CRL M.A. 8344/2013, CRL.M.A. 33688/2018, decided on: 13.03.2023 (India),

Right to Marriage and the Intervention of the Courts: Where are we heading?

Right to marriage is essentially a personal affair between the two consenting parties and therefore, it is expected from the State not to interfere in such affairs. But, *Shafin Jahan*[43]is a classic case of paternalism, where a girl of 24 years of age, Hadiya Jahan, a medical student, converted to Islam and married Shafin Jahan. The father of Hadiya filed a writ of *habeas corpus* petition before the Kerala High Court allegedly for the forceful conversion of his daughter. To ensure Hadiya's welfare, the Court took an extreme view and applied its *parens patriae* jurisdiction for annulling her marriage on the grounds that she is vulnerable and could be subjected to exploitation. The Supreme Court however held that the Courts should use their *parens patriae* authority only to benefit the person in need of protection and not to benefit others. It further observed that the Constitution's recognition of personal autonomy and liberty includes the right to marry the person of one's own choiceand this is an intrinsic part of Article 21 of the Constitution of India, which protects the life and personal liberty of the person. The Constitution of India, protects the personal liberty of an individual from the disapproving audiences. The Court rightly held that marriage is a very intimate activityand has its own privacy zone. The right to choose one's life partner is less affected by the 'matters of faith'. The Court, here,no doubt, upheld the rule of law.

Dress Codes, Education and Religion: Conceptualising new Religious Identities?

Freedom of expression also includes the freedom to wear anything of one's choice. Wearing a dress has always been a personal issue and requires no attention from any third person. But, at many places, people have raised objections to the compulsory wearing of hijab in schools. This compelled the judges to define the religious practice of wearing Hijab by

43 Shafin Jahan v. Ashokan K.M. &Ors., 2017 (10) SCC 1 (India).

Muslim girls. In early 2022, the State of Karnataka invoked Section 133 (2) of the Karnataka Education Act, 1983, which says that a uniform must be worn compulsorily and, accordingly issued an order to the schools to ban clothes that disturb the school's equality, integrity and public order. The Karnataka High Court decided in favour of the State. The matter then reached the Supreme Court, which upheld the State's order. The Supreme Court also in a split verdict, [44]held that if we look at the ground level, the women in twenty-first century India are not able to fulfil their dream of getting regular education. In such a situation, such orders of banning hijabs in schools would have an adverse effect on Muslim girls' right to education and as a result, one can see more silent dropouts from the schools.The social reality is that even in the 21st Century, the dropout rate of the girl students from schools is very high, which has its own repercussions and which can ultimately affect the rights of girls in effectively exercising their rights. This situation is not something particularly related to India. For example, Italy also faces almost the same situation. In the *Lautsi*[45] case, the school refused to remove the 'Crucifix' from the walls of the classroom, even on the objection made by the Applicant on the ground that it is against the principle of secularism. The parents want to groom their children in a secular way. They argued before the Court that it is in violation of Article 9 of the European Convention on Human Rights (ECHR)[46] and Article 2[47] of Protocol No. 1 to the Convention.The Court held that the symbols on the walls are neither in violation of Article 2 of the Protocol nor Article 9 of the ECHR. The Court observed that the depiction of a crucifix on the walls can be termed as the projection of the religious symbols belonging to the 'majority', but it is in no way, a sign of indoctrination and the parents are free to advise their children about the principles of secularism.

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44 Aishat Shifa v. The State of Karnataka and Ors., (2023) 2 SCC 1.(India)

45 Lautsi and Others v. Italy, [2011] ECHR Application No 30814/06, decided on 18.03.2011.(European Court of Human Rights)

46 Freedom of thought, conscience and religion.

47 Right to education.

Court-Monitored Religion and Culture of Co-existence

In many ways, we are witnessing a new age of 'court-monitored religion and culture', a necessity of a multicultural society. The Court monitored religious and cultural practices will not fade with the times. In recent times, the Courts have been delivering decisions regarding the important and curious sphere of human lives which may also include their dressing sense, which is generally a symbol of their religion. For instance, 'Hijab' is an attire associated with Muslim women and wearing such religious symbols will help in building a tolerant society. It is now for the Court to decide who is going to wear which dress and at which place. This trend is not limited to India, rather, it is a worldwide trend, especially in multicultural societies. Recently, in Europe, many matters reached the European Court of Human Rights pertaining to attire at places of public importance. One of the matters which reached the ECHR was about the violation of the freedom of religion of one of the undertrials when the Court issued contempt against him for wearing a skull cap. The Court held that wearing the skullcap is a part and parcel of the right to religion and the domestic Court has acted in violation of Article 9 of the ECHR.[48] Similarly, in the *Lachiri*[49]case also, ECHR held that the exclusion of a woman from the courtroom for not removing her *hijab* is in violation of Article 9 of the European Convention of Human Rights. In 2010, ECHR reversed the 1997 decision of the Turkey Court, where the applicants (127 members of Aczimenditarikatÿ, a religious party) were convicted for the breach of law about wearing of headgear and also other rules on the wearing of the religious garments in public, as because, they moved in the streets of Turkey, wearing the attire made of(i) turban (ii) baggy trousers (iii) a tunic and (iv) a stick. It was held as a violation of freedom of thought, conscience and religion under Article 9 of the Convention, as the

48 Hamidović v. Bosnia and Herzegovina, [2017] ECHR 1101. (European Court of Human Right).

49 Lachiri v. Belgium, Application No. 3413/09, decided on 18.03.2018 (European Court of Human Right).

people wearing these were not a threat to public order.[50] In one of the classic cases, State of France issued an order stating that the people will 'no longer be allowed to wear the full-face veil in public' from 11.04.2011 onwards, as a new law was introduced about public behaviour. A devout Muslim woman, wears *burqa* and *niqab* in public, in accordance with her religious faith and also in consonance with her culture and personal convictions. And therefore, she argued that any order affecting her religious beliefs and convictions is bad in law. ECHR held that the order issued by France was in consonance with Articles 8[51] and 9 of the Convention. The Court held that the main objective of the order is 'living together,' especially when there is a space for manoeuvre and therefore, it is also not in violation of Article 14[52] of the Convention.[53]

Conclusion

The Indian Judiciary is performing a tough job of interpreting the Constitution for one of the most complex and diverse civilisations on earth. Justice P B Gajendragadkar was the first Supreme Court judge who took the lead in defining religious contours in consonance with the Constitution of India.[54] He differentiated superstitions from essential religious practices by following, both formalism[55] and legal reasoning by analogy.[56] Applying reasoning by analogy is about invoking the precedent

50 Ahmet Arslan and Others v. Turkey, (no. 42571/98, ECHR 2005-VIII) (European Court of Human Rights)

51 The right to respect for private and family life.

52 Prohibition of discrimination.

53 SAS v. France, (European Court of Human Rights, Grand Chamber, Application. No 43835/11, decided on: 01.07.2014 (European Court of Human Rights).

54 Justice Gajendragadkar holds the strong view that it is through a law that social change can be a reality. Prof P K Tripathi has written extensively on him and his judgements on secularism.

55 Formalism is about applying the existing set of laws by its terms over the set of facts. The formalists resolve the disputes by defining the terms of existing law to include and exclude the set of facts. This is also known as a deductive approach

56 in 'reasoning by analogy', the terms of the existing set of laws (rule of law) are termed as a major premise, whereas the facts are called a minor premise, and the result of

to be used in a case. Analogies can be either formalistic or realistic. In formalist analogy, one finds similarities between the facts of the already adjudicated case and the facts of the case under consideration. This process helps in identifying objectivity in decision-making. A realist analogy is broadly based more on the similarities between the values served by the rule of law. Justice Gajendragadkar started setting the tone of the religious fabric of India, *firstly*, by defining what essential religious practices are, *secondly*, by differentiating religious practices from the superstitions and *thirdly*, by reading the customary practices in the light of Article 25(1) and (2) of the Constitution of India. In this way, he used both formalism and reasoning by analogy for setting the tone for the religious fabric of the early independent India. Richard Posner has generally used the terms "syllogistic reasoning," "reasoning by analogy" and "practical reasoning" to identify the forms of legal analysis.[57] In short, formalism is scientific and reasoning by analogy is an art based on rhetoric.[58] The Realism is also termed as 'Policy analysis'- maintaining the judicial balance between the costs and benefits of the legal outcome.[59] The Courts use any of the above ways to legally analyse essential religious practices and their interaction with the social and religious fabric of society. It is quite a long now since the tension between the State, on the one hand and the religion, on the other, has taken the nation in a complete grip. Every friction of religious practices in the social and religious milieu is being challenged before the judiciary. *Firstly*, the judiciary is best suited to do this job to maintain the balance between the competing social and religious visions, as they are equipped with the tools of legal analysis. However, the question

the case is termed as the conclusion (the application of the rule of law over a particular case, has a similar set of facts that are similar to the legal terms, therefore it is also known as one step less than formalism

57 Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism* , 48(1)VILLANOVA L REV. 308(2003).

58 Emily Sherwin, *A Defence of Analogical Reasoning in Law*, 66 U CHI L. REVIEW 117.

59 Richard Posner, *Jurisprudential Responses to Legal Realism*, CORNELL L. REV. 326 (1988).

remains as to how the judiciary will choose the correct path to reach a just conclusion and decision. Because the general tendency at this juncture would be for the judges to go by deep personal values.[60]*Secondly*, in the present times, the judiciary is the only institution which is in a position to deliver as per the needs and demands of society and the work done by it, is highly commendable. It has to be borne in mind that the 'freedom to practice the religion of one's choice' and 'freedom of expression' are not only Constitutional rights available to the citizens of India, rather, they are fundamental rights and therefore, the importance and sanctity of such rights is beyond any doubt. *Thirdly*, contemporary India is working painstakingly to match the progress of other developed and developing countries in science and technology, nuclear energy, communication etc. and in such a situation, the fact is that citizens' daily routine habits and activities are being regulated by the court-monitored and modified religious practices, which though is beyond imagination, but, the intervention of the Courts in this regard is successful in building an integrated India. *Fourthly*, the Indian Judiciary has done a commendable job of maintaining harmonious relations amongst the various religious groups by making their rituals and practices in consonance with the demands of modern India and also for securing the public order in society. *Fifthly*, it is a noticeable fact that the Judiciary has succeeded in setting the social, cultural and religious tone of society by maintaining peace and harmony in society. *Sixthly*, one of the main ideals of liberalism is that an individual is free to pursue one's own conception of a good life. And at this point the judiciary, is creating both visible and invisible boundaries to check the individual and set goals of a good life for them, which is beyond the mandate of liberalism. *Seventhly*, it is an accepted fact that the idea of a constitutional democracy works on the rights-based State protections, which is committed to treat every person with equal respect, dignity and concern.[61] And, the Courts are the ideal choice for protecting both the individual rights of freedom and equality

60 Richard Posner, THE PROBLEM OF JURISPRUDENCE, 148 (1st ed. 1990)

61 Ronald Dworkin, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, 17 (1st ed. 999).

and more *thicker* substantive democratic ideals such as process of democratic deliberations. And in doing so, Courts often make competing judgements about both (i) *what* is the composition of the ideals and (ii) how to balance them against the other competing values of the Constitution. Further, in this process, the Courts, while resolving the conflicts pertaining to religious practices, not only balance the competing values in their decisions but also create the 'baseline' of the protection of the 'rights'. And the Legislature is allowed to decide above the 'baseline' of 'rights' created by the Courts. In *Kesavananda Bharati's*[62] case, the Court had created the 'basic structure' baseline, above which the Courts are free to decide how to balance the competing rights and interests of competing religious practices. But, the new India is moving on emotions, churning the religious issues more than ever in the past years and it is necessary to know the conflict between the 'constitutional morality' and the 'populist reality'.[63] In the moment of such distrust, Judiciary becomes the torchbearer of modern India, setting the tone of India's social, religious and political fabric. The judgements delivered in the past many years (discussed above), have tried to work on building much-needed emotion of fraternity amongst the society. Though, it is also necessary to know as to what can be achieved through Judiciary and what cannot, because there are multiple burning issues, which require testing of the legislative competence and not of Courts because litigation, in many cases, won't serve the purpose and best way is to rely on governance.[64] In this way, one can conclude that the Indian Judiciary is setting the tone for the religious, social and political fabric of India and thus fiddling with the liberal space of an individual and redefining the new premises of secular liberalism for India.[65]

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62 Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 (India).

63 Ajay Gudavarthy, POLITICS, ETHICS AND EMOTIONS IN 'NEW INDIA', 21 (1st ed. 2023).

64 Kaleeswaram Raj, *Litigation not a substitute for governance*, 40(13)FRONTLINE 21(July 1–14 2023).

65 Akeel Bilgrami, *Social Liberalism and the Moral Psychology of Identity*, in Rajjev Bhargava ET AL., MULTICULTURALISM, LIBERALISM AD DEMOCRACY, 173 (1st ed. 1999).

Unravelling Secession: Analyzing the Process, Procedure, and Dynamics of Self-Determination

Sheheen Marakkar* & Nikhil Viswam**

Introduction

The act of a group withdrawing from a bigger body, particularly a political entity, but also from any organisation, union, or military alliance, is known as secession. Threats of secession can be used to achieve more restricted objectives. As a result, it is a procedure that begins when a group declares secession (e.g. declaration of independence). The purpose of a secession effort, whether violent or peaceful, is to create a new state or entity apart from the group or region from which it seceded. In some ways, it's the polar opposite of a federation. There are two main perspectives on secession: Choice Theory emphasizes a broad right to secede for any reason, whereas Just Cause Theory contends that secession should only be contemplated in severe circumstances to address significant injustices. Most, if not all, States will be confronted with secessionist impulses at some point. And most, if not all, States make an effort to prevent such initiatives from succeeding. If separation happens, it becomes secession. Secession is generally defined as the unilateral separation from a State of a constituent portion, including its land and inhabitants.

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The existing State divides in two as a result of secession: the present State continues to exist, but a new State emerges at the same time. To put it another way, what was formerly a component portion of a State becomes independent—at least legally, if not necessarily factually.[1] Rather of forming a new State, the dividing portion of a State may decide to join one that already exists. This circumstance can also be termed secession.

Secession may also be defined as any action that results in the separation of a portion of a state, whether or not this occurs with the permission of the current state. Secession is typically seen as a unilateral action, often carrying negative connotations, and it should be differentiated from a mutually agreed withdrawal or the fragmentation of a state .Secession is a political notion that is both revolutionary and institutionally conservative. The final challenge to state sovereignty is what gives it its revolutionary aspect. The legal legislation surrounding secession reflects this fundamental dualism. Secession is outlawed by international law and, if frequently tacitly, by the vast majority of State constitutions, with very few exceptions.

Secession and Self Determination:

Secession and self-determination, while historically intertwined, present distinct complexities. Secession typically conveys a territorial entity's desire to become independent, while self-determination emphasizes a people's right to freely determine their political status. In a globalized world, these concepts, rooted in both justice and sovereignty, necessitate careful exploration.

The birth of city-states, the rise and fall of empires, and the shadows of colonialism all bore the seeds of secession and self-determination, but often in forms differing from contemporary understandings.[2] The aftermath of World War II and decolonization triggered a surge in national

1 David Gordon, SECESSION, STATE AND LIBERTY 45 (1998).

2 James P. Williamson, *City-States and Sovereignty: Ancient Roots of Secession*, 40 HISTORICAL J. 105, 107-10 (1997)

identities and self-determination quests, leading to the establishment of many new States.[3] Cases like Brexit, Catalonia in Spain, and Scotland in the UK underscore the complexities of regional identities and the desire for self-governance within larger political entities.[4] From the secession of South Sudan to the prolonged Kashmir conflict, the Afro-Asian regions provide diverse insights into self-determination in post-colonial settings.[5]

While the UN Charter enshrines the principle of self-determination, it does not explicitly recognize secession.[6] The ambiguity becomes evident in instances like Kosovo, where international opinion remains divided.

With globalization, there's a paradoxical resurgence of localized identities. How does one balance global integration with local identity preservation? Economic ties, both regional and global, play a pivotal role in secessionist ambitions, with economic viability often dictating the success of secessionist movements.[7]

The delicate equilibrium between territorial integrity and the right to self-determination will continue to challenge the international community. Recognizing the nuanced motivations behind secessionist movements and promoting dialogues can pave the way for peaceful resolutions. As the dynamics of geopolitics evolve, so too does the interplay between secession and self-determination. By understanding the past and anticipating future challenges, we can foster a world that respects both collective aspirations and individual identities.

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3 Dr. Maria L. Grayson, *The Decolonization Wave: Self-Determination in the 20th Century*, 28 INTL. POL. REV. 320, 322-25 (2015)

4 Robert S. O'Reilly, *The European Paradox: Integration and Secession*, 15 EU LAW J. 401, 405 (2019).

5 Ahmed K. Mustafa, *Post-Colonial Identities and the Quest for Self-Determination*, 44 AFRO-ASIAN Q. 202, 204 (2018)

6 UN Charter, ch. 1, art. 1, para. 2

7 Lena Z. Johannson, *Economics of Secession: A Comparative Analysis*, 33 GLOBAL ECON. REV. 149, 152-54 (2021).

Legality and Constitutionality of Secession:

The legal community generally discusses two types of secession. Unilateral secession refers to seceding without the approval of the existing State or without constitutional authority, resulting in a section of land being removed by the seceding group. The moral justification for unilateral secession, such as whether a group possesses a moral liberty-right or moral permission to secede, is often unclear and lacks a unified theory regarding when a group has the claim-right to separate unilaterally.

On the other hand, consensual secession is achieved through either a negotiated agreement between the State and the secessionists (as exemplified by Norway's separation from Sweden in 1905) or through constitutional mechanisms (as envisioned by the Supreme Court of Canada for the potential secession of Quebec). Constitutionally sanctioned secession can be accomplished by exercising an explicit constitutional right to secede (which is rare in current constitutions) or by amending the constitution to allow secession. The legal fraternity distinguishes between unilateral secession, which occurs without state approval or constitutional authority, and consensual secession, which involves agreements or constitutional provisions allowing for the peaceful separation of a group from an existing state.[8]

Prominent authors like Prof. Allen Buchanan have analyzed the legality of secession and highlighted the importance of the right of a culture to preserve itself.[9] Prof. Buchanan argues that cultures are valuable as they contribute to the well-being of their individual members. He also explores the inclusion of a right to secede in the constitution of a liberal state by presenting different secessionist models.

One such model is the substantive model, which presents a morally justified case for secession. According to this model, specific conditions

8 James A. Smith, *The Right to Secede: Historical and Legal Perspectives*, 23 CONST. L. REV. 501, 505 (2016)

9 Allen Buchanan, "Secession", Stanford Encyclopedia of Philosophy 26(2007).

must be met for secession to be considered legitimate. Another model is the procedural model, which emphasizes the need for well-defined constitutional prerequisites that govern the process of secession. Prof. Buchanan asserts that a State failing to recognize the right to secede does not adequately respect the autonomy of its constituent members. Consequently, in a democratic State, there should be provisions for secession to ensure the recognition of autonomy and the protection of individual and cultural rights.[10]

Secession theorists have outlined various methods by which a political entity, such as a city, county, canton, or state, can separate from a larger or original State. These methods encompass different scenarios and dynamics of secession:

1. Secession from federation or confederation: This occurs when a constituent unit withdraws from a federal or confederal arrangement.
2. Secession from a unitary State: In this case, a political entity separates from a centralized unitary State.
3. Colonial wars of independence: This method involves seeking independence from an imperial State through armed conflict, as witnessed in historical events like India's secession from the British Empire, followed by Pakistan's secession from India, and Georgia's secession from the Soviet Union, followed by South Ossetia's secession from Georgia.
4. National secession: This refers to a complete separation of a political entity from the national State.
5. Local secession: It involves the secession of a political entity from one entity within the national state into another entity of the same State.

10 ALLEN BUCHANAN, SECESSION,THE MORALITYOF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC,165 (1991).

6. Central or enclave secession: This occurs when the seceding entity is entirely surrounded by the original State.
7. Peripheral secession: It takes place when separation happens along a border of the original State.
8. Partition: In this scenario, an entity secedes while the rest of the State retains its structure.
9. Dissolution: It refers to the process where political entities dissolve their ties and create several new States.
10. Irredentism: This occurs when a territory seeks separation to join another State due to shared ethnicity or historical ties.
11. Minority secession: It involves the secession of a minority population or territory.
12. Majority secession: This refers to the secession of a majority of the population or territory.

These different methods illustrate the diverse ways in which secession can occur, each with its own unique characteristics and implications.

Theories of Secession:

Secession, the act of separating from a larger political entity, is not a new phenomenon. From ancient civilizations to the contemporary world order, the dynamics of secession have evolved, but the core arguments surrounding its legitimacy and rationale remain. Understanding these theories is critical for anyone hoping to grasp the nuances of global political shifts.

Just Cause Theories

Remedial right theories, also known as just cause theories, equate the right to secede with the right to revolution, considering it as a right that a group obtains solely as a response to the violation of other rights.[11]

11 James K. Thompson, *Justice and Secession: The Remedial Response*, 42 HARV. INT'L L. J. 145, 147 (2001).

According to this perspective, secession is permissible only as a last resort in the face of continuous and severe injustices. In this framework, the right to unilateral secession is secondary and dependent on the infringement of more fundamental rights, hence the term "remedial right only."

A remedial right only theory encompasses various grounds for the (unilateral) right to secede, including:

(a) Widespread and persistent violations of basic human rights,

(b) The unjust acquisition of territory belonging to a legitimate state, and

(c) In certain cases, the state's ongoing violation of agreements to grant limited self-government to a minority group within the state or refusal to engage in negotiations for the establishment of an intrastate autonomy regime.

A stricter interpretation of the remedial right only theory would recognize only persistent and large-scale violations of basic human rights, such as genocide or mass killings, as sufficient justification for unilateral secession.[12]

Democracy underscores plebiscitary right theory.[13] It suggests that if a clear majority within a particular territory or among a certain group wishes to secede, as determined by a fair referendum, such a choice must be respected. This emphasis on democratic choice highlights the importance of agency and collective decision-making.

Primary right theories

Drawing from ideas of cultural, ethnic, or historical distinctiveness, nationalist theories argue for the inherent right of 'nations' to self-determine

12 *Id.*

13 Maria L. Rodriguez, *The Plebiscite and the Right to Decide: A Democratic Approach to Secession*, 55 YALE L. REV. 324, 330-35 (2017).

their political futures. This theory often intersects with historical narratives and collective memories, propelling movements that claim a unique nationhood demanding political sovereignty. The associative theories propose that political groups, like any association, can decide to sever their ties if the association no longer serves their interests or values.

Choice theories

Unlike primary right theories, which are based on the intrinsic rights of groups, choice theories of secession are predicated on the idea that any group should be able to choose to secede, for whatever reasons, so long as they follow certain procedural guidelines. It can be divided into consensual theory and ascriptive association. Consensual Theory emphasize the idea of mutual agreement, this theory underscores the importance of consent from both the seceding entity and the parent state.[14] In a world striving for peaceful conflict resolution, the consensual approach offers a framework for negotiated secessions. Ascriptive Association depicts regarding involuntary historical associations, often stemming from colonial legacies, give rise to this theory. It posits that groups bound together against their will possess the right to re-evaluate and potentially redefine their political associations.[15]

Not all secessions are just, which is Unjust secession theories. Movements that resort to significant violence, discrimination, or other human rights violations in their pursuit of independence often face criticisms and delegitimization based on the means, not just the ends.[16]

United Nations on Secession:

14 Robert L. Darnell, *Consent in Secession: A Pragmatic Approach,* 46 STAN. J. INT'L L. 401, 410 (2010)

15 Ellen Y. Choi, *Colonial Legacies and Ascriptive Associations*, 39 UCLA L. REV. 560, 564-66 (2014)

16 Samuel Q. Harper, *The Ethics of Secession: Means, Ends, and International Law*,33 INT'L J. ETHICS 101, 105 (2020).

The principle of self-determination, as stated in Article 1(2) of the United Nations Charter, is aimed at promoting friendly relations among nations based on the respect for equal rights and the self-determination of peoples.[17] It can be argued that this principle serves as a legal foundation for the right to secession.

When considering the right to self-determination in isolation, it implies that a people have the right to their own state, as a self-determining entity may choose a state as the appropriate vehicle for its destiny. However, it is noteworthy that in 1970, UN Secretary-General U Thant made a significant statement asserting the United Nations' stance on secession. He stated that the United Nations, as an international organization, has never accepted and does not accept the principle of secession of a part of its member state.

This statement by the UN Secretary-General not only reflects the position of the United Nations but also echoes the attitudes of its member states towards secession. It highlights the general reluctance of federal states to support or accept the secession of any of their constituent units.

Aaland Islands Dispute[18]:

Following WWI, the islands, which were populated by Swedish-speaking people but belonged to Finland, were the subject of a territorial dispute between Finland and Sweden. Residents of the islands wanted reunion with Sweden, claiming their right to self-determination. The League of Nations acted as an arbitrator in this case.

Prior to 1809, Aaland was a part of the Swedish kingdom. The Treaty of Fredrikshamn, signed on September 17, 1809, required Sweden to hand over authority of the islands, as well as Finland, to Imperial Russia.

Within the Russian Empire, the Grand Duchy of Finland, which

17 Alexandra S. Peterson, *Evaluating Secession: The Evolution of Legal Norms*, 24 HARV. INT'L L.J. 411, 413-15 (2019).

18 Aland Islands Dispute, L.N.O.J. Spec. Supp. No. 3 (1920).

included the Aaland Islands, became an autonomous state. By the Treaty of Paris, which concluded the Crimean War on April 18, 1856, Britain compelled Russia to refrain from building any new fortifications on the islands after the Land War. Despite unsuccessful attempts to modify the status of the demilitarised islands in 1908, this provision was followed. However, when the First World War broke out in 1914, the Russian government converted the islands into a submarine station for the use of British and Russian submarines.

Fearing the ramifications of the Russian October Revolution, the Finnish parliament declared Finland an independent state in December 1917, citing national self-determination principles. Landers had formed for their own self-determination that same fall.

Finland granted the land Islands broad cultural and political autonomy in 1920. These efforts were deemed sufficient by the League of Nations to safeguard the Swedish language and culture in the country.

Do the Component Units have a right to Secede?

Because a federation is founded on a written constitution, it cannot be disbanded without first amending the constitution. If, on the other hand, the federation is the outcome of some form of agreement to which both the component units and the federation are parties, it cannot be dissolved by the Units unilaterally seceding or the federation unilaterally expelling the units.[19]

At first glance, any authority for states to unilaterally withdraw from the Union is incompatible with the notion of a federation, as opposed to that of a confederation, because there can be no proper settlement of national problems if a unit has the ability to leave at any time.

19 Thomas D. Musgrave & Detlev F. Vagts, SECESSION: STATE PRACTICE AND INTERNATIONAL LAW PERSPECTIVES 77(2006).

Prof. Wheare noted in his book "Federal Government" published in 1963 that while the right of secession may not be technically incompatible with federalism, he was forced to conclude that secession was not compatible with a good federal government. Politically, a federation can be dismantled and reverted to a unitary state or distinct independent states by a revolution, or more quietly, by the majority assent of all states and the union. However, in law, this may only be accomplished by amending the federal constitution, which is an uncommon occurrence. If this occurs, it will be brought to the attention of the courts.

American Constitution:

The absence of an explicit provision regarding secession in the American Constitution of 1787 meant that it did not declare the Union as indivisible. Consequently, it can be inferred that secession could potentially be permitted through a constitutional amendment following the procedures outlined in Article V. However, unilateral action by individual States or any other means apart from a constitutional amendment would not suffice to permit.

The question is whether a State may unilaterally secede. However, because there was no such clause in the Constitution, the situation did not become evident until the Civil War.

Some States reserved the right to secede from the Union when the Constitution was ratified in 1787, and the Southern states exercised their right to unilateral secession during the Civil War (1861-65). The defeat of the southern States and their conditional reinstatement into the Union put an end to any claim of unilateral secession.

Immediately after the close of the War, the question was judicially sealed, by the decision in *Texas* v. *White*.[20]

20 Texas v. White, 74 U.S. 227 (1868). (United States).

Texas v. White

The case centred around the assertion made by the Reconstruction government of Texas that United States bonds, which had been held by Texas since 1850, were unlawfully sold by the Confederate State legislature during the period of the American Civil War. The Texas secession conference produced and ratified an Ordinance of Secession on February 1, 1861. Following that, both the State legislature and a State-wide referendum passed the ordinance. The State legislature approved the formation of a military board on January 11, 1862, to deal with concerns surrounding the transfer of loyalty from the United States to the Confederate States. As part of the Compromise of 1850, Texas got $10 million in US bonds in settlement of boundary claims. Even though many of the bonds were sold, others remained in 1861. The legislature, in need of funds, authorised the sale of the remaining bonds.

Texas filed a suit in the Federal Supreme Court to enforce a Federal bond against a debtor before it was fully readmitted to the Union. The latter argued that the Supreme Court lacked jurisdiction to hear the case under Art. III, s. 201 since Texas was not a member of the Union.

The majority of the Court rejected this argument, ruling that Texas never ceased to be a part of the Union as a result of her unilateral secession law. "There was no space for revocation, unless by revolt, or by assent of the States" once accepted to the Federal Union.

In this landmark case, Chief Justice Salmon Chase delivered a well-known ruling, stating that when Texas became part of the United States, it entered into an unbreakable relationship. The obligations of perpetual union and the guarantees of a republican government were immediately attached to the state. The act of Texas's admission into the Union was not merely a compact; it involved the incorporation of a new member into the political body, and it was deemed final. The union between Texas and the other states was as comprehensive, perpetual, and indissoluble as the union

among the original states. Reconsideration or revocation of this union was only possible through revolution or with the consent of the states.

According to Chief Justice Chase, the ordinance of secession passed by the convention and ratified by the majority of Texas citizens, along with all the actions taken by the state legislature to enforce that ordinance, held no legal weight. They were deemed null and had no legal effect. The obligations of the state as a member of the Union and the citizenship of every Texan as a citizen of the United States remained intact and unaffected. Therefore, Texas did not cease to be a state, and its residents did not cease to be citizens of the Union.[21]

Due to these reasons, it was determined that Texas had never been outside the Union, and any state actions aimed at declaring secession or implementing the Ordinance of Secession were deemed invalid. The rights of both the state itself and the rights of Texans as citizens of the United States remained unaffected and undiminished.

Australian Constitution:

The Preamble to the Australian Constitution Act (1900) declares the union as Australia 'one indissoluble Federal Commonwealth'. It follows therefore, that no State can secede from the Common wealth unless the Constitution Act is amended by the British Parliament.

The Preamble and Sections 1–8 are exempt from the modifying power granted by Section 128. Furthermore, since the Statute of Westminster of 1931, the British Parliament cannot make such an alteration without the Commonwealth Parliament and Government requesting it.

As a result, even the British Parliament is unable to change the Constitution Act to permit any State or States to secede from the Australian federation. A precedent has been created in this regard.The State of Western Australia petitioned the British Parliament in 1934 to approve an Act authorising its independence, but the petition was deemed

21 *Id.*

"unmaintainable" at the request of one Commonwealth state, despite the fact that it had been supported by a referendum in that state.

The better perspective is that such secession can only be achieved if all of the states and Commonwealth governments agree, and the Common Wealth Parliament submits an address to the British Parliament requesting such a modification.As a result, it is established that no Australian federation state may secede unilaterally.

Western Australian Secession Referendum:

Along with the State legislative election on April 8, 1933, the Nationalist Western Australian administration staged a referendum on independence. The Nationalists had campaigned in favour of secession, while the Labor Party had opposed it. Secession was supported by 68 percent of the 237,198 votes.

With the referendum result in hand, the new administration despatched a team to London to ask the British government to essentially reverse the earlier Act of Parliament that had permitted the formation of the Australian Federation.

The House of Commons of the United Kingdom convened a select committee to investigate the topic, but after 18 months of talks and lobbying, it eventually declined to do so, stating that it could not lawfully approve secession. The delegation returned home empty-handed.

Canadian Constitution:

There is no provision for secession in the British North America Act, 1867, which created a 'Federally united one Dominion'; hence, any of the parties can come out of that Union only if the B.N. Act[22] is so amended.

The procedure contained in s. 38(1) of the Canada Act, 1982, and according to that procedure (the general rule, subject to special procedure

22 British North America Act (1867).(Can.)

for specified cases), an amendment would require not only a majority in the two Houses of the Dominion Parliament, but also a majority in the Legislative Assemblies in / of the Provinces, not being less than 50% of the aggregate population of all the Provinces, secession by any particular Province by amending the Constitution Act, would be an impossibility unless the majority of the entire population and of the Legislatures of the Provinces consent thereto.

According to Sawyer, 'Modern Federalism', 1969, there is no provision for secession in Canada and had it been otherwise, the French-speaking Province of Quebec would have sought it. And yet the French speaking province of Quebec sought to secede from the dominion of Canada.

Following the close referendum result in the 1995 referendum for Quebec to secede[23], the Government of Canada initiated a reference to the Supreme Court to question the legal issues surrounding unilateral secession. The Quebec government chose not to participate in the decision. The result was that unilateral secession by Quebec from Canada was deemed impermissible. However, it was recognized that a referendum, clearly stating the secession question, could initiate negotiations between Quebec and the rest of Canada regarding the secession process. International law does not explicitly grant component parts of sovereign states the legal right to unilaterally secede from their parent state. As there was no contradiction between domestic and international law, there was no necessity to address this question.

Switzerland Constitution:

Even though the Swiss Constitution speaks of the 'sovereignty of the Cantons (i.e., States) in various Articles, such as 1, 3, 5, the Constitution is described as 'Federal', from the Preamble onwards, and it is the duty of the Federal Council to ensure observance of the Constitution [Art. 102(2)].

23 *In re* Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

The Constitution makes no provision for secession. On the other hand, the Federal Government will only guarantee a Canton's constitution provided it does not "anything contrary to the provisions of the Federal Constitution" (Art. 6(a)).

As a result, it is clear that a Canton cannot leave the Swiss Federation on its own. In reality, even before the ratification of the Constitution in 1874, the Civil War of 1847-48 thwarted an attempt to secede.

West Germany Constitution:

The West German Constitution (1949) calls itself a Federal State [Art. 20(1)]. There is no provision for secession.

On the other hand, there are provisions which indirectly bar the possibility of any secession from the Federal system. Thus, Art. 37(1) provides that the Federal Government may, with the consent of the Bundesrat (Upper House of the Federal Legislature), compel a Land (i.e.. a State) which 'fails to comply with its obligations of a Federal character' imposed by the Constitution.

Moreover Art. 84(3) empowers the Federal Government to ensure that the States execute the Federal laws and for this purpose, the Federal Government may send Commissioners to the various authorities of a State. In the result, the Federal Government has powers of effective supervision over the activities of the States and to control them, as may be necessary, to maintain the Federal system, secession from which would be an act of defiance of the Federal authority.

Malaysian and Nigerian Constitution:

In the absence of any provision relating to secession in the Constitution of Malaysia, 1957, the principle that it can be effected only through the process of amending the Constitution itself must apply, and, in fact, this principle has been applied in enacting the Malaysia Act, 1963 and the Constitution of Malaysia (Singapore Amendment) Act, 1965, by virtue of

which Singapore has ceased to be a member of the Malaysian Federation with effect from 1965.

Art. 2(1) of the Constitution of Nigeria, 1979, describes Nigeria as a Federal Republic which is 'indivisible and indissoluble'. It follows, therefore, that no member of this Federation can unilaterally secede, except through the process of amending the Constitution itself.

U.S.S.R Constitution:

The above analysis reveals that no clause in any of these Federal Constitutions allows Units to unilaterally secede from the Union, and wherever such a right has been asserted, it has been quashed by political action or court judgement.

One significant exception is the United States of Soviet Union's (1977) Constitution, which clearly declares "Each Union Republic shall retain the right freely to secede from the USSR." [24]

This is buttressed by the statement in Art. 70 that the USSR is founded on 'the voluntary association' of Soviet Republics.

Writers outside the USSR, on the other hand, uniformly believe that this is only a paper statement that was never intended to be exercised and that none of the Units will be able to effectively exercise due to the following circumstances:

According to Lenin and Stalin, they were opposed to any right to secession, as well as the idea of Federalism itself, and that Federalism could only be implemented "as a transitory stage of the road to perfect unification." The power to secession was granted exclusively to appease any dissident Unit, with the rest of the Constitution's provisions aimed at achieving unified rule.

That control is achieved by the Communist Party's monolithic Party organisation, which is the foundation of the whole constitutional system,

24 Art 72

and the Constitution itself would not accept any other Party's growth for development.

Other authors believe that simply discussing secession would be treasonous. The rationale for this is that, while the Constitution guarantees freedom of expression [Art. 50], the enjoyment of any of the provided rights is contingent on citizens fulfilling their duties and obligations, which includes observing the Constitution [Art. 591]. This means that anyone who speaks out against political institutions based on the Communist Party's unitary rule loses their right to free expression. In the result, no Unit can secede against the wishes of the Communist Party which would never allow secession.

Indian Constitution and Secession:

There being no provision for secession in the Indian Constitution, it would follow that the Union' set up by Art. I cannot be dissolved in whole or in part by secession, so long as the Constitution is not amended. Some Judges of the Supreme Court" have even opined that the 'Federal' system underlying this Union is one of the basic features of Constitution which cannot be altered by any amendment of the Constitution made in accordance with the procedure laid down in Art. 368. If this theory stands, secession cannot be effected by any particular State by anything short of the consent of all the States or by revolution or civil war.

According to Dr. B.R. Ambedkar, during the discussions in the Constituent Assembly, Article 1 of the Indian Constitution defines India, or Bharat, as a "Union of States." Dr. Ambedkar emphasized that the term "Union" was chosen to signify the inseparability of the Indian Federation. It was made clear that the Indian Federation was not a result of a voluntary agreement between states to join, and therefore, no state possessed the right to withdraw from the federation.[25]

25 Supriya Choudhury, *Secession and Constitutional Rights in India*, 2 J. CONST. L. & JURIS. 67 (2017).

The reason behind using the term "Union" was to emphasize that India is an integral whole, comprising a single people living under a single authority derived from a common source.[26] While the convenience of administration allows for the division of the country into different states, the unity of the nation remains intact.Dr. Ambedkar drew a parallel with the American experience, where a civil war was fought to establish the indestructibility of their federation and negate the right of states to secede. The Drafting Committee of the Indian Constitution believed that it was better to clarify the non-secession principle from the outset to prevent any speculation or disputes in the future.[27]

Article 2 of the Indian Constitution pertains to the admission or establishment of new states. It grants Parliament the authority to admit new states into the Union or create them through legislation, subject to the terms and conditions determined by Parliament. This article provides the framework for accepting or establishing new states, as exemplified by the inclusion of French towns like Pondicherry and Karaikal through the exercise of parliamentary prerogative. It specifically addresses the admission or formation of states that were not previously part of India.

On the other hand, Article 3 of the Indian Constitution addresses the formation of new states and the alteration of existing state boundaries, areas, or names. It grants Parliament the power to change, increase, or decrease the territory, boundaries, or names of existing states.[28] Unlike federations such as the United States or Australia, where the federation itself cannot modify state boundaries or names without state consent, in India, the territorial integrity of states is dependent on the Union. Article

26 Sumantra Bose, SECESSION AND SELF-DETERMINATION IN INDIA: THE CASES OF PUNJAB AND KASHMIR (1997).

27 Shubhangi Singh & Manish Kumar, *Secession under the Indian Constitution: A Comparative Analysis*, 5 J. CONST. L. & JURIS. 90 (2020).

28 Vishesh Sharma, *Constitutional Framework for Secession in India: An Analysis of Article* 3, 9 J. INDIAN L. & SOC'Y 141 (2018).

3 emphasizes the vulnerability and reliance of state boundaries and names on the decision-making authority of the Union, as conferred to Parliament.

9th Constitutional Amendment and *Re Berubari Union Case*[29] :

The *Berubari Union* case, emerging from the geopolitical intricacies of post-colonial subcontinent demarcations, stands as a hallmark in Indian judicial history. This case delves into the profound constitutional dilemmas posed by the Nehru-Noon Agreement's proposed territorial adjustments, challenging the very contours of India's territorial integrity and the judiciary's role in safeguarding it.

A committee was formed with the goal of apportioning the State of Bihar, and Sir Cyril Radcliffe was appointed as its chairperson .Later, a frontier between the two countries, India and Pakistan, was established. This divide resulted in several disagreements between the two countries over the placement of the apportionment. Sir Cyril John Radcliffe later divided the district of Jalpaiguri between India and Pakistan, with certain thanas (police stations) going to Pakistan and others staying with India. During this time, he overlooked one particular location known as Berubari Union No. 12, which was ultimately handed to India on August 14, 1947. Pakistan claimed the land as its own as a result of the commission's exclusion of space.

On January 26, 1950, the Indian Constitution came into effect, and Article 1 of the constitution established India as a Union of States. The organization and classification of states were outlined in Part A, B, and C of the First Schedule of the constitution. West Bengal was included in Part A, which comprised states with fully responsible governments, while Berubari Union No. 12 was also incorporated into Part A as per the determination of the Boundary Commission.

In 1952, the Pakistani government asserted its sovereignty over the Berubari Union for the first time, leading to a dispute. However, in 1958,

29 A.I.R. 1960 S.C. 945.

an agreement was reached to resolve the conflict. This agreement divided the Berubari Union into two sections, with one portion being relinquished by India and the other portion being retained by India under its sovereignty. This resolution brought an end to the dispute over the status of the Berubari Union.

The case raised several key issues, including: Whether legislative action is required to give effect to an agreement regarding the Berubari union. If legislative action is necessary, whether a law passed by Parliament under Article 3 of the Indian Constitution is sufficient, or if an amendment to the constitution under Article 368 is required. Whether the power granted to Parliament under Article 3 of the Indian Constitution is adequate to implement the agreement concerning the Berubari union, or if an amendment under Article 368 is necessary to take such action. The case examined the need for legislative action and the appropriate constitutional provisions to be invoked in order to implement the agreement relating to the Berubari union. The court deliberated on the scope and requirements of Article 3 and Article 368 of the Indian Constitution to determine the legality and procedure for carrying out the agreement.

Outcome:

After considering the arguments presented by both parties and examining the facts, the Supreme Court of India concluded that if the Parliament decides to amend Article 3 of the Constitution, it must first amend Article 368 through the legislative process. In such a scenario, the Parliament would need to pass a law specifically related to Article 368, which would then enable the formulation of laws for amending Article 3.[30]

The court's ruling emphasized that while the Preamble holds significance as a guiding principle for the drafting committee and highlights the country's sovereignty, it cannot be utilized to hinder the functioning of legislation or declare any part of the Constitution ambiguous. This is because the Preamble does not confer powers on the Parliament under

30 *Id.*

the provisions of the Indian Constitution. Consequently, the preamble of the Constitution does not imply or support any assumptions regarding the declaration of boundaries as an essential and crucial aspect of sovereignty.

In its ruling, the Supreme Court of India clarified that while Article 3(c) of the Constitution grants the Parliament the power to diminish the territory of a state, it does not encompass the authority to cede territory to a foreign country. The exercise of this power under Article 3 alone is insufficient.[31] To cede Indian territory to a foreign state, an amendment to the Constitution must be made in accordance with the provisions of Article 368, which require a special majority. The Supreme Court concluded that the only permissible way to relinquish Indian territory to a foreign state is through a constitutional amendment under Article 368. As a result, the 9th Constitutional Amendment Act was passed in 1960.[32]

To facilitate the cession of the Indian territory of Berubari Union in West Bengal to Pakistan, an agreement known as the Nehru-Noon Agreement was reached. The 9th Constitutional Amendment Act of 1960 was enacted to provide the legal basis for this agreement. The amendment enabled the implementation of the Indo-Pakistan Agreement of 1958 regarding the transfer of Berubari Union's territory to Pakistan.

16th Constitutional Amendment:

The Constitution (Sixteenth Amendment) Bill, 1963, informally known as the 'Anti-Secession Bill,' aimed to address secessionist tendencies in various parts of India. One of the key amendments was made to Article 19(2) of the Constitution, which added the phrase 'the sovereignty and integrity of India' as an exception to the right to free speech. The objective of the Bill, as stated by Law Minister A.K. Sen, was to prohibit all secessionist activities to prevent a repetition of the partition of India that occurred in 1947.

31 *Id.*

32 *Id.*

The primary focus of the Bill was to discourage local political leaders, particularly the Dravida Munnetra Kazhagam (DMK) in the State of Madras, who advocated for the secession of certain southern regions and the establishment of a separate nation known as 'Dravida Nadu' or 'Tamilnad.' The Bill was also influenced by similar calls for independence in Punjab and Nagaland.

The need for the Constitution (Sixteenth Amendment) Bill arose because the existing phrase 'security of the State' in Article 19(2) was considered inadequate to prevent individuals from using the electoral process to advocate peaceful secession.[33] The amendment bill aimed to address this by introducing an exception to the right to free speech. However, the scope of the amendment went beyond speech-related rights.

In addition to amending Article 19(2), the bill also included changes to Articles 19(1)(b) and (c), which deal with the rights to assembly and association. 'The sovereignty and integrity of India' was introduced as an enumerated exception to these rights as well. The amendment bill carried symbolic significance, reflecting a strong commitment to safeguarding the unity and territorial integrity of India.

Another significant aspect of the bill was the introduction of an oath for individuals nominated as candidates for the Lok Sabha, Rajya Sabha, or state legislatures. Henceforth, anyone aspiring to run for a seat in these legislative bodies was required to take this oath. Furthermore, the bill modified the oaths taken by elected members of Parliament and state legislatures. These individuals were now obligated to swear that they would uphold the sovereignty and integrity of India, among other commitments. The Constitution (Sixteenth Amendment) Bill aimed to address the perceived inadequacies in existing provisions, introduce new exceptions to protect the unity of the nation, and establish a solemn oath-taking requirement for candidates and elected representatives.

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33 Ashwini Kumar Mishra, *Secessionist Movements and the Indian Constitution: A Critical Appraisal*, 66 INDIAN J. PUB. ADMIN. 842 (2020)

Article 368 of Part XX of Constitution of India provides for two types of amendments.This article outlines the procedure for amending the Indian Constitution.[34] Any provisions related to secession would require an amendment to the Constitution, and Article 368 provides the framework for such amendments.

Article 356 of the Indian Constitution pertains to the imposition of President's rule in a state. It empowers the President of India to assume certain powers and functions of the state government in situations where there is a breakdown of the constitutional machinery in that state[35]. This provision becomes particularly significant when secessionist movements pose a threat to the unity and integrity of the nation.

Conclusion:

In the evolving tapestry of global politics, secession emerges not merely as an act of territorial bifurcation, but as a profound manifestation of a collective's quest for self-determination. Throughout this analysis, what stands out is the delicate equilibrium required between the aspirations of a subgroup and the overarching necessity for national unity and territorial integrity. We've journeyed through myriad processes and procedures, gleaning insights from both successes and failures of past secessionist movements. The dynamics of self-determination, as observed, are neither solely legalistic nor purely emotional, but rather an intricate blend of historical contexts, geopolitical realities, and the pulsating will of the people.

In today's interconnected world, secessionist endeavors have rippling effects that extend beyond national borders, influencing international diplomacy, global economic structures, and even cultural ties. These multilayered ramifications underscore the need for a careful, empathetic,

34 Alok Kumar & Sudhir Kumar Singh, *Secession and the Indian Constitution*, 9 INDIAN J. CONST. L. 1 (2012).

35 *Id.*

and well-negotiated approach to secession, respecting both the will of those seeking self-determination and the broader geopolitical ecosystem.

As nations and global entities, our challenge is to recognize and validate the genuine aspirations of people while maintaining the delicate web of international cooperation. The road to understanding secession is long, winding, and punctuated with challenges. Yet, with discernment and dialogue, it can be navigated, ensuring that the sacred principle of self-determination, enshrined in the heart of international law and human conscience, is upheld in its truest sense.

The South China Sea Arbitral Award: Six Years on and Its implications on Dispute Settlement Mechanism under UNCLOS III

Arya P.B*

Introduction

The reluctance of States to accept the jurisdiction of courts and arbitrators has been one of the weaknesses of international law. A widely ratified convention like the United Nations Convention on the Law of the Sea, 1982[1] (hereinafter, the Convention or UNCLOS) was believed to, at least , remedy this problem. [2]In fact, one of the remarkable features of this Convention is its compulsory dispute settlement mechanism. However, the question is how far this convention has succeeded in the effective implementation of this dispute settlement mechanism to ensure the international legal order on the law of the sea. While a majority of the judgments and arbitral awards rendered under this Convention has been accepted by the States, there are very few instances where the mechanism

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1 United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

2 John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, The American J. Int'l L., 499, 488-99 (1994).

proved to be not successful in taking the opposing parties to confidence and deciding the matter once and for all, due to factors which shall be analyzed in this research. The South China Sea arbitration is a glaring example of how powerful State Parties to this remarkable convention, hailed as the "Constitution of the Oceans,"[3] may end up disregarding the basic tenets of this Convention.

An Analysis of the South China Sea Arbitral Award

The award, *in the Matter of the South China Sea Arbitration,* is the result of an arbitral proceedings initiated by the Republic of the Philippines against the economically and militarily superior, People's Republic of China[4] alleging violations of China's obligations under the Convention. The arbitral award was rendered by the Arbitral Tribunal Constituted under Annex VII to the Convention on 12th July 2016 with its registry at the Permanent Court of Arbitration.[5] The Award on issues of jurisdiction and admissibility was rendered on October 29, 2015.[6] This award has become the prime focus in the international law of the sea particularly due to the strategic and economic interests of the major global players at stake in the South China Sea.[7]

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3 Remarks by Tommy Koh of Singapore, President of the Third United Nations Conference of the Law, Adapted from Statements by the President on 6 and 11 December 1982 at the final session of the Conference at Montego Bay, the United Nations.

4 China and the Philippines are parties to the Convention. One of the major maritime power not to have ratified the Convention is the United States of America.

5 In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Final Award on July 12, 2016.

6 In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19,Award on Jurisdiction and Admissibility on Oct. 29, 2015.

7 The region of South China Sea extends to approx. 3.5 million square kilometres surrounded by China, Philippines, Vietnam, Malaysia, Brunei, Singapore and Indonesia. The South China sea is a legal battle ground due to the overlapping territorial disputes involving China, the Philippines, Vietnam, Malaysia, Brunei, Indonesia, and Taiwan.

At the crux of the disputes lay the excessive claims made by China relying on historic claims based on the 'Nine Dash Line',[8] which is objected to by all the stakeholders in the region. The main points of disputes raised by the Philippines related to the maritime entitlements of the respective parties, the legal status of certain maritime offshore features, and the need for protecting the marine environment in the region.[9]

From the very inception, China refused to participate and rejected the jurisdiction of the Tribunal on the ground that it had excluded itself from the compulsory dispute settlement mechanism under the UNCLOS-III on matters relating to maritime boundary limitation, historic bays, and titles and military use of ocean through the declaration made by it on 7 September 2006 under Article 298.[10] However, the Tribunal had made itself

8 The vague and unsubstantiated "Nine Dash Line" encompasses almost 90 per cent of the South China Sea. By 2009, China had begun to undertake construction activities on the various maritime features in the sea and started placing its military over board. It also objected to freedom of navigation in these waters. Exploration and exploitation activities were also carried out by China in the region. *See* Caitlin Campbell and Nariza Salidjanova, South China Sea Arbitration Ruling: What Happened and What's Next?*,* U.S. – China Economic &Security Rev. Commission,(July12,2016)(Mar.24 ,2023, 10.30 A.M) https://www.uscc.gov/sites/default/files/Research/Issue%20 Brief_South%20China%20Sea%20Arbitration%20Ruling%20What%20 Happened%20and%20What's%20Next071216.pdf. *Also see* Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 A. J. I. L. 98 (2013).

9 Abeer Mustafa, *Case Brief on the South China Sea Arbitration Between the Republic of the Philippines and the People's Republic of China by the Permanent Court of Arbitration,* Research Society of Int'l L., (Jun.7,2023,10.04 AM),https://rsilpak.org/2017/case-brief-on-the-south-china-sea-arbitration/#_ftn14.

10 China's Declaration in Accordance with Article 298 of UNCLOS, 7 September 2006, (Jul. 1, 2023,11 A.M) https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/,. The declaration states that, "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."

clear that it will not delve into questions of delimitation[11] and sovereignty; and on the side of the Philippines, it was submitted that it does not seek to adjudicate on issues of sovereignty over the maritime features claimed by either parties or the delimitation of maritime boundaries.[12] The Tribunal by its Award delivered on October 2015 declared itself to have jurisdiction in the matter and held that China's nonparticipation in the proceedings was not a bar to proceed with the case.[13] China on its side issued a Position Paper in 2014, disputing and refusing the jurisdiction of the tribunal.[14]

While adjudicating the matter, the Tribunal dispensed the nine-dash line as having no legal basis,[15] the maritime features in the Spratly Islands were held not to be capable of generating 200nm EEZ.[16] The Chinese interference with the oil exploration activities of the Philippines, obstructing its fishing vessels, and conducting land reclamation in the

11 The Tribunal clarified that the dispute related to the extent of maritime entitlements and that the same is different from maritime delimitation. It was noted by the tribunal that "while all sea boundary delimitation will concern entitlements, the converse is not the case." *See* Final Award, *supra* note 5, at para. 204.

12 As per Art 298(1) of the Convention, State parties by declaration may refuse to be bound by the compulsory dispute mechanisms with respect to disputes concerning – 'historic titles', 'military activities' and 'law enforcement activities'.

13 *Supra* note 6.

14 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, Ministry of Foreign Affairs of the PRC, 7 December 2014, (Jun,22,2023,10.30 AM), https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201412/t20141207_679387.html.

15 It was observed that the Convention supersedes any historic rights in excess of the Convention and that the historic rights claimed by China in the South China Sea have been persistently objected to by many countries. *See* Final Award, *supra* note 5, at para. 278.

16 Though under UNCLOS -III, EEZ can be claimed by countries around their islands no such claim can be made around rocks that cannot sustain human life. This basic point of law has been superseded by China in the regions of South China Sea. The Tribunal had held that despite the reclamation and construction activities undertaken by China on these maritime features their basic nature as a rock or low-tide elevation, as the case may be, did not change to that of an island.

EEZ of the Philippines were all held to be in violation of the sovereignty of the Philippines and the international law of the sea. The Chinese land reclamation activities were held to have caused severe damage to the marine environment and thereby violative of UNCLOS provisions on the protection and preservation of the marine environment.[17] It was further added that since China is a party to the UNCLOS-III it will be bound by the decision of the Tribunal[18] pursuant to Article 296 (1)[19] and Article 11 of Annex VII.[20]

China's Response to the Award and the Ripples in the international community

China brushed aside the award as a mere 'piece of paper,'[21] disregarding it as "null and void" with "no binding force" and issued a statement to this effect in 2015.[22] Irrespective of the award, China continues to claim legal

17 *See* Final Award, *supra* note 5, at para. 992.

18 Being a party to the UNCLOS, China is bound under international law to be bound by the ruling of the tribunal. How can the tribunal's award be enforced discussed in Mark E. Rosen, *After the South China Sea Arbitration*, Diplomat (Japan) (June 21, 2016), http://thediplomat.com/2016/06/after-the- south-china-sea-arbitration/.

19 Article 296, UNCLOS III- Finality and binding force of decisions
1. Any decision rendered by a court of tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

20 Article 11, Annex VII, UNCLOS- III- Finality of award
The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.

21 China's Ministry of Foreign Affairs, *Speech by Dai Bingguo at China- US Dialogue on South China Sea between Chinese and US Think Tanks,*(July 5, 2016),(Mar.27,2023,10.40 AM) http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1377747.shtml. *See,* Lan Nyugen, *The South China Sea Arbitral Award: Not 'Just a Piece of Paper'*, MARITIME ISSUES, (Mar.27,2023,10.40 AM) http://www.maritimeissues.com/politics/the-south-china-sea-arbitral-award-not-just-a-piece-of-paper.html.

22 Statement on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal established at the Request of the Republic of the Philippines, Ministry of Foreign Affairs of the People's Republic of China (Oct. 30, 2015) (Mar.27,2023,10.40 AM) https://www.fmprc.gov.cn/eng/

and administrative control over the disputed territories and has reinforced its jurisdiction by passing domestic laws such as the Coast Guard Law in January 2021 and the Revised Maritime Traffic Safety Law in April 2021. It has even remodelled its "nine-dashed line" claims into "Four Sha" claims.[23]

The award has been hailed and criticized at the same time.[24] The Philippines had initially given a subdued response to the ruling. After the initial inertia in trying to enforce the award, the Philippines have over time been assertive about its big win.[25]The award triggered an exchange of notes *verbales* and position statements between regional and extra-regional countries on their take on the issues concerning the South China Sea.

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wjdt_665385/2649_665393/201510/t20151030_679419.html. *Also see,* Chinese Society of International Law, *The Tribunal's Award in the 'South China Sea Arbitration Initiated by the Philippines Is Null and Void*, GLOBAL TIMES, June 13, 2016.

23 Quach Thi Huyen, *The "Four-Sha" Claim: Signalling a Post Covid-19 Global Order*, MARITIME ISSUES, Nov. 26, 2020,(Apr.23,2023,11AM), http://www.maritimeissues.com/law/the-foursha-claim-signalling-a-post-covid19-global-order.html.

24 The Chinese Society of International Law had published a treatise titled *The South China Sea Arbitration Awards: A Critical Study*, 17 Chinese J. of In'l L., 207–748 (2018), (Apr.23,2023,11AM) https://doi.org/10.1093/chinesejil/jmy012, for refuting the legality of the award. It is stated therein that the award is invalid and it undermines the international rule of law. It is argued that the essence of the dispute relates to the maritime boundary delimitation between China and Philippines. It was also states that tribunal had come to the erroneous conclusion that the parties were not able to settle their matter through negotiation. Thomas J. Schoenbaum, *The South China Sea Arbitration Decision: The Need for Clarification*, Symposium on the South China Sea Arbitration, ASIAN SIL (2016), argues that the award is unfair to China and has favoured Philippines in respect of all the claims put forward by it. *Also see,* Nong Hong, *The South China Sea Arbitral Tribunal Award: Political and Legal Implications for China*, 38 CONTEMPORARY SOUTHEAST ASIA, 356, 56-361, (2016).

25 The Philippine President Rodrigo in his speech at the UN General Assembly in September 2020 asserted that, "the Award is now part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish or abandon." *See* Nguyen Hong Thao & Nguyen Thi Lan Huong, *The South China Sea Arbitration Award: 5 Years and Beyond*, THE DIPLOMAT, July 12, 2012, (Apr.23,2023,11 AM),https://thediplomat.com/2021/07/the-south-china-sea-arbitration-award-5-years-and-beyond/.

A number of diplomatic note exchanges were made between December 2019 to January 2021 by countries such as Brunei, China, Malaysia, the Philippines, Vietnam, Indonesia, the United States, Australia, France, Germany, the United Kingdom, and Japan. Except for China, all these countries recognized that the Award reflected an authoritative interpretation of the international law of the sea with respect to the dispute in the South China Sea. They affirmed the need for freedom of navigation and over flight in the South China Sea and that drawing of archipelagic baselines, generation of maritime zones, historic rights claims, etc., should be strictly in compliance with the UNCLOS-III.[26]

The Chairman of the Association of South East Nations (ASEAN) in the 36th and 37th Summits held in 2020 reaffirmed the need for upholding international law of the sea including the UNCLOS-III.[27]The South-China Sea dispute has also become a source of competition between the United States and China. The United States has always taken the stand to defend freedom of sea in the South China Sea and persisted in continuing with its freedom of navigation operations along with allies such as Australia, France, Germany, and the United Kingdom.[28] Irrespective of the disregard shown by China for the award, it does pose some geopolitical pressure on China and the same could increase substantially if other littoral States in the South China Sea choose to bring their grievances against China before arbitral tribunals.[29]

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26 *Id.*

27 Since 2016 the (ASEAN) have been trying to enforce this judgment which has not seen much success. The ASEAN had also attempted to implement a code of conduct in the South China Sea for the all the stakeholders to be bound by.

28 Nguyen Hong, *supra* note 25.

29 Hamsa Devineni & Gurpreet S Khurana, *China and the South China Sea Arbitration: Analyses in the Indi-Pacific Context*, NATIONAL MARITIME FOUNDATION, Dec. 28, 2018,(Apr 24,2023, 11 AM), https://maritimeindia.org/china-and-the-south-china-sea-arbitration-analysis-in-the-indo-pacific-context/.

An Analysis of the Responses from the States to Awards/judicial decisions pursuant to the provision in UNCLOS-III.

All State parties to the UNCLOS-III are obliged to settle their disputes pertaining to the Convention amicably, mutually, and by peaceful means.[30] If the disputes cannot be settled amicably then it may be referred to the dispute settlement mechanism provided under Part XV of UNCLOS-III. As part of the package deal, the States had to accept the compulsory dispute settlement system under Part XV to become a state party to this Convention.[31] The States were given a choice to choose from the four alternatives - ITLOS, the International Court of Justice, Annex VII arbitral tribunals, and Annex VIII special arbitral tribunals.[32] Art. 309 of the Convention, further provides that, no reservation or exceptions to the dispute settlement mechanism may be made by the State parties unless expressly allowed by the Convention.[33]

The total number of cases decided by Annex VII arbitration[34] stands at 17 from 1998 onwards. Some of these cases though started as Annex VII arbitration were later transferred to ITLOS or terminated by the claimants or by parties through agreement. The number of cases submitted to the

30 *See* Art 279 of the United Nations Convention on the Law of the Sea, (Apr 24,2023) http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

31 The member of the U.S. delegation to the UNCLOS III, Louis B. Sohn was held to be specially responsible for devising the system of dispute settlement.

32 *See* Art. 287, UNCLOS- III.

33 Erik Franckx, *The Effects of the South China Sea Dispute and the Arbitral Ruling on UNCLOS and International Law,* CENTRE FOR STRATEGIC & INT'L STUDIES (2017),(Jun. 24,2023,11 AM) https://www.jstor.org/stable/resrep23138.7

34 On their website, the Permanent Court of Arbitration claims that: "Since the 1982 Convention came into force in 1994, the PCA has acted as registry in all but one of the cases that have been arbitrated under Annex VII of UNCLOS". See Permanent Court of Arbitration, United Nations Convention on the Law of the Sea, (Jun.12,2023, 11AM) https://pca-cpa .org/en/services/arbitration-services/unclos/.

ITLOS since 1997 stands at 32.[35]Increasingly countries are resorting to the UNCLOS mechanism to resolve their disputes amicably. For instance, the maritime boundary dispute between Kenya and Somalia was referred to the ICJ in 2014.[36] The dispute between Mauritius and UK relating to the Chagos Archipelago was referred to the ICJ in 2017.[37] The disputes brought under Part XV cover a wide range of issues such as maritime delimitation, navigation rights etc.[38]

There are a number of cases, even before the South China Sea Arbitration, where the States have refused to appear in the proceedings before an international adjudicatory body.[39] However, among the claims initiated under Part XV before the PCA, the only other case where the opposite party did not appear is the *Arctic Sunrise* Case.[40] In this case, the

35 *Refer* the website of the International Tribunal for the Law of the Sea at https://www.itlos.org/en/main/cases/list-of-cases/, for the list of the cases submitted before it.

36 Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), (ICJ), The Hague, ICJ Latest Press Release No. 2018/12, Feb.12, 2018,(Jun.18,2023,10.30AM), https://www.icj-cij.org/files/case-related/161/161-20180212-PRE-01-00-EN.pdf

37 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Request for Advisory Opinion transmitted to the Court, ICJ, The Hague, 23 June 2017,(Jun.18,2023,10.30AM) https://www.icj-cij.org/files/case-related/169/169-20170623-REQ-01-00-EN.pdf

38 *See* Erik, *supra* note 33.

39 "The Corfu Channel Case (United Kingdom v. Albania), Merits, [1949] ICJ Rep. 4; United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, [1980] ICJ Rep. 3; Anglo-Iranian Oil Case (United Kingdom v. Iran), Judgment, [1952] ICJ Rep. 93; Aegean Sea Continental Shelf Case (Greece v. Turkey), Jurisdiction, Judgment, [1978] ICJ Rep. 3; Nottebohm Case (Liechtenstein v. Guatemala), Judgment, [1955] ICJ Rep. 1; Nuclear Test Case (Australia and New Zealand v. France), Judgment, [1974] ICJ Rep. 253; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, [1986] ICJ Rep. 14; Arctic Sunrise Case (Netherlands v. Russia), Provisional Measures, Order of 22 November 2013, ITLOS Case No. 22; Arctic Sunrise Case (Netherlands v. Russia), Award of 14 August 2015, [2015] PCA Case No. 2014-02." *See* Jacqueline Joyce F. Espenilla, *Judicial Fact-Finding Initiatives in the South China Sea Arbitration*, 9 Asian J. of Int'l L., 22, 20-30 (2019).

40 Jacqueline, *id.*

Russian authorities had boarded and seized the vessel belonging to Greenpeace while they attempted to climb over the Prirazlomnaya oil drilling platform constructed in Russia's EEZ. Upon the arbitration proceedings being initiated against Russia, it refused to appear and defend the case. Russia also refused before the ITLOS where the Netherlands had filed for provisional measures in the case. Russia's stand was expressed by it officially through a Position Paper published on the website of its Ministry of Foreign Affairs.[41] Though it did not refute the jurisdiction of the court, it claimed that the law enforcement measures undertaken by its authorities against Green peace's vessel were lawful under international law.[42]

Under international law, non-appearance of the opposite party is not a bar to proceed with the matter and the final outcome of the proceedings will be binding on the non-appearing party, provided that the claim of the appearing party is "well founded in fact and law."[43] However, the non-appearance and refusal by two major countries to take part in the Annex VII proceedings instituted against them cannot go unnoticed.[44]

However, some developing countries like India has always taken a positive approach to arbitral awards even when the award was largely against its interest as in the case of arbitration on the maritime boundary delimitation with Bangladesh.[45]

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41 *On Certain Legal Issues Highlighted by the Action of the Arctic Sunrise against Prirazlomnaya Platform*, Ministry of Foreign Affairs of the Russian Federation,Aug. 5, 2015,(Jun.12,2023,10.40 AM) http://www.mid.ru/documents/10180/1641061 / Arctic+Sunrise.pdf/bc7b321e-e692-46eb-bef2-12589a86b8a6.

42 *See* Erik, *supra* note 33.

43 Jacqueline, *supra* note 39.

44 *See* Erik, *supra* note 33.

45 In the matter of Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Permanent Court of Arbitration (PCA), The Hague, (Jul. 8, 2014),(Mar 24,2023,11 AM) https://www.pcacases.com/web/sendAttach/410. It must be noted that arbitral proceedings have been initiated by the Islamic Republic of Pakistan against the Republic of India in the matter of Indus Water Treaty before the PCA, and the PCA concluded its first meeting to decide on its competence on May 13, 2023. India had declined to pariticipate in the proceedings and challenged the competence

India has always taken the firm stand that maritime disputes must be settled as per the UNCLOS.[46]

Means for the implementation of awards/judgments pursuant to Part XV dispute settlement mechanism

Though, as per Art. 12(1) of Annexure VII, the arbitral tribunal which rendered the award has the power to decide on the implementation of the award, yet the Convention is silent on how this power could be exercised.[47] Unlike, where the decisions of the ICJ can be implemented by taking recourse to the UN Security Council,[48] no such mechanism is mentioned in the UNCLOS. Thus, the execution of awards by the ITLOS and the arbitral tribunals are subject to the "good faith obligation" of the parties to the dispute.[49] At times, diplomatic goodwill and persuasion could be the only mechanisms available to the affected party. The existing geopolitical rivalry and the presence of extra-regional powers in the Indo-Pacific region could make enforcement of the award even more challenging.[50]

Conclusion

Though the South China Sea Arbitration award has been criticized for being one-sided and for having decided almost all the issues raised in the dispute in favor of the Philippines,[51] the large-scale implication of the award in the politically tense South China Sea region and its contribution

of the Tribunal to decide the matter. (Jul. 1,2023, 11 AM),https://pcacases.com/web/sendAttach/45492.

46 Dhruva Jaishankar, The South China Sea arbitration ruling, and why it matters to India, July 13, 2016, (Jun.14,2023,12.30 PM),https://www.brookings.edu/opinions/the-south-china-sea-arbitration-ruling-and-why-it-matters-to-india/.

47 *See* Hamsa & Gurpreet, *supra* note 29

48 Art. 94 of the UN Charter.

49 *See* Hamsa & Gurpreet, *supra* note 29

50 *Id.*

51 *See* Nong Hong, *supra* note 24.

to the law of the sea cannot be ignored. However, China still refuses to be bound by the award and pursues its excessive maritime claims in the South China Sea unfettered. It has been noted that China is not even deterred by the "reputational costs of flouting international law" in continuing with its interests, which could bring in further instability in the disputed regions.[52]The non-compliance or non-adjustment of the behavior of China in accordance with the Award will undermine the adherence to international law. Further, the approach of "pick and choose" pursued by certain State parties to this Convention is a blatant violation of the concept and the spirit of the "package deal" envisaged by the Convention.[53]

This award indicates certain inherent limitations within this convention when it comes to the settlement of disputes. The failure of the Philippines to compel enforcement indicates the weakness in UNCLOS for the lack of effective enforcement mechanisms. As discussed earlier, effective implementation mechanisms as provided in the ICJ statute must also be incorporated into this Convention. The incorporation of the provisions on enforcement mechanisms into the Convention could be one of the ways to ensure effective enforcement of arbitral awards.[54] It is important for the tribunals to take the parties into confidence and provide incentives for them to negotiate their differences.[55]It is also argued that consistent opposition to the excessive claims by China in the South China Sea by the claimant States and the rest of the world can prevent this award from being dispensed away as a mere 'piece of paper.'[56] The ASEAN can take it as an

52 Caitlin & Nariza, *supra* note 5.

53 Thomas J.,*supra* note 24. *Also see,* James Harrison, MAKING OF THE LAW OF THE SEA- A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW, 44 (1st ed. 2011).

54 The procedure for amendment of the Convention is enumerated in Articles 312-316, Part XVII of UNCLOS-III. Hamsa & Gurpreet, *supra* note 29.

55 Thomas J ,*supra* note 24

56 Lan Nyugen, *The South China Sea Arbitral Award: Not 'Just a Piece of Paper'*, 2019, MARITIME ISSUES,((Jun.14,2023,12.30 PM), http://www.maritimeissues.com/politics/the-south-china-sea-arbitral-award-not-just-a-piece-of-paper.html

opportunity to accelerate negotiations in the region and to evolve a Code of Conduct for the competing parties in the South China Sea.[57] Deliberations and discussions may also be initiated at different multilateral fora for a common understanding on issues such as freedom of navigations, legality of maritime claims relating to various maritime features etc.[58] It is always open for the State parties to a treaty to conclude a subsequent agreement relating to the scope of the application of the treaty and the rules or manners for interpreting its provisions. The decisions on such matters may be taken before the appropriate fora such as the Meeting of States Parties to the UNCLOS or the UN General Assembly."[59]

As an initial response to this award most of the European and other Countries had shown a toned-down approach to the award. This was because they feared that an open protest against the Chinese attitude towards the award may create problems for them. If the South China Sea award were ever to be followed as a precedent then States like Australia, France, the UK, and the United States would equally stand to lose large areas of EEZ and continental shelf. Many States have similar EEZ claims around maritime features resembling rocks like the one made by China, [60]and they fear that a strong objection to the excess of China would hit back at them.[61]

57 *See* Nong Hong, *supra* note 24. The Regional Comprehensive Economic Partnership (RCEP) which came into force in January 1, 2022 is a welcome approach in this regard. *See* Xia Liping, *The Major Powers' Relations in the South China Sea from Chinese Perspectives,* MARITIME ISSUES, (Apr. 5, 2023,2 PM), http://www.maritimeissues.com/most-prominent-news/the-major-powers-relations-in-the-south-china-sea-from-chinese-perspectives.html .

58 Hamsa & Gurpreet, *supra* note 29.

59 Stefan Talmon, *The South China Sea Arbitration and the Finality of 'Final' Awards*, 8 J. INTL. DISPUTE SETTLEMENT, 400, 388-400, (2017).

60 *Id.* For an account of such excessive claims by countries such as France, Australia, Fiji, Kiribati, Mexico, Venezuela, Norway, Portugal, and the United States.

61 *Id* at 399.

Nevertheless, it is important to note that in international law, decisions rendered by international adjudicatory bodies have no precedential value and are only binding between the parties to the disputes.[62]

As noted at the beginning of this research paper, one of the biggest drawbacks of international law is the effective implementation of the rules therein. In most cases, the failure to implement the provisions in international conventions cannot be understood from a legal sense. As Stefan Talmon notes, "the legal position of States is usually motivated not by the noble ideals of the rule of law but by hardened self-interest."[63] However, for orderly international relations, it is important that all international disputes are solved amicably and by following the rules of international law. A "return to power politics" or "might make right" is not acceptable and can prove to be catastrophic.

62 *See* Article 59, Statute of the ICJ, states that "ICJ decisions have not binding effect except between the parties and to the particular case at hand." Article 296(2), UNCLOS III, states that "any decision of the tribunal ' shall have no binding force except between the parties and in respect of the particular dispute." While permanent international courts may consider past decisions for sake of consistency and predictability, arbitral tribunals are never inclined to do so.

63 *Supra* note 59 at 400.

Sports Betting in India: A Comparative Analysis of UK, US, Australia and New Zealand Laws for Prospective Legislation

T. Nishit*

Introduction

Gambling and Betting have been a part of Indian society from a long time. It was considered as an act of entertainment even from the period of Harappan Civilization as we discovered dice dating back to 10,000 BC.[1] There are evidences of gambling and betting from Indian Mythology, Manusmriti, Arthasastra, etc.[2] However, horse racing was introduced with the advent of British in India and all other forms of gambling were made illegal.

The gambling practises continued even though it was made illegal as the KPMG's report estimated India's overall gambling market to be $60 billion. The Federation of Indian Chambers of Commerce & Industry (FICCI) estimated the illegal betting market in India to be around Rs. 3,00,000 crore.[3] The income from such unregulated market is suspected to be used for terrorism, money laundering and other illegal activities.[4]

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1 Jan Mcmillen, UNDERSTANDING GAMBLING- HISTORY, CONCEPT AND THEORIES(1996).

2 *Id.*

3 Sakshi Pawar & Naman Lohiya, *Legalising Online Sports Betting in India: A Gamble unto Itself*, 4 IJLPP 35 (2017).

4 *Id.*

As such unregulated market is ever increasing, there are supporters of legalized betting in the country as it would generate revenue, provide employment and also would take the money out of black market. Law Commission of India in its 276th report, Mudgal Committee (2014), Lodha Committee (2015) also have suggested that betting should be legalized in India. However, such regulations should address two major issues associated with sports betting, i.e., protection of integrity of sport and vulnerable sections of the society.

In this paper, the researcher discussed the law on gambling and betting in India to understand the present scenario and also regulations of sports betting around the world which can be considered as a guide for future legislations.

Law on Gambling and Betting in India

Public Gambling Act was passed by the British government in 1867 with the objectives to prevent public gambling and maintenance of common gambling houses.[5] The Act criminalized gambling in 'common gaming houses' for private gain, maintenance of gambling houses, visiting a gambling house, possession of gambling devices and financial gambling operation.[6]

Gambling and betting in India was placed under List II of Schedule VII after the Constitution came into force which empowers State governments to enact laws on these subjects. Though the applicability of Public Gambling Act of 1867 was limited to a few States before independence, many other States have adopted the Act vide Article 252 of the Constitution with minor amendments.[7]

Section 12 ,of the Public Gambling Act, 1867, provided that the Act will not be applicable to 'games of mere skill.' This condition of exempting games of skill from the ambit of gambling is being followed by most of

5 Gargi Sethi, SETHI'S LAW RELATING TO GAMBLING, BETTING, LOTTERIES AND CLUBS ETC.(2004).

6 *Id.*

7 *Id.*

the States even now. However, there are a few states like Assam, Orissa and Telangana which did not consider this distinction between 'games of chance' and 'games of skill' and prohibited all such games.

The issue that crops up in every discussion of gambling and betting is this distinction between 'game of chance' and 'game of skill,' with the former being considered as gambling. The "Public Gambling Act of 1867" did not define a game of skill and it was the judiciary that considered this issue way back in 1957. The Supreme Court in the two *Chamarbaugwala* cases[8] held that those competitions which involve 'substantial skill' will be protected under Article 19(1)(g) of the Constitution.

The two important cases that considered this distinction between game of chance and game of skill are *State of Andhra Pradesh* v. *K. Satyanarayana*[9] and *Dr. K.R. Lakshmanan* v. *State of Tamil Nadu*.[10] In *Satyanarayana* case, the Supreme Court held that the card game 'Rummy' is a game of skill "because the fall of the cards has to be memorized and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill."[11] In *Lakshmanan* case, the Supreme Court held that "Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated - is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player.But a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element

8 State of Bombay v. R.M.D. Chamarbaugwala, [1957] 1 SCR 874:R.M.D Chamarbaugwala & Anr v. Union of India [1957], 1 SCR 930 (India)

9 AIR 1968 SC 825

10 AIR 1996 SC 1153

11 State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825 (India)

of skill predominates over the element of chance."[12] In these two cases, the Supreme Court applied the 'dominant factor test' to determine this distinction.

The same test was applied by the Punjab & Haryana High Court in "*Varun Gumber v. Union Territory of Chandigarh"*[13] and held that fantasy sports, like Dream11, are similar to horse racing as "both of them require the same level of 'skill, judgment and discretion' and thus, they fall under the category of games of skill."[14] In another similar case, the Bombay High Court also held that fantasy sports involve substantial skill and thus do not fall under gambling.[15]

The question to be considered now is whether sports betting is a game of skill or chance. The Apex court held in *Lakshmanan* case that "Whether a particular horse wins at the race or not, is not dependent on mere chance or accident but is determined by numerous factors, such as the pedigree of the animal, the training given to it as well as the rider, its current form, the nature of the race, etc."[16] Similarly in case of sports betting, there are certain factors to be considered before placing a bet. It includes international ranking of the team, performance of key players in the past matches, record of win-loss at the venue, injuries to players, pitch report and toss in sports like cricket, home/away situations in certain sports, etc. These factors play a dominant role in placing a bet and a person who does not know about these statistics is at a disadvantage.

Thus, sports betting have to considered as a game of skill and there has to be regulation instead of prohibition. Many countries in the world regulate sports betting in their jurisdictions from which India can learn from those experiences. In the next part of the paper, sports betting regulations around the world have been discussed.

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12 Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153(India)

13 CWP No. 7559 of 2017

14 *Id.*

15 Gurdeep Singh Sachar v. Union of India & Ors, [2020]72GSTR75(Bom)

16 Dr. K.R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153(India)

Regulation of Sports betting around the world

A. *United Kingdom*

UK passed gambling legislation in 1960 to tackle the problem of illicit betting by legalizing betting shops and also established a regulatory body.[17] It was felt that the 1960 Act failed to stop illicit gambling as expected and thus, Gambling Act of 2005 was passed.[18] Section 1 of the Act sets forth the objectives which it aims to achieve through licensed gambling. They are- "(a) preventing gambling from being a source of crime or disorder, (b) ensuring that gambling is conducted in a fair and open way, and (c) protecting children and other vulnerable persons from being harmed or exploited by gambling."[19] The Act deals with all kinds of gambling and betting in its jurisdiction. The objectives mentioned above help in solving two major problems associated with sports betting, i.e., maintaining integrity of sport and safeguarding vulnerable sections of the society.

Section 20 of the Act provides for the establishment of 'Gambling Commission' that acts as the regulatory body for gambling and betting in the country. The Commission is entrusted with the duty to issue codes of practice for the gambling facilities to follow and conditions which the gambling operators need to fulfil to obtain the license.[20] Pursuant to these sections, the Commission issued "Licence Conditions and Codes of Practice."[21]

The Act also deals with underage gambling by criminalizing both minors as well as gambling licensees if any person under the age of 18

17 Zach Schreiber, *The Time is Now: Why the United States Should Adopt the British Model of Sports Betting Legislation*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J.353, 371-72 (2017)

18 *Id.*

19 The United Kingdon Gambling Act, 2005, s. 1.(UK)

20 The United Kingdon Gambling Act, 2005, ss. 22, 23.(UK)

21 Gambling Commission (UK), Licence Conditions and Codes of Practice, (June 23,2023,10.30 AM),https://www.gamblingcommission.gov.uk/PDF/LCCP/Licence-conditions-and-codes-of-practice.pdf

years gambles.[22] These provisions help in solving that problem since criminalizing only one party to this issue, i.e., either minor or gambling licensee, would continue to provide alternatives to the party that is not criminalized. For instance, if a minor who tried to gambling were left without any punishment, he would search for another alternatives to gamble or place bets. The Act also criminalizes spot-fixing and match-fixing under illegal gambling practices.

The Gambling Commission is also provided with a lot of discretion in granting licenses to operators but the applicants need to mention certain details.[23]This application process allows the people to place bets with trusted operators rather than unknown illegal bookmakers.[24]The Act also provides flexibility to the Commission to have a wholesome view at the issue and helps to determine whether it is desirable to grant the applicant a license and also to develop new methods to achieve the objects of the Act.

'Mandatory Reporting' is one such method developed by the Commission pursuant to section 88 of the Gambling Act, 2005.[25] As the Gambling

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22 The United Kingdon Gambling Act, 2005, part IV(UK)

23 The United Kingdon Gambling Act, 2005, s. 69.(UK)
- a) specify the activities to be authorised by the licence,
- b) specify an address in the United Kingdom at which a document issued under this Act may be served on the applicant,
- c) be made in such form and manner as the Commission may direct,
- d) state whether the applicant has been convicted of a relevant offence,
- e) state whether the applicant has been convicted of any other offence,
- f) contain or be accompanied by such other information or documents as the Commission may direct, and
- g) be accompanied by the prescribed fee.

24 Sean M. Farrell, *Cashing in on Murphy v. NCAA: Looking to the United Kingdom and Australia for Solutions to Regulating Sports Betting in America*, 30 IND. INT'L &COMP. L. REV. 251 (2020).

25 The United Kingdon Gambling Act, 2005, s. 88."The Gambling Commission may add, as a condition to a license, a requirement to report any suspicion that an offense under the Gambling Act has been committed or that someone has breached a rule set by a sporting body"

Commission is the sole regulatory body on gambling and betting, it is an arduous task to monitor all the betting activities in the country. However, if such task is entrusted to the sports book and gambling operators to report suspicious activity to the Commission, it can evaluate such reports and investigate the issue. This helps in early recognition of the issue and also acts as a disincentive to potential match fixers as they know that they would come under suspicion if any irregular betting patterns are determined by the sports books. 'Sports Betting Intelligence Unit' (SBIU), established under the Commission, encourages the flow of information between the sporting body and the gambling licensee.[26] The police powers entrusted by the Act to the Commission to prosecute offences is done through SBIU that works together with the State police, gambling licensees and the sporting bodies.[27]

These provisions made UK a mature and highly competitive gambling market. The gambling market generated a total Gross Gambling Yield of 14.2 billion pounds in 2019-20.[28]

B. ***Nevada (United States of America)***

The 20th century witnessed enactment of statutes in the United State of America to regulate gambling including the Federal Wire Act, which was passed in 1961 as the sports betting market was being dominated by illegal crime syndicates. The federal government could as a result regulate sports betting but "laws were not intended to impede ordinary citizens' ability to bet on sports in accordance with the law in their particular State, but instead were intended to complement existing State laws that forbade

26 Rohani Mahyera, *Saving Cricket: A Proposal for the Legalization of Gambling in India to Regulate Corrupt Betting Practices in Cricket*, 26 EMORY INT'L L. REV.365 (2012).

27 *Id.*

28 Gambling Commission (UK), Industry Statistics- November 2020,(June 23, 2023,11 AM),https://beta.gamblingcommission.gov.uk/statistics-and-research/publication/industry-statistics-november-2020.

unauthorized in-state bookmaking."[29] The Act did not entirely ban sports betting as the states can determine what kind of sports betting can be allowed.

However, the federal government passed Professional and Amateur Sports Protection Act (PASPA) in 1992 which banned sports betting without any powers to the States. Section 3702 of the Act prohibit States "from sponsoring, operating, advertising ,promoting, licensing, or authorizing sports lotteries or any other type of sports betting that is based on professional or amateur games or performances.."[30]

US Supreme Court in *Murphy* v. *NCAA*[31] struck down PASPA. It gave an impetus to the States to legislate on sports betting. In this case, the State of New Jersey challenged the constitutionality of PASPA, a federal statute that banned sports betting. The SC held that section 13702(1) violated 'anti-commandeering principle' that makes a federal law unconstitutional if it orders the States to follow federal standards.

Section 3704 of PASPA provided an exception for States that had previously allowed sports betting in their jurisdiction , to continue with it. Nevada was one of the States that made use of this exception as it had a long history of sports betting. It had legalized sports betting in 1949, established the Nevada Gaming Control Board in 1955 and Gaming Commission in 1959.[32] The excise tax on registered bookmakers was reduced from 10% to 2% in 1974 as it was felt that the tax structure should provide incentives for operators to offer bets in a safe manner and to make others join the regulated system of betting which was later reduced to 0.25 % in 1982.[33]

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29 Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J 153, 154 (2018)

30 United States of America Professional and Amateur Sports Protection Act,1992, ss. 3702-3704.(United States)

31 Murphy v. NCAA, 138 S. Ct. 1461 (2018)

32 Becky Harris, *Regulated Sports Betting: A Nevada Perspective*, 10 UNLV GAMING L.J 75 (2020).

33 *Id.*

The law on sports betting was codified in 2009 through "Title 41, Chapter 463 of Nevada's Statutory Code."[34] Nevada Gaming Commission, the regulatory body on betting activities in the State, was created under section 463.022 under the new codified law. The Commission is entrusted with the power to decide the betting activities which will be allowed in the state.[35]

The entities have to undergo stringent license conditions and requirements to obtain a license to provide wagering services in Nevada. The individuals associated with the entity must also meet strict gaming standards and must be 'persons of the highest calibre.'[36] Financial and criminal investigations are conducted by the Nevada Gaming Board before granting a license. The findings of the investigation report are reviewed by the Board with the applicant at a public meeting and if the Board approves, the application is forwarded to the Nevada Gaming Commission. The Commission further reviews the report and decides whether to grant license after another round of public hearing with the applicant. If there is any change in the management of the entity like job promotion or change in responsibilities of employees, Nevada Gaming Control Board and Commission launches a fresh investigation into the matter to rule out foul play by the management.[37] It is pertinent to note that the investigative powers are entrusted with the Nevada Gaming Control Board and the decision making powers are with the Nevada Gaming Commission.

The internal control standards include submission of audit reports by the sports books, record of every details of betting activity like each wager received, each win paid out, large payouts, etc.[38] The sports books

34 United States of America, NevadaRevised Statutes, 2009, s. 463. (United States)

35 *Id.*

36 Nevada Gaming Commission Regulations, 2019, s. 3.090 (United States)

37 *Id*., Sec. 3.110

38 State Of Nev. Gaming Control Board, Minimum Internal Control Standards, Race and Sports (2008),(May 4,2023, 10.30 AM), https://gaming.nv.gov/index.aspx?page=182

also need to maintain minimum on-hand funds and a restricted reserve account with a financial institution which must be approved by the Gaming Commission in order to protect the payment of wagers.

There are strict regulations for creation of user accounts as well. A person has to be above twenty-one years of age to bet. The creation of user account has to be done at the casino physically to verify the identity and age of the user.[39] The licensees have to further create a secure personal identifier which has to be unique for each user "that is reasonably designed to prevent the unauthorized access to,or use of, the wagering account by any person other than the patron or patrons for whom the wagering account is established."[40]

The State also has a dedicated funding to solve the problem gambling through the Department of Health and Human Services by providing services like treatment of problem gambling, prevention, workforce development, etc. [41] The funding is generated by carving out a specific portion of tax revenue generated through gaming. There is also a 24-hour helpline service for problem gamblers which is provided by Nevada Council on Problem Gambling, a private non-profit agency associated with National Council on Problem Gambling.[42]

C. *Australia*

Sports betting in Australia are regulated predominantly by State and local governments. The laws regulating sports betting differ with each jurisdiction. Interactive Gambling Act was enacted by the federal legislature in 2001 to "prohibit interactive gambling services to the customers in Australia including casino-style games, online slot machines

39 Becky Harris, s*upra* note33

40 Nevada Gaming Commission Regulations, 2019, s. 5.225(6) (United States)

41 Becky Harris, *supra* note33

42 Nevada Council on Problem Gambling, Get Help Now,(May 24,2023,11.30),https://www.nevadacouncil.org/get-help-now/

and online wagering services that accept in-play bets on sports events."[43] The Act also provides that interactive gambling services can be provided only by operators which obtained license from appropriate authority.[44]

In 2011, "National Policy on Match-fixing in Sport" was developed together by commonwealth, state and provincial governments of Australia with an intention to "deter match fixing and in doing so preserve the integrity of one of Australia's greatest assets-our Australia's] national sporting heritage."[45] The purpose of the Policy is to increase public confidence in integrity of sport.[46]

The agreement also states that there has to be a "Sport Controlling Body" which has to register betting events on behalf the sport with betting agencies.[47] The Policy provides that "a 'Sport Controlling Body' for each sport or competition to be identified and registered by an appropriate regulator, for example, a state or territory gaming commission, and be recognised in each jurisdiction."[48] The Sport Controlling Body plays a major role in sports betting as a betting operator cannot offer bets to the public unless there is an agreement between the recognized Sport Controlling Body on behalf of a particular sport and the operator or if an

43 Australian Communications and Media Authority (ACMA), Interactive Gambling Act Reforms, May 24,2023,11.30), https://www.acma.gov.au/Industry/Internet/Internet-content/Interactive-gambling/interactive-gambling-act-reforms

44 *Id.*

45 Sport and Recreation Ministers' Council Communiqué (2011),(May 24,2023,11 AM) https://www.sportintegrity.gov.au/sites/default/files/National%20Policy%20on%20Match-Fixing%20in%20Sport%20%28FINAL%29.pdf.

46 "Maximise public confidence in the integrity of sport and to ensure level playing field, by: (a) articulating the roles, responsibilities and aspirations of all Australian governments, sporting organisations and the betting industry; (b) making a commitment to pursue nationally consistent legislative arrangements and standard requirements across all governments, sporting organisations and the betting industry in regard to match-fixing in sport; and (c) detailing the approach to implementation of the Policy."

47 *Id.*

48 *Id*.

appropriate regulator allows the operator to offer bets. This condition is a deciding factor in developing betting market in the country as the Sport Controlling Body can refuse to enter into an agreement with the betting operator if it feels that the operator may not protect the integrity of the sport. This mechanism also helps in avoiding foul practices in the sport as both the parties are in a better pedestal to determine illicit betting activities.

The National Policy states that there can be different agreements in each state to capture the requirements and diversity.[49] Pursuant to this relaxation, the states of New South Wales and Victoria passed their own legislations that adopted the requirements as mentioned in the Policy.[50] In New South Wales, there has to be an 'Integrity Agreement' between the Sport Controlling Body and the betting operator and it must include relevant details to provide financial return to Sport Controlling Body and protect integrity of sport.[51] It is pertinent to note that the agreement is between private parties and not the government. The reason for this stipulation is that Sport Controlling body and the betting operator can determine suitable terms of the agreement better than the government. The National Policy also provides that there has be financial return to the sport on which the bets are accepted which can be in the form of fees to be paid by the betting operator to the sporting body.[52] Financial aspect of integrity agreements and precondition of knowledge sharing between Sport Controlling body and betting operator help to tackle the menace of match fixing as the betting activities would continue only when the integrity of the sport is protected.

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49 *Id*.

50 Sean M. Farrell, *supra* note24

51 (1) an outline of the measures used to prevent, investigate and assist in the prosecution of any match fixing or corrupt behaviour; (2) provision of financial return to the sport; (3) Information sharing arrangements; and (4) a consultation process for applications for new sporting events and bet types

52 *Id.*

The State of Victoria had similar laws requiring agreements similar to Integrity agreements since 2003, i.e., even before the National Policy on Match fixing was developed.[53] The required terms of agreement between the Sport Controlling body and the betting provider are similar to those as provided by New South Wales. However, there is one difference between the two states. Unlike New South Wales, if Sport Controlling body refuse to enter into an agreement with the betting provider, betting services can be provided by the operator if the Victorian Gambling Commission, the State regulator of betting, allows. However, it is desirable for the Sport Controlling body to enter into an agreement with the negotiated terms rather than the terms determined by the Commission.

D. ***New Zealand***

New Zealand has a long history of horse racing and betting. In 1835, first recorded horse race was held in Bay of Islands.[54] The Gaming and Lotteries Act was passed in 1881 because of concerns over corruption in horse racing industry. The Act was based on the Gaming Act 1845 and Gaming Houses Act 1853 of United Kingdom. The Act made public gambling and gambling houses illegal. Public betting on sporting events was banned and betting contracts were made void, but not illegal. It was also provided that totalisators have to be licensed under Colonial Secretary. Thus, betting was not entirely banned as licensed totalisators can offer bets to the public.[55] In 1908, Gaming Act was passed to restrict provision of betting services to the racecourse and made gambling houses, street betting illegal.

Even though there was a limited legal betting market, illegal bookmakers continued to offer bets to the public as it was considered as

53 *Id.*

54 Elizabeth Toomey & Simon Schofield, *Sports Betting in New Zealand: The New Zealand Racing Board*, *in* SPORTS BETTING: LAW AND POLICY (P. M. Anderson et al.eds., 2012)

55 *Id*.

acceptable by the society.[56] The Royal Commission on Gaming and Racing was constituted in 1946 which estimated that the amount of bets carried by illegal betting market is more than the regulated market and recommended off-course betting market to be regulated by the state.[57] In 1949, Totalisator Agency Board (TAB) was established by the State which is the first legally authorised betting agency in the world that provided both on-course and off-course betting. Further in 1971, Racing Act was passed which created the New Zealand Racing Authority for "redistribution of profits in the racing industry."[58] In 1995, Racing Amendment Act was passed which authorized TAB to provide betting on limited sporting events.

In 2003, Gambling Act and Racing Act were passed to consolidate the laws on gambling and betting in the country. Gambling Act 2003 provided that contracts authorised by the Act are enforceable and all the other contracts would be rendered void.[59] Racing Act 2003 is concerned with betting on racing and sporting events in the country.[60] It also replaced New Zealand Racing Authority with New Zealand Racing Board (NZRB). NZRB has a broad range of functions as stated in section 9 of Racing Act, 2003 including developing policies related to racing industry, issue of betting licenses, distribution of funds generated through racing and sports betting, etc.

While the NZRB is the comprehensive body of all sports betting in the country, TAB is its commercial arm. TAB offers bets to the public either directly through its outlets or indirectly through agencies and sub-agencies authorised by TAB.[61] However, NZRB must first enter into an agreement

56 Grant D, *The nature of gambling in New Zealand: A brief history,* in GAMBLING IN NEW ZEALAND(Curtis B. ed.2002).

57 Grant D, TWO OVER THREE ON GOODTIME SUGAR: THE NEW ZEALAND TAB TURNS, 50 (2000).

58 *Id.*

59 New Zealand Gambling Act 2003,2003, s. 14.(New Zealand)

60 New Zealand Racing Act, 2003, s. 3. (New Zealand)

61 Elizabeth Toomey and Simon Schofield, *supra* note55

with relevant National Sporting Body to offer bets on a particular sporting event.[62] For instance, if the NZRB wants to offer bets on cricketing event, it must first enter into an agreement with the New Zealand Cricket Board. Thus, the Act provides for the involvement of a stakeholder of a sporting event, i.e., a National Sporting Body in betting activities. In 2020, the total betting and gaming turnover generated by TAB was 2.6 million dollars.[63]

The Gaming Act 2003 and the Racing Act 2003 provided that all the stakeholders of gaming industry need to provide funding for problem gambling services. The Responsible Gambling Code of Practice and Harm Prevention and Minimisation Policy regulations were issued by NZRB in 2004. Pursuant to these regulations, NZRB initiated 'Set your limit' and 'Self Exclusion' programmes. Under the former, the user's account will be suspended if a weekly spending or loss limit is reached and in the latter, the user can voluntarily be denied to further participate in betting.[64]

In 2020, Racing Industry Act was passed which replaced the Racing Act, 2003.Under the new Act, the powers and functions of New Zealand Racing Board were transferred to the TAB New Zealand established under section 54 of the Act. The objectives of TAB New Zealand are laid down in section 57 of the Act.[65]

Section 79 of the Racing Industry Act, 2020 is similar to section 55 of its predecessor which states that TAB New Zealand must enter into an

62 New Zealand Racing Act, 2003, s. 55.(New Zealand)

63 New Zealand Racing Industry Transition Agency, Annual report 2020,(May 4,2023,11 AM),https://www.tabnz.org/sites/default/files/documents/tab21780%20AR%20 2020%20f%20web%20%281%29.pdf

64 Elizabeth Toomey & Simon Schofield,*supra* note55

65 New Zealand Racing Act, 2003, s. 57. (New Zealand)
(a) to facilitate and promote betting; and subject to ensuring that risks of problem gambling and underage gambling are minimised, to maximise-
(i) its profits for the long-term benefit of New Zealand racing; and
(ii) its returns to New Zealand sports in accordance with agreements entered into under sections 79 and 80

agreement with the relevant National Sporting Organization to conduct betting of a sporting event. The Act also provides that there has to be a payment of revenue to National Sporting Organization derived from betting of a sporting event by the TAB New Zealand.[66] Section 89 criminalizes a person under the age of 18 if he makes a bet, whether on his own or on behalf of another person.

Thus, TAB New Zealand is the sole authority to issue licences to the racing clubs to offer on-course bets and all other off-course betting is conducted by TAB New Zealand either directly through its outlets or indirectly through agencies.

Model Provisions to regulate Sports Betting

The regulations of the above mentioned countries help us to legislate on sports betting suitable to India. The following provisions if included in the legislations will try to increase revenue for the State, protect integrity of the sport as well as vulnerable sections of the society-

The researcher suggests that *online sports betting* should be legalized initially as it can be considered as the first step in legalization of gambling and betting in the country. As we have seen in the recent past that there has been an enormous rise in fantasy gaming service providers[67] and as most of them are offered online, we can similarly start online sports betting to understand the implications.

The *State and local governments* must play a significant role in offline betting services. As we have seen in Australia, state governments must be given power to determine the conditions under which betting should be regulated. It is pertinent to not that the regulations on offline sports betting may be not be unique in the entire country as the states can adopt those regulations which they feel are desirable.

66 New Zealand Racing Industry Act 2020, s. 82. (New Zealand)

67 Santosh Vikram Singh, The Rise of Fantasy Sports in India, Lexology, (Mar. 26,2023,10.30 AM) https://www.lexology.com/library/detail.aspx?g=556d4dc9-6fb0-43bb-acae-8dd10ea16d2a

Sport Controlling Bodies should be included in betting activities as betting operators offer bets on their respective sporting events. There has to be financial sharing between the betting operators and sport controlling bodies which acts as an impetus for the sporting bodies. It must also be provided that certain amount of such funds received must be used by the sporting bodies to develop infrastructure at regional level for the benefit of sport.

India should have a *regulatory body* at the central level like Gambling Commission of United Kingdom[68]to streamline the licensing process of online betting services. While the national regulatory body can suggest the states in physical betting, it cannot decide on this issue at regional level. This problem can be solved by establishing betting regulatory bodies at regional level. There has to be some form of flexibility to be provided to these regulatory bodies as the legislations cannot predict the future of this emerging industry. As we have seen in United Kingdom that such flexibilities granted to the Gambling Commission helped in developing 'Mandatory Reporting.'[69]

There has to be *knowledge sharing* between States, Sport Controlling body at appropriate level and betting operator. Such knowledge sharing helps in detecting in irregular betting patterns and also addressing the issue as fast as possible. We can establish a body similar to SBIU of Gambling Commission of UK which helps in flow of information between the parties.[70]

The legislations must provide *definitions* of relevant terms such as betting, regulator, licensing conditions, etc. Another issue in case of sports betting is determining whether it includes skill or chance and the legislation must address this question. As we have already discussed the issue above, sports betting should be considered as a game of skill.

68 *Supra* note 20

69 *Supra* note25

70 Rohani Mahyera, *supra* note26

There has to be provisions to criminalize spot-fixing, match-fixing and underage gambling similar to Gambling Act, 2005 of United Kingdom.[71] In case of underage gambling, both the parties involved (minors and betting operators) must face criminal consequences.

The tax levied by the State should not be too high. If the tax is high, the users may bet in the underground markets where the return are high. Thus, it is suggested that, the tax must be levied at less than 10% from the winnings of the users and around 20% from the net revenue of the betting operators.

Problem Gambling should be addressed by all the stakeholders of betting activities and should not be left alone to the State.[72] The betting operators must provide information to the users for counselling in their respective premises or websites. The sporting bodies and the State must allocate a specific portion of their revenue generated through betting activities for research, counselling, etc. for problem gambling. There can also be monthly spending limits on the user accounts so as to disallow them from spending more than they can afford.[73]

The betting operators should not offer bets on regional sporting events. One of the reasons for the athletes to accept spot or match fixing is financial benefit and athletes in regional sporting events are not paid sufficiently. The sporting bodies can dedicate a specific portion of the revenue generated from betting activities to increase monetary benefit to athletes at regional level. Also, spot fixing can be avoided by banning in-play betting.

71 *Supra* note22

72 *Supra* note43

73 Elizabeth Toomey and Simon Schofield, *supra* note55

Conclusion

The investigation done by Al Jazeera in 2017 called the 'Munawar files' depicted the alarming influence of the underworld mafia on match fixing and sports betting in cricket. This is mainly because of large unregulated betting market in the country and the fascination of sports betting in the society. The State cannot be a mute spectator and cannot stay in denial that there is no sports betting in the country.

State must regulate the betting market. The regulation of sports betting in India would eventually lead to revenue generation, employment creation, increase in viewership of sporting events that were previously ignored and also removing the black money from the market. It is pertinent to note that legalization of sports betting in the country will not entirely stop the influence of underworld mafia on sports betting. However, this should not dissuade the States as the advantages outweigh the disadvantages. A legal system which prohibits betting rather than regulating it is just turning its back on the problem. Regulations would reveal the inherent problems in the system and then the State can solve them through effective policies and implementation.

The prospective legislations should follow Australian National Policy on Match-fixing in Sport broadly by providing crucial roles to Sporting bodies and the regional governments. Social issues like problem gambling and underage gambling can be addressed by following the Gambling Act, 2005 of United Kingdom. If these provisions are followed, we may solve the social problems associated with betting, protect integrity of sport and increase financial returns to the State.

When Patented Medicines are Unaffordable: An Analysis of the Recourse under the Indian Patent Act, 1970

Smruthy N. Pradeep* & Dr. Kavitha Chalakkal**

Introduction

Public health initiatives and allocations around the world battle with excessive pharmaceutical prices, and such concerns are not exclusive to developing countries and low-income nations. According to a 2019 WHO report, 12.7% of the world population spends more than 10% of their household income on healthcare.[1] The situation is similar in India also, as there is a persistently high out-of-pocket (OOP) expenditure relating to healthcare that pushes thousands of people into poverty every year.[2]Moreover, the proportion of healthcare expenses allocated to medicines in India, as a part of the overall out-of-pocket expenditure, has been observed to be significantly greater compared to other nations.[3]

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1 PRIMARY HEALTH CARE ON THE ROAD TO UNIVERSAL HEALTH COVERAGE, GLOBAL MONITORING REPORT EXECUTIVE SUMMARY, WHO/HIS/HGF/19.1, (2019).

2 Sakthivel Selvaraj et al., INDIA HEALTH SYSTEM REVIEW (2022).

3 Shankar Prinja et al., *What is the out-of-pocket expenditure on medicines in India? An empirical assessment using a novel methodology*, 37 Health Policy Plan. 1116,

This has led to a situation where due to their limited ability to purchase medicines, most of the Indian population may find themselves forced into poverty as the costs of essential medicines in the Indian market are high and expensive for a sizable portion of the population.

An observation of the Indian pharmaceutical market reveals that pharmaceutical prices in India have undergone several changes throughout the years. At one time, India used to be one of the most expensive countries in the world for drugs, and it was the introduction of the Indian Patent Act of 1970, which abolished the product patent protection in pharmaceuticals, that led to a drastic change in the pharmaceutical pricing situation. The development of a robust generic pharmaceutical industry that emerged as a result of the patent reforms in the 1970s made India a significant player in the global pharmaceutical industry, garnering distinction as a low-cost manufacturer of high-quality medications. This enabled the country's population to buy cheap and affordable generic versions of patented prescription drugs. However, with the entry to the World Trade Organisation (WTO) in 1995 and the subsequent full compliance of TRIPS by 2005, there was a change in the status of the prices of patented pharmaceuticals in India. Pharmaceutical products reflecting extraordinary price escalation were principally those drugs that included newly developed molecules that may be eligible for patents.[4]

A 2016 study conducted more than a decade after India renewed patent protection for pharmaceutical products revealed that when comparing the change in average price before and after a patent grant, there is a minor, immediately apparent, and continual price increase following the patent grant.[5] According to different studies on the impact of TRIPS on the Indian

(2022).

4 Frederick M. Abbott, *Excessive Pharmaceutical Prices and Competition Law: Doctrinal Development to Protect Public Health*, 6 UC IRVINE L. REV. 281, (2016).

5 Mark Duggan et al., *The Market Impacts of Pharmaceutical Product Patents in Developing Countries: Evidence from India*, 106 AM. ECO.REV 99, (2016), https://doi.org/10.1257/aer.20141301

pharmaceutical market, it was found that post-2005, the market for anti-cancer medications was showing a tendency of monopolization, and this trend was expected to worsen in the future. The pre-TRIPS regime's influence was anticipated to wane over time as growing numbers of newly released compounds would be covered by product patents.[6] The studies show that the present prices of patented medicines in India are reminiscent of pre-1970 conditions. As per a 2019 study on the Indian pharmaceutical market, even though products priced above INR 1 lakh are only 12, those priced more than INR 1000 are not negligible (2175)- what is even more alarming is that the number of such products increased by about 50% from 2013 to 2019.[7] Hence, the influence that patent protection has on the prices of pharmaceuticals is significant and crucial for the Indian healthcare sector. It can be seen that patent protection in India is, therefore, a question of larger social relevance due to the specific circumstances existing in the country. Although, it has been stated that several of the provisions of the Indian Patent Act 1970 are designed to meet the public interest goal of ensuring that the population has access to affordable medications without compromising the objective of awarding a patent, i.e., to incentivize inventors.

The Guiding Principles of the Indian Patent Act, 1970

The recommendations of the Justice N Rajagopala Ayyengar Committee, appointed by the Nehru Government in 1957, to identify the drawbacks of the 1911 British legislation on the Indian Patent ,form the basis of the Indian Patent Act of 1970. The report broadly defines patents as statutory grants of monopoly for working on an invention and vending the resulting product.[8] The report identified the patent system as a quid pro

6 Sudip Chaudhuri, IMPACT OF PRODUCT PATENTS ON PHARMACEUTICAL MARKET STRUCTURE AND PRICES IN INDIA, IIM Calcutta Working Paper Series, (2018).

7 Sudip Chaudhuri, ARE MEDICINE PRICES HIGH AND UNAFFORDABLE AFTER TRIPS? EVIDENCE FROM PHARMACEUTICAL INDUSTRY IN INDIA, (2019).

8 Rajagopala Ayyangar, REPORT ON THE REVISION OF THE PATENTS LAW 11

quo system: the monopoly that a patentee acquires is solely in return for disclosing the innovation to the public, which is free to use after the patent period has ended.[9] Patent laws are based on the premise that fostering creativity and innovation is valuable, and providing exclusive rights through a temporary monopoly incentivizes such progress. The Ayyengar Committee concluded that when used in developing nations, the approach will not have the same outcomes. Patent law is frequently employed as a tool for controlling a nation's political economy. The political economy governs the rules and regulations of the patent systems, and the role of civil or common law in this context is limited.

The 1959 Committee report served as the foundation for India's patent statute and jurisprudence, highlighting that patent systems serve not only the interests of inventors but also the national economy and technological progress. In line with the Indian proposition on patent law in 1970, an effective patent law is achieved by carefully balancing three factors:

1) Rewarding inventors to encourage future innovations.
2) Providing protection from competition to attract venture capital for the successful exploitation of inventions.
3) Community interest.

In India's patent policy, equal importance is placed on both the reward to the inventor and the public interest component. This signifies that the policy recognizes the significance of incentivizing inventors while also prioritizing the broader welfare and societal benefits for the public. Considering the economic-social and cultural situation of newly independent India, the Ayyengar Committee affirmed that food and medicines that are essential should be made available to everyone at

(1959).

9 Justice Prathiba M. Singh et al., *An International Guide to Patent Case Management for Judges: India*, in AN INTERNATIONAL GUIDE TO PATENT CASE MANAGEMENT FOR JUDGES, 250 (2023).

reasonable rates to ensure health and food security and that no exclusivity or any type of monopoly should be granted in respect of such articles. This position is reflected in the original Act as it did not permit product patents to pharmaceuticals and certain other segments like agrochemicals.[10] The prohibitionof product patents were aimed at widening the field of competition and leading to the manufacture of these products in adequate quantities and at the most affordable prices for the general population.[11] This also enabled the growth of a robust generic medicines market which not only met the needs of the domestic population but also led India to a position where it became the pharmacy of the global south. This invariably helped millions of people suffering from life-threatening diseases around the world, and therefore, for the same reason, the reintroduction of product patents, especially in the pharmaceutical sector, was a major concern for global health security as these developing nations relied on affordable medicines produced by India's generic drug manufacturing industry.[12]

Despite the implementation of TRIPS, the immediate consequence in India did not involve a scenario where patented medicines became unaffordable for the majority of the population. This can be attributed to the presence of provisions within the Patent Act that continued to prioritize public interest concerns, even after the necessary amendments were made to comply with TRIPS in 2005. These provisions helped maintain a balance between protecting pharmaceutical product patents and ensuring affordable access to essential medicines for the Indian population. These pro-competitive provisions incorporated into the Indian Patent Act 1970, on the recommendation of the Committee Report, which stand as a testimony to the public interest consideration of the Indian patent policymakers, are not violative of TRIPS. These are globally accepted as the exceptions and

10 Rajagopala Ayyangar, *supra* note 8, at 39.

11 *Id.*

12 Nazim Akbar, *Access to Medicines as an Element of Right to Health: With Special Reference to Pharmaceutical Patents in India*, 10 DEHRADUN L. REV.(2018).

limitations available under the TRIPS framework. Notably, some of these provisions were incorporated into TRIPS due to the negotiation efforts of developing countries, primarily led by India, in the Uruguay Round negotiations. Some of these exceptions are provisions relating to granting of compulsory licenses, parallel import, use or acquisition of the patented invention by the Government, etc.

This paper aims to examine the effectiveness of these provisions in ensuring the availability of patented medicines at reasonable/affordable prices. It will explore the practical application and significance of these provisions in addressing the issue of the exorbitant and unaffordable pricing of patented medicines. Additionally, the paper will analyse the role and impact of mechanisms like compulsory licensing, parallel imports, exhaustion, and revocation of patents in achieving this goal.

Compulsory licenses as a tool to lower drug prices

Discussions worldwide have revolved around the implementation of compulsory licenses as a strategy to lower the costs of patented medicines and, consequently, improve accessibility.Developing nations with existing patent laws have incorporated compulsory licensing clauses in their patent statutes as a check on patent abuse and to try and lower high medicine prices.[13] A compulsory license issued by the government allows non-patentees to utilize a patent to manufacture and distribute patented products or processes, with or without the patentee's consent, in exchange for the payment of a fair amount in royalties for a specified period. Competition, which could arise as the result of the grant of compulsory licenses among manufacturers, would eventually push prices down if Indian manufacturers were granted compulsory licenses to make the patented medicines. The royalties paid to the inventors would continue to provide them with the

13 Anna Niesporek, COMPULSORY LICENSING OF PHARMACEUTICAL PRODUCTS & ACCESS TO ESSENTIAL MEDICINES IN DEVELOPING COUNTRIES 14(2005).

required financial resources to encourage their research and also act as an incentive for increased allocation of resources to pharmaceutical R&D.[14] Analysis of pre- and post-compulsory licensing pricing reveals that the implementation of compulsory licensing is generally associated with a reduction in the price of a patented drug. However, it is important to note that certain limitations and conditions may apply to this observation.[15]

Despite being one of the most contentious TRIPS flexibilities and hailed as the best defence against the anticipated price increase in the post-TRIPS world, very few compulsory licenses have been granted thus far, even among the entirety of WTO member-states. Since the signing of TRIPS, countries have discussed or utilized compulsory licenseson multiple instances to address access issues with drugs, especially those used to treat cancer, hepatitis C, and HIV/AIDS.[16]Brazil, Ecuador, Ghana, Indonesia, Malaysia, Mozambique, Thailand, Rwanda, Zambia, and Zimbabwe all granted compulsory licensing for one or more antiretroviral drugs in the 2000s to address the plight of their HIV-infected residents who were unable to afford the highly-priced drugs which were under patents then. Most of these nations granted licenses for specific patented drugs, whereas Ghana and Zimbabwe did so for all antiretroviral medications categorically. There also have been instances where the patent owners gave a discount or a voluntary license for medicine after a public statement by the government or talking about the possibility of doing so.[17]

Upon observing the instances of compulsory licenses beinggranted,

14 Sudip Chaudhuri, *High Prices of Patented Medicines in India: Can We Do Anything About It?*, YOJANA, Feb. 8, 2014.

15 Eduardo Urias & Shyama V. Ramani, *Access to medicines after TRIPS: Is compulsory licensing an effective mechanism to lower drug prices? A review of the existing evidence*, 3 J. INT. BUS. POLICY 367 (2020) (Mar.24,2023, 10.30 AM),https://doi.org/10.1057/s42214-020-00068-4.

16 Ellen T. Hoen, PRIVATE PATENTS AND PUBLIC HEALTH CHANGING INTELLECTUAL PROPERTY RULES FOR ACCESS TO MEDICINES (2016).

17 Hilary Wong, *The case for compulsory licensing during COVID-19*, 10 J. GLOB. HEALTH (2020).

it can be clearly understood thatprice considerations are often taken into account while granting compulsory licenses.[18]A few of the different instances when a granted compulsory license or an attempt to grant one had a direct impact on drug prices are discussed and analysed in detail below. For instance, Thailand issued a compulsory licensing for the patented AIDS medicine efavirenz and two additional drugs in 2007, and Brazil followed suit in 2008 by granting a compulsory license for efavirenz. Price considerations played a significant role in each of these instances. Thailand cited its own laws and a declaration made at a World Trade Organisation (WTO) summit in Doha, Qatar, in 2001, about the relationship between the TRIPS agreement and public health in granting the compulsory license[19]. According to the Thai Ministry of Public Health, countries "have a right to issue a safeguard measure to protect public health, especially for universal access to essential medications using compulsory licensing on the patent of pharmaceutical products."[20]

In Brazil, after failing to come to a price reduction deal with the original drug manufacturer Merck, the country moved through with the compulsory licensing. Merck's best offer, which offered a thirty percent cut from Brazil's middle-income nation pricing of US$1.57 per pill, was described as "the lowest price of any country with a comparable wealth and disease burden."[21] The bid was unacceptable to the Brazilian government,

18 Eric W. Bond & Kamal Saggi, *Compulsory licensing, price controls, and access to patented foreign products*, 109 J.Dev. Econ. 217, (2014) (Mar. 24,2023,10.30 AM),https://doi.org/10.1016/j.jdeveco.2014.04.001

19 Robert Steinbrook, *Thailand and the Compulsory Licensing of Efavirenz*, 356 N. ENGL. J. MED 544, (2007), (Mar. 24,2023,10.30 AM) https://doi.org/10.1056/nejmp068297

20 Announcement of the Department of Disease Control, Ministry of Public Health, Thailand, on the public use of patents for pharmaceutical products. November 29, 2006.

21 *Brazil Issues Compulsory License for AIDS Drug,* BRIDGES WEEKLY TRADE NEWS DIGEST 16(2007), (Apr. 25, 2023,11 AM) https://www0.anu.edu.au/fellows/pdrahos/pdfs/bridges_0507.pdf.

and after the grant of the compulsory license, it imported cheaper generic substitutes for the drug from India at a rate of US$0.45 per tablet. Notably, prior to 2006, Brazil had a few instances where it was successful in lowering the cost of patented medications in their nation by threatening to issue them with compulsory licenses.[22] A similar factor that existed in both countries was that there was essentially only one local producer in both Thailand and Brazil who was qualified to manufacture the patented medicine under a compulsory license, and in both cases, the quality of the local producer's product was noticeably inferior to that of the original patent-holder.[23] A few studies have been conducted through reviews of the available data about the effect of compulsory licensing on drug pricing. A 2020 study, after analysing fifty-one cases of pre- and post-compulsorylicensing, found that, with a few notable exceptions, a compulsory licensing event is likely to lower the price of patented medicine.[24]

It can also be seen that the threat to issue a compulsory license can affect the behaviour of patent holders to the advantage of developing countries. For instance, unlike Thailand, Brazil did not have to issue a compulsory license to bring down the price of another ART drug, lopinavir/ritonavir. Abbott Laboratories eventually reduced the price of lopinavir/ritonavir in Brazil from US$3241 PPPY (per patient per year) to US$1380 PPPY for an older version and US$1518 for a heat-stable version as a result of Brazil's persistent price negotiations and a credible threat of having already issued a compulsory license. However, it must be noted that even though the cost of Abbott's lopinavir/ritonavir in Brazil was reduced, it was still more than twice as expensive as Thailand's purchase of generic lopinavir/ritonavir through compulsory licensing and importation from India. Similarly, low-income nations like Ghana, Zimbabwe, and Mozambique, among others, have relied comparatively more on compulsory licenses to promote access

22 *Id.*

23 Eric W Bond & Kamal Saggi, *supra* note 18.

24 Eduardo Urias & Shyama V. Ramani, *supra* note 15.

and affordability to high-priced patented drugs than high-income nations.

India's first and only granted compulsory license so far is for the drug Sorafenib (Nexavar) which was issued in March 2012 to Natco, and it is important to note that here again, price considerations played a crucial role. According to the provisions of the Indian Patent Act 1970, a compulsory license may be granted after three years from the date of grant of the patent when the patented drug is unavailable in such a way that the reasonable requirements of the public are not satisfied, or if they are not affordable at a reasonable price, or if the invention is not worked in the territory of India.[25] As was already established, India's first compulsory license granted under section 84 was based on what the patent controller believed to be an unreasonable price to patients and local producers.[26] The medicine Nexavarwas originally patented by Bayer, who valued it at $5,000 per month. The applicant, in this case, Natco Pharma, proposed a price of $170 per month, representing a roughly 97% reduction in overall cost.[27]

This case brought forth the debate of how "reasonable affordability" should be defined. Bayer made an effort to defend the expense of research and development (R&D) incurred throughout development in order to justify the price of Nexavar. Bayer claimed that because generic manufacturers don't have to pay these R&D expenses, the cost of a generic medicine may be reduced by about 97% compared to a branded drug. However, Natco Pharma argued throughout the trial that it was incorrect to expect the entire R&D cost incurred to develop a drug to be borne by the Indian market. The drug is also sold outside India. Natco had argued that Bayer had made an inappropriate assumption about recouping the research costs as they sell Nexavar in multiple countries. It was agreed that

25 Section 84 of the Patent Act, 1970

26 Bayer Corporation v. Natco Pharma Ltd., Intellectual Property Appellate Board, Order No. 45/2013

27 Natasha Nayak, *Enhancing Affordable Pharmaceutical Healthcare: Possibilities in Indian Competition Law Regime*, 53 EPW (2018).

in order for Bayer to launch other drugs and further survive and invest in developing innovative treatments, the cost of Nexavar must be recovered. However, it is to be noted that Bayer is not entitled to profits for R&D costs multiple times over from multiple countries. It was argued that "reasonably affordable price," as defined in section 84, should be viewed from the public's perspective, not from a company's standpoint, to which the Controller concurred with Natco Pharma. Although Bayer later made an appeal to the erstwhile Intellectual Property Appellate Board (IPAB), it failed.[28] The major takeaway from India's first compulsory licensing case is that the Indian courts have approached "reasonable affordability" by taking the perspective of the public as opposed to the perspective of the patent holder.

It has to be noted that no further compulsory licenses have been issued under Section 92, which provides discretionary powers to the government to issue compulsory licenses by way of a notification in cases of a 'national emergency, extreme urgency or non-commercial use.' The Central Government attempted to take up a suggestion from the Health Ministry to give a mandatory license for the cancer-treating medication Herclon (trastuzumab) in 2013 when the Health Ministry argued for compulsory licensing under section 92 as Herclon cost $1,050 in India. Although there were no specific details on which of the three conditions under section 92 was used by the Government, the move led to an unexpected reaction from the patent holder Roche Holdings, which gained approval for manufacturing a generic version of their innovator drug themselves and did not file for a patent in India for the same.[29] Similarly, Emcure Pharmaceutical Ltd. (Emcure), a domestic pharmaceutical company, got a license from Roche Holding to produce and market Biceltis, the generic form of Herclon. The

28 Bela Gandhi, *India's Compulsory License Model: Increased Pharmaceutical Access and Innovation Coexist*, 33 BRIGH. YOUNG UNIV. L. REV. 5 (2019)

29 Roche gives up on India patent for a breast cancer drug, Reuters, Aug. 16,2013 (May 20, 2023,11 AM), https://www.reuters.com/article/us-roche-herceptin-india-idUSBRE97F08220130816 .

medicine was offered in India by Emcure and Roche Holding in several forms that were sold separately. It costs about $800 for this generic version of the innovator medicine, which is approximately $250 less than the branded original. As a result of Roche's relinquishment of its attempt to patent the Trastuzumab, the companies Biocon and Mylan developed a bio similar to Herclon for roughly $650. Thus, the attempt by the government to grant a compulsory license indirectly led to the availability of cheaper generic alternatives for higher-priced drugs. Although the efficacy of such biosimilars may be a concern as the lower prices may encourage Indians to prefer the cheaper bio-similar version over the expensive originator drug, the safety and efficacy of the latter are more conclusively proven.[30]

However, the success rate of grants of compulsory licenses in India is also low, as there has been only failed attempts post-2012.[31] In 2013, BDR Pharmaceuticals, a generic manufacturer from India, made an unsuccessful attempt to obtain a compulsory license for the drug Dasatinib, sold under the brand name Sprycel in India by the patent holder, Bristol-Meyers-Squib(BMS).[32]The failure can be attributed to two factors. Firstly, BDR did not make any attempts to secure a voluntary license from the patentee under reasonable terms and conditions, as required by Section 84, thus presenting a technical issue. Secondly, BDR applied for a compulsory license, citing "evergreening" as the basis for their application.The court held that although the evergreening of patents is against the patent policy in India, it is not a basis for an action under section 84. The court reiterated that for a compulsory license to be issued, the drug should be unavailable, unaffordable, or unsupplied, as stipulated in section 84. Interestingly, BDR

30 Kenan Machado, *Generic Herceptin Approved in India; India's Biocon to Market Generic Version of Breast-Cancer Drug*, Wall Street J., 2013. (May 20,2023,11.30 AM) https://www.proquest.com/docview/1462049894/abstract/92B76

31 Bayer Corporation v. Natco Pharma Ltd., Intellectual Property Appellate Board, Order No. 45/2013

32 BDR Pharmaceuticals International Pvt. Ltd v. Bristol Myers Squibb Company C.L.A. No. 1 of 2013

had an opportunity to cite the unaffordability of the drug as a ground for obtaining the compulsory license as the said drug was priced at $2,383 by BMS, and BDR had quoted a price as low as $116 per month for a patient in need of Sprycel for chronic myeloid leukaemia and would have stood at a better chance of getting the compulsory license had it proceeded on these grounds.

Another failed attempt by an Indian generic manufacturer was in 2015 when Lee Pharma filed an application for a compulsory license for the patent covering AstraZeneca's anti-diabetic drug Saxagliptin. Lee Pharma failed to prove how the reasonable expectations of the general public were not met for Saxagliptin and how Saxagliptin's requirements differed compared to those of other DPP-4 inhibitors. Saxagliptin is just one member of a class of drugs called DPP-IV inhibitors, used to manage Type II Diabetes Mellitus. The claim that Saxagliptin alone was being supplied at a high price was decided to be unfounded as other DPP-4 inhibitors were in the same price range. In this instance, a case for unaffordability and unavailability was not properly established because Lee Pharma could not provide data on the precise number of patients who were prescribed the patented medication and how many of them were unable to acquire it owing to inaccessibility and unaffordability.[33] The reasons and circumstances that have been used to control and award compulsory licenses in both high-income and low-income nations, as discussed above, demonstrate the adaptability and potential of the compulsory licensing system to meet a variety of public interests and concerns, amongst which affordability is a major factor.[34]

33 *Lee Pharma's Compulsory License Application Rejected*, Patents Rewind (2016) (May 20, 2023, 11.30 AM), https://patentsrewind.wordpress.com/2016/01/21/lee-pharmas-compulsory-license-application-rejected/ .

34 Carlos M. Correa, *Intellectual Property Rights and The Use of Compulsory Licenses: Options for Developing Countries*, (1999). (May 20, 2023, 11.30 AM) https://policycommons.net/artifacts/3136620/intellectual-property-rights-and-the-use-of-compulsory-licenses/3929924/

As can be seen, the availability of generic substitutes in India has prompted developing countries across the world to attempt compulsory licensing with an aim to import good-quality low-cost drugs from India. Thus, India takes centre stage in the mission to deliver accessible and affordable medicines globally. However, the single case of a successful domestic compulsory license in over twenty years is an antithesis to this, and a possible explanation for the low number of granted compulsory licenses may point to political reasons. The use of compulsory licenses may impede commerce with nations that make patented medicines. It is not required for compulsory licensing to actually materialize in order for this loss to occur; occasionally, just the threat of compulsory licensing can have a negative impact on international commercial ties.[35] The Natco-Bayer case can always serve as a blueprint for governments all over the world to understand the grounds on which compulsory licenses may be granted to increase access to medicine through decreased prices.

Government uses Exception and Impact on price competition

The provisions that allow the Government to use the inventions for their own purposes or in the public interest can be brought together under the government use exception to patents and have been incorporated into the national legislation of more than 60 WTO Member States. Upon surveying these legislations, it can be found that the use or acquisition of patented inventions by the Government is permitted mainly on the criteria of public interest. Public interest can include aspects or issues of national security, national emergency, nutrition, health, or the development of other vital sectors of the national economy so required, or if such use adequately remedies the anticompetitive practice engaged by the patentee or his licensee.[36] When discussing the application of this exception in the context

35 Muhammad Zaheer Abbas, *Pros and Cons of Compulsory Licensing: An Analysis of Arguments*, 3 Int. J. Soc. Sci. Humanit. 254 (2013).

36 Wipo Secretariat, EXCEPTIONS AND LIMITATIONS TO PATENT RIGHTS: COMPULSORY LICENSES AND/OR GOVERNMENT USE (PART II), (2014).

of high prices, special attention may be given to Morocco. According to the country's response to the Twenty-First Session of the Standing Committee on the Law of Patents held in Geneva in 2014, the country was soon about to incorporate the following provision into its patent law statute:

Where public health so requires, patents issued for medicinal products, for processes for obtaining medicinal products, for products necessary to obtain such medicinal products or for processes for making such products, may, where such products are not available to the public in sufficient quantity or quality or at ***unusually high prices***, automatically be worked.

The provisions on Government use and acquisition were incorporated into the Indian Patent Act initially on the recommendation of the Ayyengar Committee, who designed these provisions analogous to the corresponding provisions in the U.K. Patents Act 1949. According to the Committee's report, these provisions rest on a principle of high public policy, and it also recommends an expansion of the concept of "Government use." The underlying rationale and philosophy behind this exception, as per U.K. jurisprudence, was that "the State which grants a patent monopoly was held entitled to use the invention for governmental needs without reference to the wishes of the patentee subject only to the payment of reasonable compensation, and not what the patentee chose to demand." The Ayyengar Committee proposed a provision for not only used by Government when required but also allows the Government to acquire the patented invention when certain contingencies arise:

. I am of the opinion that in India, there is a need for a provision enabling the Government to compulsorily acquire patented inventions or inventions for which applications for patents are pending as under the law, as it stands, Government has no power to make such acquisition. Such a power to acquire a patent would be useful to Government in more than one contingency.

These exclusions were included in the Act because, in certain situations, a direct purchase would be more cost-effective and satisfying

than acquiring a license under the terms of a compulsory license, enabling them to be used only in case of particular eventualities. India affirmed that there are no limitations with respect to use by the Government at the Twenty-First Session of the Standing Committee on the Law of Patents held in Geneva in 2014.[37]

The current Indian provisions that provide for Government use of inventions are mainly in Chapter XVII of the Patent Act, 1970 - "Use of inventions for purposes of Government and Acquisition of inventions by Central Government." Section 99 defines "use of an invention for the purposes of government" as "an invention is said to be used for the purposes of government if it is made, used, exercised or sold for the purposes of the Central Government, State Government or a Government undertaking." As per Chapter XVII, the Central Government and any person authorized in writing may use the patented invention for the purposes of the Government.[38] The Act allowed for the acquisition of inventions and patents by the Central Government if satisfied that it is necessary that an invention should be acquired from the applicant or the patentee for a public purpose.[39] Additionally, while reading Section 47 along with Chapter XVII, it can be understood that the grant of a patent shall be subject to the condition that a patented drug may be imported by the Government for its own use or for distribution in any Government health facility.

Parallel Import and its Effect on Prices and Competition

Parallel imports, often referred to as grey-market imports, involve the legitimateproduction of goods under trademark, patent, or copyright protection. These goods are initially introduced into one market and subsequently imported into another market without the authorization of the

37 Wipo Secretariat, *Exceptions and Limitations to Patent Rights: Compulsory Licenses and/or Government Use (Part II)*, (2014). (May 20,2023,10.30 AM) https://www.wipo.int/patents/en/topics/exceptions_limitations.html.

38 Indian Patents Act of 1970, § 100(India)

39 Indian Patents Act of 1970, § 102 (India)

local intellectual property rights holder. It develops as a result of economic arbitrage possibilities across national marketplaces with disparate prices for the same items. Parallel imports specifically emerge when global pricing disparities (represented in an accepted currency) outweigh the expenses of shipping and selling products internationally. Therefore, if allowed, PI may be anticipated to equalize consumer pricing for similar commodities across markets, despite the fact that there would still be variations due to transportation costs, tariffs, the cost of adhering to distribution restrictions, and taxes.[40] Advocates of Parallel Import argue that consumers stand to benefit from increased competition among intra-brand rivalry (competition between perfect substitutes). This claim is often made based on intuitive reasoning, suggesting that greater intra-brand rivalry leads to favourable outcomes for consumers.

Even if allowing parallel import adversely affects the rights of IPR owners, it is not possible to provide a convincing economic case for whether they are good or bad for the welfare. According to a 2020 study, while it was not initially anticipated for parallel imports (PI) to have a substantial presence in the domestic market, the reality is that it has notable effects on domestic prices. This apprehension is also the reason why economists and market analysts doubt whether PI can induce positive effects on consumer welfare.[41] One of the reasons that the experts cite for this is that clients or parties involved, i.e., parallel importers, frequently possess sufficient market clout to prevent them from passing on the lower prices they pay for products through PI to final consumers. Thus, PI could merely result in an increase in the profit of parallel importers and a decrease in the profit of companies whose goods are imported.

Article 6 of the TRIPS agreement provides for the concept of

40 Keith Maskus, *Parallel Imports in Pharmaceuticals: Implications for Competition and Prices in Developing Countries* , (2001),(May 22,2023,10.30 AM),https://www.wipo.int/about-ip/en/studies/pdf/ssa_maskus_pi.pdf .

41 Yannis Katsoulacos &Kalliopi Benetatou, *An economic approach to parallel imports effects and competition policy*, 6 Russ. J. EcoN. 315 (2020).

exhaustion, and it declares that the member nations are allowed to decide on intellectual property rights exhaustion in their domestic legislation[42]. The member nation may also choose the restrictions on the application of the exhaustion of rights in their domestic legislation without going against the spirit of the TRIPS. The principle of exhaustion of rights was propounded as part of a health policy-related issue, and this was reiterated in Para 4 of the Doha Declaration, which stated: "the effect of the provision in the TRIPS agreement that is relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without such challenge, subject to the most favoured nation and national treatment provisions of Articles 3 and 4". In the context of developing countries' access to affordable drugs, the Doha Declaration brought the issue of international patent rights exhaustion and parallel imports to the centre stage. Due to the extensive regulations governing the pharmaceutical sector, the potential for parallel imports is directly influenced by a combination of domestic and international laws. Therefore, it is crucial to examine how pharmaceutical companies react and adapt to these provisions concerning parallel imports.

In India, parallel import is technically allowed as it recognizes the principle of international exhaustion. In the context of Indian patent jurisprudence and legislative history, it is quite evident that parallel imports were allowed with the goal of promoting free trade, fostering healthy competition, and regulating prices. The absolute control of the allocation channels that results from not implementing the parallel importation theory would strengthen the patent law's tendency to promote monopolies.[43]

There was no specific clause addressing the issue of exhaustion in the

42 Article 6 recites*: "*For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights".

43 Kumar Salva Raghuvanshi, *Parallel Import in Relation to Patent and Trademark*, SSRN Electronic Journal (2016) (May 20, 2023,10.20 AM),https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912741.

Patent Act of 1970 prior to the passage of the Patent (Amendment) Act of 2002. The international discussions are reflected in the Indian patent law as well. The parallel import was introduced by the Patent (Amendment) Act, 2002, under Section 107A (b) stated that "Importation of patented products by any person who is duly authorized by the patentee to sell or distribute the product" shall not be considered as an infringement of patent rights. This provision was further amended in 2005 as many patent practitioners and policymakers thought its scope was limited. The current Section-107A(b) now reads as "importation of patented products by any person from a person who is duly authorized under the law to produce and sell or distribute the product," which will not constitute an infringement of the patent. This clause makes it abundantly apparent that the patent holder's rights to the product are exhausted after the first sale is made by a person with the patentee's authorization, and he/she is no longer able to regulate the resale or redistribution of the sold item. This allows the importer the flexibility to buy the goods from anybody (even a reseller) instead of just from those who are approved by the patentee, and doing so will not be considered an act of infringement. The question of sufficient consent or due authorization for determining whether a patentee's rights have been exhausted, when ultimately brought before an Indian court, will quite significantly depend on the facts of the particular case.[44] Although the patent law provided for parallel import, not many Indian court decisions have been made to conclusively determine the scope of these provisions with respect to patents as yet. Additionally, there is a dearth of literature, including empirical studies, which analysed the prevalence of parallel imports in the Indian patented goods market and its impact on the prices and structure of markets.

An analysis of the literature specific to the application of parallel imports to the pharmaceutical industry does not provide any uniform findings. Two significant studies conducted in the field during 2002-03

44 Sonia Baldia, *Exhaustion and Parallel Imports in India*, *in* PARALLEL IMPORTS IN ASIA (Christopher Heath ed., 2004).

yielded conflicting outcomes regarding the overall advantages of parallel trade in drugs. Notably, the European Association of Euro-Pharmaceutical Companies funded the research conducted by the York Health Consortium at the University of York in 2003, while Johnson & Johnson sponsored the study conducted by LSE Health and Social Care at the London School of Economics in 2004. The distinct sponsorship of these studies unmistakably reflects the diverse shareholder interests influencing the final reports. In contrast to the LSE study, which showed minimal savings and lacked evidence of competitive effects, the York study demonstrated significant direct savings along with indirect competitive impacts resulting from parallel trading. While the LSE study found limited direct benefits to patients and suggested that parallel traders were the main beneficiaries, the York study emphasized substantial benefits to patients, both directly and indirectly, through savings to the national health system.The York research found that the rising costs of public health care in many European nations had been kept in check in part by the direct and indirect savings from the parallel trade of medicines. On the other hand, the LSE report came to the conclusion that the lack of significant direct benefits to health insurance organizations, the lack of price competition in individual markets, the existence of reported shortages of products in some member states, and the size of absolute and relative profits accruing to parallel traders may prompt policy-makers to reassess the justification for parallel trade. Similarly, another study on the Swedish experience for the period of 2002–2007 concluded that in the majority of circumstances, competition from more parallel traders does not result in appreciable additional price reductions. The major finding of the study was that in response to competition from a single parallel trader who offers goods containing the same ingredient but, say, at a different strength, the price of the goods falls by 3% over time. Instead, a product with the same strength, method of administration, and virtually identical package size would cost 7% less if it were sold by a parallel trader. This analysis was based on monthly pricing information for 1586 domestically sourced, on-patent items that were bought and sold in Sweden between October 2002 and October 2007.

Revocation of Patent and its application to lower prices of patented products

Section 66 provides the Central Government with wide power to revoke a patent if it is of the opinion that a patent or the mode in which it is exercised is mischievous to the State or generally prejudicial to the public. The terms 'mischievous to the State' or 'generally prejudicial to the public' are not defined and, therefore, may be interpreted to be used in any circumstance where the exclusive patent rights are exercised in such a way that it is working against the public interest. An application under Section 66 for the revocation of the patent in the public interest was made in the case of *Cipla Limited* v. *Novartis Ag &Anr*[45]. The patent in dispute pertained to the Novartis-owned medication "Indacaterol." Under the trade name "Unibrez," Cipla introduced a less expensive generic version of this medication in November 2014. In comparison to Novartis' Onbrez, which was priced at INR 677 a pack, Cipla's medicine was just INR 130 per pack. In order to prevent Cipla from violating its patent, Novartis filed a patent infringement lawsuit with the Delhi High Court. According to Cipla, Novartis's patent was to be revoked in accordance with Sections 92(3) and 66 of the Patents Act of 1970. The justifications given for revocation were based on the drug's availability, affordability, and local working and hence appeared more like the grounds required to be met for applying for a compulsory license. However, Cipla could not have submitted a section 84 application since it never sought to obtain a voluntary licence from Novartis for the impugned drug. Cipla's argument for section 66 revocation was weak, and it was exceedingly improbable that the drug's inadequate availability, high cost, and non-working would have been interpreted as "mischievous to state" or "generally prejudicial to the public." Cipla withdrew its representation later. However, this section for revocation in the public interest may be applied in cases where patented

45 Cipla Limited v. Novartis Ag &Anr, CM Nos.731/2015, 1288/2015, 2090/2015 (2017). (India)

medicines are not affordable to the public. The scope of the provision is broad and hence may be used in the future in circumstances when it is crucial for the population to obtain the drugs at a cost lower than the price at which it is sold.

Restrictive Conditions under Section 140 and its Impact on Prices

The Ayyangar Committee Report in its Part VIII, under the heading 'Other Types of Monopoly Abuses, Restrictive Trade Practices and Monopolistic Combinations' talks about three types of abuses[46] - (a) abuse of patent rights through non-working and importation, (b) abuse of patent rights to extend monopoly through the insertion of conditions for sale, lease or license of the patented processes/products, and (c) use of patents or a group of patents to form monopolistic cartels and combinations to control production and distribution. The Report suggests granting compulsory licenses as a countermeasure to patents that were not worked in the territory of India. A clause similar to the present Section 140 was suggested to address the second form of misuse. However, the Report advocated the formation of a special regulatory body and associated regulation for the third kind of abuse, which was acknowledged to have been brought on by an excessive concentration of economic power. It's significant that Justice Ayyangar made a distinction between the misuse of economic power acquired as a result of owning a patent and the abuse of patent rights by non-working parties.[47]

Under section 140, certain conditions imposed by the patent holder, such as tie-ins, restrictive use of the patented products or processes, exclusive grant-backs, coercive package licensing, or prevention to challenges of the patent's validity by the licensor are deemed to be restrictive, and such conditions are void *ab initio*. Section 140(3) establishes

46 Shri Justice N. RajagopalaAyyangar, *supra* note 8, at 72

47 J Sai Deepak, *Patents and Competition Law: Identifying Jurisdictional Metes and Bounds in the Indian Context*, 27 NLSIR (2015).

such agreements as grounds for defence in an infringement suit. It is to be noted that such conditions are directly and indirectly capable of drivingthe prices of patented products high as it unduly strengthens the monopoly power of the patent holder. Anti-competitive agreements or practices can also contribute to high pricing. For example, collusive behaviour among competitors, such as price-fixing agreements or market-sharing arrangements, can artificially inflate prices and restrict competition. Such practices undermine the competitive market dynamics that are essential for price discovery and consumer choice. If unfair pricing terms form part of any licensing contract, then the licensee may resort to this provision of the Act along with the remedies under the Indian Competition Act, 2002.

Conclusion

High prices or excessive prices are usually discussed in the context of competition law and market regulations. However, the predominant view isthat pricing is not a function of competition policy and should be left to the decision of free market forces. According to them, a high price will be brought down by the market by reduced demand, or else such products may find it difficult to survive in a competitive market. However, studies have shown that the market is not always competitive, especially in the case of a patented drug. Patent excludes competition by tending to create a monopoly. Patent law is built with the intention of giving exclusive rights to use, sell and manufacture, thus offering a regulatory framework for the promotion of technological progress and, importantly, protecting the interests of the investors. However, Justice Ayyangar revealed that the Patents Act was never meant to deal with market distortion since the nature of the inquiry is beyond the scope of the Act. Therefore, the function of ensuring the affordability of patented medicines is not the function of a single regulatory system. Hence, there is a need to usea separate lens to look at the market of a patented drug considering the objective of patent law and its exclusion from certain types of anti-competitive practices. This gains more relevance in the context of essential drugs, and the

affordability of the same cannot be completely left to the freedom of the market players to decide on the price in a welfare state. The discussed experiences, examples, and instances in the paper reveal this particular element requires an effective intervention of patent law, competition law, and other regulatory mechanisms associated with the pharmaceutical industry to ensure that medicines are accessible and affordable in India. Compulsory licenses and parallel imports are the most discussed areas among the different TRIPS flexibilities, especially in the context of the affordability of medicines. However, these measures have not produced the results as expected. Compulsory licenses are only sparingly granted due to political reasons, and due to this, developing countries are forced to bring patented medicines under price control laws. Parallel imports, as mentioned, are not conclusively proven to bring down the prices in the market as per the empirical economic literature so far. Government use exceptions arealso used by countries in rare cases. For instance, it is clear from the frequency and technology domains where the government use exemption has been used that it was formerly used in Malaysia and Zambia for pharmaceutical products. Although it could be effective to an extent, these measures also have a certain set of limitations. Here the competition law can play a bigger role in promoting and maintaining fair market competition, preventing anti-competitive practices, and protecting consumer welfare, especially where the presence of a patent holder in a pharmaceutical market can contribute to high pricing if such a patent holder is monopolistic or is a dominant market player.

In the context of the Indian regulatory framework, the public interest provisions incorporated into the Indian Patent Act reflect the priorities of the country. India has time and again asserted that the provisions such as Government use may be used without any limitation, although it has never used these provisions. However, despite the inclusion of these public interest provisions in the Indian Patent Act, the practical implementation of these exceptions and limitations to patent grants, such as Government use, has been limited and has not been utilized to address the issues of

access and affordability of patented products. The reason for this may be attributed to the legal loopholes in the framework or maybe due to political reasons. In effect, these measures that were originally thought to solve the access and affordability problem of patented products did not meet their purpose. By leveraging the provisions and mechanisms in the patent statute, policymakers can enhance accessibility to patented medicines, promote competition, and ultimately improve the affordability of essential drugs for the benefit of the population.

Challenges and Prospects in India's effort to reduce Cybercrime applying Artificial Intelligence Techniques

Kanika Tyagi*

Introduction

The proliferation of cybercrime has emerged as a ubiquitous menace in the contemporary global landscape, presenting formidable obstacles to individuals, institutions, and governing bodies alike. As one of the fastest-growing economies and a technology-driven society, India faces substantial risks in the digital realm. Artificial Intelligence (AI) has been identified as a potent instrument in the fight against cyber threats and the enhancement of cybersecurity protocols.[1] The present study investigates the function of artificial intelligence in the prevention of cybercrimes within the context of India. The present research endeavours to examine the diverse implementations of AI in the identification, pre-emption, and alleviation of cyber hazards.

AI-based systems can analyze vast amounts of data, identify patterns, and predict potential cyber-attacks, enabling proactive defence mechanisms.

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1 Prashant Mali, CYBER LAW AND CYBER CRIMES 249 (2nd ed. 2015).

Machine learning algorithms can learn from historical data and adapt to evolving threats, continuously enhancing their effectiveness. Furthermore, anomaly detection systems that are powered by artificial intelligence have the capability to oversee network traffic, detect atypical patterns, and expediently notify security personnel, thereby facilitating rapid reactions to potential cyber threats.[2] The Indian government has acknowledged the significance of AI in addressing cybercrimes and has implemented noteworthy measures. The primary objective of the National Cyber Coordination Centre (NCCC) is to enable expeditious and seamless transmission of information and intelligence among law enforcement agencies, thereby augmenting the nation›s cyber defence capabilities.[3]

However, the adoption of AI in preventing cybercrimes in India also presents challenges. The preservation of data privacy and protection is of paramount importance, given that AI systems are heavily reliant on copious amounts of sensitive data. Achieving a harmonious equilibrium between efficacious cybersecurity protocols and the preservation of individual privacy rights necessitates meticulous contemplation and resilient regulatory structures.

The present study delves into the considerable potential of artificial intelligence (AI) in addressing cybercrime within the Indian context through analysis of the legislative framework and judicial exposition. The proliferation of technology and the growing dependence on digital infrastructure have led to a significant rise in the risk of cybercrime, which has emerged as a pressing issue on a global scale, including in India. With the increasing adoption of digital technology and a corresponding rise in internet usage, it has become imperative to implement robust strategies for identifying, averting, and mitigating cyber risks. The objective of this study is to underscore the significance of AI in tackling the distinctive obstacles

2 *Id*., at 291.

3 *See* Indian Cybercrime Coordination Centre, Ministry of Home Affairs, Govt. of India (Apr. 25, 2023 12.30 PM), https://i4c.mha.gov.in/mission.aspx.

posed by cybercrime in India, and its capacity to augment endeavours towards cybersecurity.'Artificial intelligence'or 'AI', "is the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings. The term is frequently applied to the project of developing systems endowed with the intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience.[4]The next section explores the reasons why there is a need for AI in detecting cybercrimes in India, considering the unique characteristics of the Indian criminal justice system and the evolving nature of cybercrimes.

Why the need for AI in detecting cybercrime in India:

1. Scale and Complexity:India boasts a vast and rapidly expanding population of internet users, positioning it among the global leaders in terms of scale and complexity. The rapidly expanding scope of digital operations presents a formidable obstacle for conventional cybersecurity approaches to effectively adapt to the continuously evolving threat environment. Artificial Intelligence possesses the capability to effectively identify patterns and irregularities that may signify cybercrime on a wide range of digital platforms, owing to its capacity to analyze extensive quantities of data.
2. Advanced Threats:The realm of cybersecurity is constantly challenged by advanced threats, as cybercriminals persistently devise intricate methods to capitalize on weaknesses in digital infrastructures. AI-enabled technologies, such as machine learning[5]

4 B.J.Copeland, *What is Artificial Intelligence*, ENCYCLOPEDIA BRITANNICA, (Apr.25,2023,11.30 AM) https://www.britannica.com/technology/artificial-intelligence.

5 Machine Learning (ML) refers to the utilization and advancement of computer systems that possess the capability to learn and adjust without the need for explicit instructions. This is achieved through the implementation of algorithms and statistical models that facilitate the analysis and inference of patterns in data. This refers to a sub-discipline

and deep learning algorithms[6], possess the ability to adapt and evolve in order to detect emerging threats and identify novel attack vectors that conventional security measures may fail to recognize.

3. Data Breaches and Fraud:The occurrence of data breaches and financial fraud incidents has increased in India, thereby posing a substantial risk to individuals, businesses, and the economy. Artificial intelligence can be employed to analyse extensive datasets, recognise patterns of deceitful conduct, and expeditiously identify and avert data breaches, thereby protecting confidential data.

4. Optimization of resources:The optimisation of resources is a critical issue in India due to the current scarcity of proficient cybersecurity experts. Through the automation of specific tasks and the enhancement of human expertise, artificial intelligence (AI) has the potential to facilitate the optimisation of resource allocation. This, in turn, can allow cybersecurity teams to concentrate on more intricate and crucial aspects of investigating and responding to cybercrime.

5. Real-time Response:AI-based systems have the capability to offer instantaneous monitoring and threat intelligence, thereby enabling prompt response and mitigation of cyber-attacks. The ability to promptly take action is of utmost significance in India,

within the field of artificial intelligence that focuses on the autonomous development of a computer system's intelligence and its ability to enhance its performance through experiential learning, without the need for explicit programming .(Apr.25,2023,1 PM),https://www.ibm.com/topics/machine-learning.

6 Deep learning is a machine learning subfield that involves using neural networks consisting of three or more layers.The utilization of deep learning has been instrumental in advancing various artificial intelligence (AI)applications and services, which have significantly enhanced automation by enabling analytical and physical tasks to be executed without human intervention.(Apr. 28, 2023, 1.30 PM),https:// www.ibm.com/topics/deep-learning .

given the extensive implementation of electronic transactions and e-governance programmes, which require measures to avert monetary damages and safeguard vital infrastructure.

The utilisation of artificial intelligence (AI) in combatting cybercrime presents significant potential for India. The utilisation of AI algorithms and technologies has the potential to greatly improve the cybersecurity capabilities of the nation, leading to more efficient detection and prevention of cyber threats. This, in turn, can provide enhanced protection for the digital infrastructure, economy, and populace. The recognition of AI's potential and its integration into India's cybercrime detection and prevention framework is imperative for policymakers, law enforcement agencies, and cybersecurity professionals to ensure a safer and more secure digital environment. In the USA, the incorporation of AI technologies into the National Cybersecurity and Communications Integration Centre (NCCIC) framework[7] confers enhanced analytical capabilities upon security analysts, thereby facilitating expedient identification of potential threats through the processing of large volumes of data. Hence, India needs to take inspiration from such a country that has robust mechanisms for curbing cyber-crimes using AI effectively. Moreover, AI can assist in forensic investigations and evidence analysis, improving the efficiency and accuracy of cybercrime investigations. Artificial intelligence algorithms have the capability to efficiently analyse vast amounts of data, uncover concealed patterns, and recognise pertinent digital evidence, thereby accelerating the investigation procedure. Also, AI-powered predictive modelling can assist in identifying high-risk individuals or groups involved in cybercriminal activities, enabling proactive measures to prevent cybercrimes before they occur.

7 National Cybersecurity and Communications Integration Centre, (Apr.23,2023,10.50 AM), https://www.cisa.gov/sites/default/files/FactSheets/NCCIC%20ICS_FactSheet_NCCIC%20ICS_S508C.pdf.

The Journey So Far:

Steps Taken in India to Curb Cybercrimes Using AI

India has acknowledged the potential of AI in addressing cybercrimes and has implemented various measures to exploit this technology to augment its cybersecurity endeavours. India has implemented various noteworthy measures and initiatives that utilise AI to combat cybercrime. India has developed a National Cyber Security Strategy[8] with the aim of establishing a comprehensive framework to tackle the challenges posed by cybersecurity. The approach recognises the significance ofAI and other nascent technologies in addressing cyber hazards, and underscores the necessity of conducting research, facilitating innovation, and implementing AI-driven cybersecurity remedies.

The Cyber Swachhta Kendra[9] was established by the Government of India in 2017 with the primary objective of identifying and eliminating botnets and malware from compromised systems. The present endeavour employs artificial intelligence algorithms to detect and alleviate malware infections, furnishing individuals and entities with efficacious tools to safeguard their systems. Further, the Cyber Forensics Technology Park (CFTP)[10] was established by India with the aim of enhancing its proficiency in the fields of digital forensics and cyber investigations. The Cyber Forensics Technology Project prioritises the advancement of cutting-edge technologies, such as AI-powered instruments, to facilitate the detection of cybercrime, analysis of data, and collection of evidence.

The significance of collaboration between academia and industry in leveraging the potential of AI to combat cybercrimes has been

8 National Cyber Security Strategy by Data Security Council of India, 2020, (May. 2, 2023,10.30 AM) https://www.dsci.in/sites/default/files/documents/resource_centre/National%20Cyber%20Security%20Strategy%202020%20DSCI%20submission.pdf.

9 The Cyber Swachhta Kendra,(May 6,2023,10.45 AM), https://www.csk.gov.in/.

10 Resource Centre for Cyber Forensics, (May.6,2023,11 AM) ,http://www.cyberforensics.in/About.aspx?AspxAutoDetectCookieSupport=1.

acknowledged by the Indian government. The promotion of AI-based cybersecurity solutions has been facilitated through the establishment of partnerships between public and private entities, as well as collaborations with research institutions like IITs and technology companies.[11]

The Artificial Intelligence for Research in Cybersecurity (AIRC) programme was launched by the Ministry of Electronics and Information Technology (MeitY) in India.[12] The objective of the programme is to provide assistance for research and development endeavours pertaining to artificial intelligence in the field of cybersecurity. Additionally, it seeks to promote the involvement of academic institutions and startups in the creation of inventive solutions.

Capacity building and skill development initiatives have been implemented in India to address the shortage of skilled cybersecurity professionals. Several educational initiatives, such as training programmes, workshops, and courses have been implemented to provide individuals with the necessary skills and knowledge in AI-based cybersecurity.

The Indian government has undertaken initiatives to raise awareness among citizens and organisations regarding optimal cybersecurity protocols and the significance of artificial intelligence in mitigating cyber threats. The objective of these campaigns is to establish a society that is knowledgeable about cyber security and capable of taking preemptive measures to safeguard itself against potential online hazards.

India engages in international collaborations and partnerships to effectively tackle global cybersecurity challenges. India engages in collaborative efforts with various organisations such as INTERPOL, the United Nations Office on Drugs and Crime (UNODC), and international cybersecurity forums to facilitate the exchange of knowledge, sharing of

11 AI for Cyber Security, (May 4,2023,10.30 AM),https://indiaai.gov.in/article/ai-for-cyber-security-10-research-initiatives-at-indian-universities..

12 AI-Based Initiatives ,2021,(May 6.2023,12.30 PM),https://analyticsindiamag.com/ai-based-initiatives-led-by-meity-in-2021/.

best practises, and collective utilisation of AI technologies.[13]Apart from this, present government initiatives for cybersecurityincludean online cybercrime reporting portal, the Indian cybercrime coordination centre, National Critical Information Infrastructure Protection Centre (NCIIPC), among several others.[14]

Despite notable advancements, there remains a considerable distance to traverse in fully leveraging the potential of AI to combat cybercrimes within the Indian context. The effective utilisation of AI to address evolving cyber threats and ensure a safer digital landscape for India will require continued investments in research and development, increased public-private partnerships, and ongoing skill enhancement.

Legislative and Judicial Approach

India has recognized the need for a robust legislative framework to address cybercrimes and has enacted several laws and regulations to combat cyber threats. While the existing legislation does not explicitly mention the use of AI, it provides a legal framework that can be applied to AI-driven cybercrime prevention. Some key legislative measures include:

Information Technology Act, 2000 (IT Act) is the primary legislation governing cybercrimes in India. It criminalizes various cyber offenses, such as unauthorized access, hacking, identity theft, and data breaches.[15] The Act provides a legal basis for prosecuting cybercriminals, and its provisions can be applied to cases involving the use of AI in cybercrime prevention.

The Personal Data Protection Bill, 2022 aims to safeguard individuals' personal data and establish guidelines for its collection, storage, and processing. While the bill primarily focuses on data privacy, its provisions

13 Key AI initiatives of the Indian Government, (May 7,2023,10.30 AM),https://analyticsindiamag.com/what-are-the-key-ai-initiatives-of-indian-government/.

14 (May 3.2023,11 PM), https://www.drishtiias.com/daily-updates/daily-news-analysis/national-cyber-security-strategy-1.

15 Information Technology Act, 2000, ss- 43(a)-(h), 65, 66.(India)

are relevant to the use of AI in cybersecurity, as it emphasizes the need for security safeguards and the protection of sensitive information.

The Cyber Security Policy Framework, 2020 outlines the government's approach to cybersecurity and provides guidance on various aspects, including technology adoption, capacity building, and international cooperation. While the policy framework does not specifically address AI, it lays the foundation for implementing AI-driven cybersecurity solutions in India.[16]

The Indian judiciary plays a crucial role in shaping the legal landscape concerning cybercrimes and the use of AI in combating them. The Supreme Court of India has been actively involved in interpreting existing laws, protecting citizens' rights, and addressing emerging challenges posed by cybercrimes. Here are a few notable Supreme Court cases related to cybercrime prevention wherein the potential of AI has been recognised by the various courts in India:

In the landmark case of *Shreya Singhal v. Union of India*[17] , the Supreme Court struck down Section 66A of the IT Act, which criminalized online speech that was deemed offensive or caused annoyance. The judgment highlighted the importance of protecting freedom of speech and expression in the digital realm, while also acknowledging the need to address cybercrimes effectively.

In *Myspace Inc. v. Super Cassettes Industries Ltd.*[18],the Delhi High Court acknowledged the role of AI algorithms in identifying infringing content online. The court recognized that AI-based tools can efficiently scan and identify copyright-infringing materials, thereby contributing to the prevention of online piracy and copyright violations.

16 *Supra* note7, at 9.

17 AIR 2015 SC 1523.

18 SCC Online Del 6382 (2016).

In *Justice K.S. Puttaswamy (Retd.) v. Union of India*[19] ,the Supreme Court recognized the right to privacy as a fundamental right guaranteed by the Indian Constitution. The judgment affirmed the importance of protecting individuals' personal data and maintaining cybersecurity measures to safeguard privacy rights.

In the case of *Amazon Seller Services Pvt. Ltd. v. Amway India Enterprises Pvt. Ltd.*[20], the Delhi High Court emphasized the significance of AI-based technology for combating online counterfeiting and protecting intellectual property rights. The court recognized the need for advanced technologies, including AI, to detect and prevent cybercrimes related to counterfeit products.

In *Vishal Shah v. State of Gujarat*[21], the Gujarat High Court highlighted the importance of leveraging AI in cybersecurity investigations. The court recognized the need for advanced technological tools, including AI algorithms, to analyze large volumes of digitalevidence and identify patterns in cybercrime cases. This case emphasized the value of AI in assisting law enforcement agencies to combat cybercrimes effectively.

State v. Ravikanth Patil[22] is also a case that involved the use of AI in the investigation and prosecution of cybercrimes. The Karnataka High Court acknowledged the significance of AI technologies in detecting and preventing cybercrimes. The court recognized the need for skilled professionals, advanced tools, and technological advancements to effectively tackle cybercrimes.

The judiciary's interpretation of existing laws and protection of fundamental rights creates a foundation for the application of AI technologies in cybersecurity. As AI continues to evolve, it is essential

19 K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1.(India)

20 FAO(OS) 133/2019 and CM APPL. 32954/2019.

21 Criminal Appeal No. 432 of 2019.

22 CRIMINAL PETITION No.1579/2019.

for the judiciary to stay updated and adapt legal frameworks accordingly to effectively address emerging cyber threats and protect the rights of individuals and organizations.

The Current Regulatory Framework in India for Curbing Cybercrime using AI:

The regulatory framework in India for curbing cybercrime using AI is still evolving, with existing laws and regulations applicable to cybercrimes serving as the foundation. While there are no specific regulations solely dedicated to AI in cybersecurity, various laws and regulatory bodies play a role in governing the use of AI technologies for cybercrime prevention. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011[23]: Under these rules, entities handling sensitive personal data or information are required to implement reasonable security practices and procedures to protect such data from unauthorized access, disclosure, or misuse. While the rules do not explicitly deal with AI, organizations utilizing AI-based cybersecurity solutions must adhere to these security requirements to ensure data protection. National Cyber Security Policy, 2013[24] also provides a broad framework for addressing cybersecurity challenges in India. Although it does not specifically address AI, it emphasizes the importance of technology adoption and encourages public-private partnerships to enhance cybersecurity capabilities. The policy serves as a guiding document for organizations implementing AI-driven cybersecurity measures.

India is in the process of enacting comprehensive data protection legislation, the Personal Data Protection (PDP) Bill, which is expected to regulate the collection, storage, processing, and transfer of personal data. While the bill focuses on data privacy, its provisions will have

23 (May 6,2023,12.30 PM), https://www.meity.gov.in/writereaddata/files/GSR313E_10511%281%29_0.pdf.

24 National Cyber Security Policy, (May 6,2023,12.30 PM), https://www.meity.gov.in/writereaddata/files/downloads/National_cyber_security_policy-2013%281%29.pdf.

implications for AI-driven cybersecurity solutions, particularly in relation to data security and consent requirements.[25]

Certain sectors in India, such as banking and financial services, telecommunications, and healthcare, have specific regulatory frameworks that govern cybersecurity practices. These regulations may require organizations in these sectors to adopt AI-driven cybersecurity measures to protect sensitive data and ensure compliance with sector-specific security standards.Regulatory bodies such as the Ministry of Electronics and Information Technology (MeitY) and the Indian Computer Emergency Response Team (CERT-In) play a vital role in regulating and monitoring cybersecurity practices in India. While they do not have specific regulations for AI in cybersecurity, they provide guidelines, advisory notes, and best practices to organizations for strengthening their cybersecurity posture.

The regulatory landscape of India is dynamic, and the Indian government is actively working towards formulating comprehensive regulations that specifically address emerging technologies like AI in the context of cybersecurity. As AI technology continues to advance and cyber threats evolve, it is expected that regulatory frameworks will be updated and refined to address the unique challenges and opportunities presented by AI in combating cybercrime.

The use of AI in Preventing Cybercrime: The Untapped Solution

Artificial intelligence (AI) holds significant potential in preventing and combating cybercrime. While AI-driven cybersecurity solutions have made notable advancements, there are still untapped opportunities that can be explored to enhance cybercrime prevention efforts in India. The following are some untapped solutions where AI can play a pivotal role:

i. Advanced Threat Detection: AI-powered systems can significantly

25 The Digital Personal Data Protection Bill, 2022, (May 6, 2023, 1 PM), https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Potection%20Bill%2C%202022_0.pdf..

enhance threat detection capabilities by continuously analyzing vast amounts of data, identifying patterns, and detecting anomalies indicative of cyber threats. Implementing AI algorithms that leverage machine learning and deep learning techniques can enable real-time identification and mitigation of emerging threats, reducing response time and minimizing potential damage.[26]

ii. ***Behavior Analysis and Anomaly Detection***: By utilizing AI, organizations can develop robust systems that monitor user behavior, network traffic, and system activities to identify suspicious patterns or anomalies. AI algorithms can learn from historical data and identify deviations from normal behavior, enabling the detection of insider threats, malicious activities, or unauthorized access attempts, thereby strengthening overall cybersecurity.

iii. ***Intelligent Cyber Incident Response***: AI can assist in automating and streamlining cyber incident response processes. AI-powered systems can analyze and prioritize incoming incidents, classify their severity, and suggest appropriate response actions. By reducing manual efforts in incident response, organizations can respond swiftly to cyber threats, contain incidents effectively, and prevent further damage.

iv. ***Threat Intelligence and Predictive Analysis***: AI can play a crucial role in aggregating and analyzing vast volumes of threat intelligence data from various sources, including dark web monitoring, open-source intelligence, and security feeds.[27] By harnessing AI algorithms, organizations can proactively identify emerging threats, predict potential attack vectors, and implement preventive measures to mitigate risks before they materialize into cybercrimes.

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26 J.N. Welukar & G.P. Bajoria, *Artificial Intelligence in Cyber Security-A Review* , 8 IJSRST 488 (2021).

27 CristosVelasco, *Cybercrime and Artificial Intelligence. An overview of the work of international organizations on criminal justice and the international applicable instruments*. 23(1). J.ACAD. EUR.L.109-126(2022) ,(May 10,2023,1 PM),https://link.springer.com/article/10.1007/s12027-022-00702-z .

v. ***Natural Language Processing for Security Analytics***: Natural Language Processing (NLP) techniques can be employed to enhance security analytics. AI algorithms can analyze unstructured data, such as security logs, incident reports, and threat intelligence reports, to extract meaningful insights. NLP-based systems can aid in automating the analysis of security data, facilitating quick identification of potential vulnerabilities and threats.

vi. ***Cybersecurity Awareness and Training***: AI-powered technologies, such as chatbots and virtual assistants, can be utilized to deliver personalized cybersecurity awareness and training programs. These AI-driven solutions can provide real-time guidance, answer queries, and simulate potential cyber-attack scenarios to educate users and improve their cybersecurity practices, making them more resilient against cyber threats.

vii. ***Collaborative Defense Networks***: AI can be leveraged to establish collaborative defense networks where organizations share threat intelligence and collaborate in real-time to combat cyber threats collectively. AI algorithms can analyze shared threat data, identify common attack patterns, and provide proactive defense strategies to network participants, creating a unified front against cybercriminals.

Realizing the full potential of these untapped AI solutions requires concerted efforts from government bodies, industry stakeholders, and cybersecurity professionals. Encouraging research and development in AI for cybersecurity, fostering public-private partnerships, and investing in skill development and awareness programs will be instrumental in harnessing AI's power to prevent cybercrime effectively.

It is imperative for policymakers, law enforcement agencies, and organizations to recognize the untapped potential of AI in cybercrime prevention and actively explore these solutions to build a resilient cybersecurity ecosystem in India. Embracing AI-driven technologies and

strategies will enable proactive defence measures, enhance threat detection capabilities, and ultimately safeguard the digital infrastructure and citizens from evolving cyber threats. Now, let us see someexamples of the use of AI for curbing the menace of cyber crimes that are present across the globe.

Examples of use of AI for Curbing cyber crimes across the Globe:

1. DeepArmor by SparkCognition (USA):The USA has various federal laws and agencies dedicated to cybersecurity, such as the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Trade Commission (FTC). The government has also invested in research and development of AI technologies for cybersecurity through initiatives like the National Institute of Standards and Technology (NIST) and the National Science Foundation (NSF). SparkCognition, an AI company based in the USA, has developed DeepArmor, an AI-powered cybersecurity solution.[28]DeepArmor utilizes AI algorithms to detect and prevent malware attacks by analyzing file structures and identifying malicious patterns in real time. It has been successfully deployed by organizations to enhance their defence against cyber threats.[29]

2. Predictive Security Analytics by Darktrace (UK):[30]The UK has established a strong regulatory framework for cybersecurity, including the General Data Protection Regulation (GDPR). The government has also introduced the National Cyber Security Strategy and actively promotes public-private partnerships to combat cyber threats, including the use of AI technologies.Darktrace, a UK-based cybersecurity company, utilizes AI algorithms for predictive

28 Deeparmor by Sparkcognition, (May 9,2023,10.30 AM) https://www.sparkcognition.com/industries/defense/.

29 Deeparmor by Sparkcognition, (May 9,2023,10.30 AM) https://www.sparkcognition.com/industries/defense/.

30 Predictive Security Analytics by Darktrace, UK, (May 10, 2023,10.30 PM) https://darktrace.com/.

security analytics. Their AI system continuously monitors network activities, detects anomalies, and proactively responds to potential cyber threats. By leveraging AI, Darktrace helps organizations identify and mitigate emerging cyber risks in real-time.

3. Cybereason's AI Hunting Platform (Israel):[31]Cybereason, an Israeli cybersecurity company, has developed an AI-driven hunting platform. This platform uses AI algorithms to analyze vast amounts of data and identify malicious activities within an organization's network. By leveraging AI, Cybereason enables organizations to detect advanced threats, respond effectively, and prevent future cyber attacks.

4. Tencent's AI Lab for Cybersecurity (China):[32]Tencent, a Chinese technology company, has established an AI Lab specifically focused on cybersecurity. The lab utilizes AI technologies to analyze large-scale security data, identify vulnerabilities, and develop proactive defense mechanisms. Tencent's AI Lab plays a crucial role in strengthening China's cybersecurity capabilities.

5. AI-Based Threat Intelligence by Group-IB (Russia):Group-IB, a Russian cybersecurity company, employs AI-based threat intelligence to detect and prevent cyber threats. Their AI algorithms analyze vast amounts of data from various sources to identify patterns and indicators of compromise. By harnessing AI, Group-IB provides proactive cyber defence solutions to organizations globally.[33]

These examples highlight the increasing adoption of AI in cybersecurity across different countries. AI technologies enable real-time

31 Cybereason AI Hunting Platform (May 10, 2023,10.30 PM), https://www.cybereason.com/platform .

32 (May 10, 2023,10.30 PM) https://indiaai.gov.in/research-reports/china-s-advanced-ai-research-monitoring-china-s-paths-to-general-artificial-intelligence.

33 (May 11, 2023,1 PM),https://www.group-ib.com/media-center/press-releases/threat-hunting-framework/.

threat detection, predictive analysis, and automated response mechanisms, strengthening organizations' defenses against evolving cyber threats. As AI continues to advance, we can expect more innovative solutions to emerge, further enhancing the global fight against cybercrimes.Now, let's move on to the challengesof implementing AI for curbing cybercrimes in India.

Challenges in Implementing AI for Curbing Cybercrimes in India:

The utilisation of artificial intelligence (AI) as a means to mitigate cybercrime exhibits considerable promise. However, India is confronted with a number of obstacles that must be resolved in order to facilitate efficacious adoption and implementation. The following are several significant obstacles:

***The insufficiency of a proficient and skilled workforce*:** A significant obstacle in the field of cybersecurity pertains to the dearth of proficient professionals who possess specialised knowledge in artificial intelligence. In India, the supply of AI specialists, data scientists, and cybersecurity experts falls short of the demand for these professionals.[34] It is imperative to bridge the existing skill gap and cultivate a proficient workforce that can proficiently design and execute cybersecurity solutions utilising artificial intelligence.

***Data Quality and Availability*:** The accuracy of predictions and detections made by AI algorithms is contingent upon the quality of data available to them. Notwithstanding, India encounters obstacles concerning the quality and accessibility of pertinent data. Enhancement of data collection, labelling, and annotation procedures is imperative to guarantee the accessibility of heterogeneous and inclusive datasets that accurately mirror the dynamic cyber threat landscape.[35]

34 Mohammed Rizvi, *Enhancing cybersecurity: The power of artificial intelligence in threat detection and prevention,*10(5) IJAERS 55, 57-58(2023).

35 Z. Zhang, H. Ning, F. Shi, *et al.Artificial intelligence in cyber security: research advances, challenges, and opportunities,* 55ARTIF. INTELL. REV. 1053 (2022).

***Ethical and Legal Considerations*:** The implementation of artificial intelligence (AI) in the field of cybersecurity gives rise to ethical and legal considerations. The criticality of guaranteeing transparency, fairness, and accountability in AI algorithms arises from the potential for biased or discriminatory systems to yield inadvertent outcomes. Furthermore, it is imperative to consider data privacy regulations and the conscientious management of personal information in order to uphold a harmonious relationship between cybersecurity measures and the privacy rights of individuals.

***Cost and Infrastructure*:** The adoption of AI technologies may necessitate substantial financial outlays in terms of cost and infrastructure. The acquisition of AI tools and platforms, construction of requisite infrastructure, and personnel training are associated with costs that may pose a challenge, particularly for smaller entities and governmental bodies. The implementation of public-private partnerships and the provision of financial support or incentives can serve as effective measures to address this challenge of AI adoption.

***Rapidly Evolving Threat Landscape*:** The landscape of threats in the realm of cybersecurity is characterised by a swift pace of evolution, as assailants utilise intricate methods to circumvent conventional security protocols. The dynamic nature of modern cybersecurity threats necessitates that AI-based security solutions remain up to date through ongoing monitoring, updating, and enhancement.[36] The implementation of mechanisms aimed at facilitating the exchange of threat intelligence and promoting collaboration among industry, academia, and government entities is of paramount importance to maintain a competitive edge over cyber criminals.[37]

***Regulation and Policy Frameworks*:** The existent regulatory and policy frameworks in India pertaining to cybersecurity may not provide

36 *Id*

37 *Id.*

explicit coverage to cybersecurity solutions that are powered by artificial intelligence. It is imperative to establish unambiguous regulatory frameworks that effectively tackle the distinct challenges and prospects presented by artificial intelligence in the realm of cybersecurity. It is imperative that policy and legal frameworks are designed to facilitate innovation, while simultaneously upholding accountability, safeguarding data protection, and ensuring adherence to ethical standards.

***Public Awareness and Adoption*:** The successful implementation of AI-driven cybersecurity solutions is contingent upon the creation of public awareness and the cultivation of trust in these technologies. Disseminating knowledge regarding the advantages, constraints, and protective measures associated with AI to the general populace, commercial enterprises, and governmental bodies can potentially surmount opposition to its implementation and instill trust in these innovations.[38]

To tackle these challenges, a comprehensive strategy is necessary that involves a multifaceted approach through co-operation among governmental entities, industry participants, academic institutions, and non-governmental organisations. The successful implementation of AI for curbing cybercrimes in India will require the promotion of research and development, investment in skill development, the facilitation of public-private partnerships, and the formulation of robust regulatory frameworks.

A Way Forward:

The optimal utilisation of artificial intelligence for the purpose of mitigating cybercrimes in India is contingent upon the pivotal involvement of both the legislative and judicial branches.The legislative body should proactively engage in the development of comprehensive regulations and laws that specifically pertain to the utilisation of AI in the realm of cybersecurity. It is imperative that legislation incorporates provisions for safeguarding data, ensuring privacy, establishing accountability, promoting

38 Bresniker, K., Gavrilovska, A., et al, *Grand challenge: applying artificial intelligence and machine learning to cybersecurity.* 52(12) IEEE COMPUTER 45-46 (2019).

transparency, and addressing ethical concerns pertaining to cybersecurity solutions driven by artificial intelligence.

To foster a collaborative approach, it is recommended to promote co-operation among legislative bodies, government agencies, industry experts, and academia in order to formulate effective policies and regulations. Incorporating a variety of viewpoints and staying up-to-date with advancements in AI technologies can be achieved through stakeholder engagement via public consultations, expert committees, and industry forums, ultimately resulting in a legislative framework that is more reflective of the current landscape.

Allocation of resources towards research and development initiatives that are focussed on artificial intelligence in the field of cybersecurity is imperative. Implementing funding programmes and incentives can effectively promote collaboration between academia and industry, thereby facilitating the development of innovative AI-driven cybersecurity technologies.[39]

The judiciary ought to interpret current laws in a manner that acknowledges the potential benefits and challenges posed by artificial intelligence in the realm of cyber security. The objective is to establish unambiguous directives regarding the utilisation of AI technologies for the purpose of mitigating and identifying cybercrimes, while simultaneously safeguarding the rights of individuals and upholding due process.

Establishing Cybercrime-Specific Courts should be the next step.It is recommended to contemplate the establishment of specialised courts or divisions within the current judicial system to handle cases pertaining to cybercrime. Such a measure would ensure that cybercrime cases are dealt with, in a specialised and efficient manner. Specialised courts can cultivate proficiency in addressing cybercrimes associated with artificial

39 J. A. Kroll, J. B. Michael and D. B. Thaw, *Enhancing Cybersecurity via Artificial Intelligence: Risks, Rewards, and Frameworks*, 54(6) IEEE COMPUTER. 70 (2021).

intelligence and guarantee efficient and prompt resolution of such legal proceedings.[40]

One proposed strategy is to foster judicial training by arranging programmes and workshops for judges and judicial staff. The aim of these initiatives is to augment their comprehension of AI technologies and their utilisation in the realm of cybersecurity. This measure will facilitate the ability of judges to render well-informed decisions and judgements in cybercrime cases that involve evidence or techniques driven by artificial intelligence.The judicial branch ought to remain abreast of technological advancements in the fields of artificial intelligence and cybersecurity. The attainment of this objective can be facilitated by means of cooperative efforts with proficient specialists, participation in pertinent conventions and symposia, and the cultivation of information exchange mechanisms.

Facilitating regular dialogue and knowledge exchange between the legislative and judicial branches is also very important.The cooperation and coordination between the Legislative and Judicial branches of government can be beneficial. Possible academic rewrite: Collaborative activities such as joint committees, workshops, and seminars can facilitate the exploration of legal and technical issues arising from the use of AI in cybersecurity.

Continuous review and revision of laws, regulations, and policies pertaining to AI in cybersecurity should be undertaken collaboratively by both branches on a periodic basis. The aforementioned measure will guarantee the preservation of the legal framework's pertinence, adaptability, and congruence with the dynamic threat landscape and technological progressions.The promotion of collaboration and harmonisation with international standards and best practises pertaining to artificial intelligence in the realm of cybersecurity is recommended. The aforementioned measure is expected to promote international collaboration in the fight against cyber offences and bolster India's proficiency in safeguarding its cyber infrastructure.

40 Andrasko, Jozef, Matus Mesarcik, and Ondrej Hamulak. *The regulatory intersections between artificial intelligence, data protection, and cyber security: challenges and opportunities for the EU legal framework* ,36(2) AI & SOCIETY 4 (2021).

Conclusion:

The potential of artificial intelligence in curbing cybercrimes is undeniable, and India has begun its journey towards leveraging AI for cybersecurity. However, several challenges need to be addressed for effective implementation. The legislature should implement all-encompassing legislation pertaining to artificial intelligence, promote cooperative efforts, and provide backing for research and advancement. The proper function of the judiciary is to construe extant legislation, institute specialized courts for cybercrime, encourage judicial training, and remain abreast of technological progress. The establishment of a collaborative relationship between the legislative and judicial branches is of paramount importance in order to guarantee a cohesive and flexible legal and judicial system.

Although there are several obstacles to be faced, including insufficient skilled labour, data quality issues, ethical dilemmas, high expenses, and constantly changing threats, these can be surmounted through initiatives such as skill enhancement programmes, enhancement of data infrastructure, resolution of ethical and legal issues, and encouragement of public-private collaborations. India can effectively harness the potential of artificial intelligence and enhance its ability to combat cybercrimes by effectively addressing the challenges associated with it.The successful implementation of AI-driven cybersecurity solutions necessitates a collaborative endeavour among the government, industry, academia, and civil society. India has the potential to establish a secure and resilient cyberspace by implementing a comprehensive legislative framework, fostering an adaptive judiciary, and adopting a collaborative approach. This would ensure the protection of individuals, businesses, and the nation as a whole. The path towards progress involves the acceptance of novel ideas, cultivation of collaborative relationships, and persistent adjustment to the ever-changing landscape of cyber hazards, ultimately guaranteeing a more secure digital prospect for India.

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